

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' Amended 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 Relators' "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 to not present an actionable claim in mandamus.

I. Procedural Posture

Relators, owners of commercial property in Trumbull County, filed this original action in mandamus on November 29th, 2007, 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. In December, 2001, ODOT had filed a statutory appropriation action to acquire only a sewer easement over a small portion of the property Relators' Trumbull County but that action sat untried (and still pending unresolved) on the docket of the Trumbull County Common Pleas Court. The ODOT appropriation case, along with a companion case involving property located directly across the street from Relators' property, should have proceeded to trial in a relatively short time after an answer was filed; however, that was not the case. On the eve of trial in both cases, the owners, represented by the same attorney, asserted counterclaims seeking writs of mandamus to order the filing of appropriation claims for "additional property takings," asking that a jury determination compensation at the same time it decided compensation in the original ODOT cases. Although the Trumbull County Common Pleas court granted leave to file the counterclaims, it ultimately granted ODOT's motions to dismiss for lack of subject matter

jurisdiction which is clearly vested in courts of Franklin County by R.C. 5501.22. The judgments of dismissal 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 appeals in the *Blank* and *Kardassilaris* cases, but affirmed the dismissals on the ground 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 cases. *Proctor v. Kardassilaris*, 115 Ohio St.3d, 2007-Ohio-4838. Two months after this Court rejected the argument that procedural provisions of Civ. R. 13 circumvents the jurisdictional limits of claims against the Director in R.C. 5501.22, these property owners, still represented by the same counsel, filed companion mandamus actions in this Court, in which they present virtually the exact same claims which were stated in the counterclaims ultimately seeking compensation for "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.

ODOT moved to dismiss the mandamus action for a procedural defect in the affidavit requirement of S.Ct.Prac.R. X(4)(B); but before a ruling was made on that motion, Relators moved to file an amended complaint. This Court granted that motion and Relators filed an Amended Complaint seeking a writ for the same alleged "additional taking of property rights" and an order that compensation be decided by adding an appropriation claim to the still pending ODOT case in Trumbull County.

II. Pertinent Allegations of Fact

In order to improve State Route 5 in Trumbull County by a widening and replacement of sewers, drainage and sidewalks, ODOT needed to acquire a small sewer easement and temporary

construction easement over a parts of Relators' property in Cortland. (Complaint at ¶1) Unable to reach an agreement for purchase with the Blanks, ODOT filed an appropriation petition on December 3rd, 2001. (Complaint at ¶1) While that case was pending, ODOT entered onto the expressly appropriated areas under the quick-take authority of R.C. 163.06 and built the improvements. (Complaint at ¶2) The Relators allege that when ODOT went beyond the boundaries of the appropriations and physically damaged their property when it constructed the improvements. They request the writ of mandamus to compel the Director to appropriate additional parts of their property that they allege were taken during this process. (Complaint at Prayer for Relief ¶1)

Relators allege that ODOT's contractor occupied, operated, stored, and parked construction equipment on their parking lots impairing access to their building; dirtied, gouged, roughed up or otherwise damaged the blacktop of the parking lot; cracked and broke a portion of a concrete pad and a pillar of a commercial building; caused a permanent vertical crack in a wall of a restaurant building; broke a sewer line to the restaurant and made improper repairs; broke through a gas line serving the property; broke a storm sewer and failed to repair properly; blocked delivery access to the rear door of the restaurant; and used non-appropriated property to park construction equipment. (Complaint at ¶2) Relators assert that the contractor's actions "broadened [ODOT's] occupation of Relators' property outside and beyond the limits of the easements taken... by using and confiscating... additional property rights in the real estate during construction that were not described in the Respondents' Petition for appropriation or included in the original plans and specifications." (Complaint at ¶2)

A careful analysis of the Relators' claims, however, reveals that this is simply an action against the State of Ohio for money damages for negligent or tortious conduct. Taken as true for

the purpose of this motion, these acts do not give rise to a takings claim in mandamus. Instead, Relators present a claim for which remedy is available in an action for money damages brought in the Court of Claims which holds exclusive and original jurisdiction over such action.

III. Law and Argument

Relators' 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," and to have that appropriation joined for trial with a seven year old, still pending statutory appropriation filed by ODOT. But Relators 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 Relators cast as a public "taking" is not shown to be a public use of their building, parking lot or other land and the remedy available for such injurious conduct is governed by the Court of Claims Act. Relators seek to avoid the exclusive jurisdiction of the Court of Claims by calling the construction-related damage claims as a "taking" of property. Simply saying it is a public taking 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 Relators' 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. Relators' 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. Here, however, the public did not benefit from the contractor's negligence or tortious conduct outside the boundaries of the property appropriated in ODOT's pending case. Indeed, should Relators' allegations be proven, such as the breaking of the sewer line and gas line, the public at large was *harmed* by the actions of the contractor. The allegations in the Relators' Complaint raise an issues of negligence and tortious conduct, rather than a public taking.

The Relators attach a memorandum to their Amended Complaint in which they cite several cases to encourage this Court to view their allegations as "takings" for which mandamus is necessary. While such advance defense of their complaint is not binding on this Court, ODOT must point out that the cases actually support this motion. While the decisions recognize that a physical encroachment or material interference with private property may be a "taking," they also point out 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, Relators do not allege that the

construction-related damages, however brief, was for a public use or otherwise intended to be a part of a larger design of the highway improvement project.

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 presented by Relators, 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 is 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 *damnum 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.*

Relators do not allege that occupation of their property, damage to their improvements, breaking of utility services, or any other ill was necessary for proper operation of the roadway improvement project. To the contrary: they allege that ODOT's contractor negligently and/or tortiously impaired access, damaged parking areas, failed to properly make repairs, used areas outside of designated boundaries, and other complaints. However, none of Relators' allegations have a nexus to a public use of their property.

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.

As stated before, Relators do not allege that any of ODOT's contractor's actions subjected their property beyond the expressly appropriated sewer easement and temporary easement areas to *proper public use*. Rather, Relators assume this Court will leap to the conclusion that any activity by ODOT's contractor while constructing the highway improvement, which caused any physical damage to the Relators' property, is sufficient to constitute 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 negligence and tortious conduct.

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, Relators specifically allege ODOT's contractor broke through utility lines and failed to make proper repairs. (Complaint at ¶2) This Complaint demonstrates Relators' intention is to turn a negligence or tortious 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 Relators should be foreclosed from presenting their claims for relief; but only that it needs to be adjudicated in the Court of proper jurisdiction. In the absence of any nexus between the claimed injury and public use, the jurisdiction to remedy this alleged improper negligent or tortious conduct 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 Relators' 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.) *Zelenak v. Indus. Comm.* (10th Dist.), 148 Ohio App.3d 589, 2002-Ohio-3887, at ¶15.

Relators' allegations of damage arise from the physical construction of the highway improvement project by ODOT's contractor. Rather than seek direct monetary relief in the Court of Claims, Relators 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, Relators have chosen to portray their damages from the physical construction of the improvement project, as "additional property rights taken and damages caused" by ODOT. However, Relators are doing precisely what was warned against in *Friedman*, supra, characterizing their action as one for an extraordinary writ as a means to ultimately obtain money damages from the State in order to avoid the jurisdiction of the Court of Claims.

The need to look more closely at the allegations of conduct and the nature of relief sought for the claim in a "takings versus tort" situation was thoroughly discussed in *Rosendale v. ODOT* (2006), Franklin Co. Case No. 06CVH-04-4827 (copy of decision attached). In that case, a

property owner alleged that his property was damaged by ODOT during construction of a nearby road project and filed a mandamus action asking that 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 for lack of subject matter jurisdiction, the trial court pointed to the need to look to the nature of the relief which the claimant seeks rather than how the cause of action is pled, citing to *Zelenak v. Indus. Comm. Of Ohio* (2002), 148 Ohio App. 3d 589, 593, 2002-Ohio-3087. The Franklin County 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 Relators do not make an explicit demand for money, they also do not seek an order to repair any damages that have already occurred. Instead, they seek a writ of mandamus with an ultimate objective of getting their claims in front of jury in Trumbull County to plead their case for an award of money damages and costs of repairs. While the claims for money damages were more obvious in *Rosendale*, the outcome in this case should be no different – dismissal of the landowners' claims since the Court of Claims has exclusive, original jurisdiction over such controversies.

In *State ex rel. Blackwell v. Crawford* (2005), 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 was 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, Relators have alleged that ODOT has "broadened its occupation of Relators' property outside and beyond the limits of the easements taken;" damaged parts of the residue building, and broke utility lines to the property. (Complaint at ¶2) 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 alleged misconduct could be construed as constituting a public use, Relators' requested relief in this Court would nevertheless be improper as their allegations implicate claims for money damages for injuries that have already occurred.

The Relators seek to avoid the exclusive jurisdiction of the Court of Claims by piecemeal litigation, first seeking a writ of mandamus over construction-related damages as a "taking" before this Court, and then hoping to litigate towards a monetary award by a jury in Trumbull County. This Court should reject their attempt to undermine the legislative intent to centralize the filing and adjudication of all damage claims against the State before the Court of Claims.

C. Dismissal of the Relators' Complaint is proper.

Although this Court has jurisdiction over original actions in mandamus, it has also

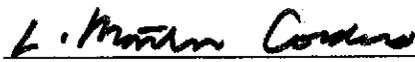
recognized the limitations of jurisdiction over claims against the State. Claims for money damages against the State in actions for tortious conduct are clearly within the exclusive, original jurisdiction of the Court of Claims. *Boggs v. State* (1983), 8 Ohio St. 3d 15. Allowing Relators' negligence and/or tortious claims to proceed before this Court in the guise of a mandamus action would detract from the grant of exclusive, original jurisdiction to the Court of Claims. This Court should resist opening the door to property owners to turn every governmental tort which causes injury to private property into a public taking claim and thereby turning common pleas courts of eight-eight counties into courts of claim simply because a complaint alleges "additional property rights taken and damages caused" by public construction activity.

IV. Conclusion

Relators' 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 construction-related damage claims. Relators' attempt to cloak their negligence and tortious conduct claims as "takings" should be rejected and this Court should dismiss the Complaint for Writ of Mandamus.

Respectfully submitted,

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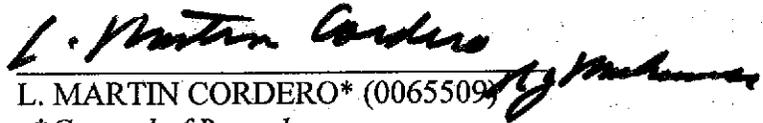
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Motion Of Respondent Under S.Ct.Prac.R. X(5) To Dismiss Amended Complaint Of Relator For A Writ Of Mandamus* was served by U.S. mail this 1st day of April, 2008, upon the following counsel:

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APPENDIX

Unreported decision in *Rosendale v. ODOT* (2006), Franklin County Common Pleas Court Case No. 06CVH-04-4827

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Michael O. Rosendale,

Plaintiff,

v.

Ohio Department of Transportation, et al.,

Defendants.

Case No. 06CVH-04-4827

Judge John F. Bender

CLERK OF COURTS

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FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

DECISION AND ENTRY
GRANTING MOTION OF DEFENDANT OHIO DEPARTMENT OF
TRANSPORTATION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

And

OVERRULING AS MOOT RENEWED MOTION TO VACATE
JUDGMENT TRANSFERRING VENUE TO FRANKLIN COUNTY
COURT OF COMMON PLEAS
Filed May 24, 2006.

RENDERED THIS ____ DAY OF JULY 2006

BENDER, J.

Procedural Posture

Plaintiff Michael O. Rosendale filed a complaint against Defendant the Ohio Department of Transportation ("ODOT") and Defendant C. J. Mahan Construction Company ("Mahan") in the Stark County Court of Common Pleas. Defendant ODOT filed a motion to dismiss for lack of subject matter jurisdiction. Shortly thereafter, Plaintiff filed a motion to transfer the case to Franklin County for improper venue pursuant to Civ.R. 3(B), which the Stark County court granted.

Defendant ODOT then filed a motion in Stark County asking that court to vacate its transfer order, contending that as it never had subject matter jurisdiction, it correspondingly had no authority to issue an order to transfer the case for improper venue. Defendant ODOT submits that the Stark County court's transfer order is therefore void ab initio. Defendant ODOT's motion to vacate was denied, and the case was transferred to Franklin County.

This matter now comes before the court on Defendant ODOT's May 24, 2006 renewed motion in Franklin County to vacate the earlier order transferring the case from Stark County. No brief in opposition has been filed. The time for briefing has expired, and the motion is ripe for determination pursuant to Loc.R. 21.01.

Summary of Arguments

Plaintiff alleges Defendants ODOT and Mahan damaged his property during a road construction project. As a remedy, Plaintiff asks for a writ of mandamus directing Defendant ODOT to institute appropriation proceedings pursuant to R.C. 163.01 and to then purchase his property "at a price equal to its market value" before it was damaged. Complaint, Count I. Plaintiff "alternatively" claims Defendant ODOT created conditions on his property that constitute a nuisance, and seeks "damages in an amount to be hereafter determined at a trial of this matter." *Id.*, Count II. Plaintiff also alleges Defendant Mahan negligently operated machinery and/or failed to erect sufficient barriers, thereby causing material structural damage to Plaintiff's property. *Id.*, Count III. In his prayer for relief, Plaintiff asks for damages in excess of \$25,000.00 each for Counts II and III.

Defendant ODOT contends the Stark County court's order transferring the case here is void ab initio, as that court never had subject matter jurisdiction and had no authority to issue a transfer order. Defendant ODOT submits that the complaint should have been dismissed under Civ.R. 12(B)(6) pursuant to its earlier motion, or voluntarily dismissed pursuant to Civ.R. 41(A) and filed in the proper court.

Discussion

As a court of general jurisdiction, a common pleas court hears all matters at law and in equity that are not denied to it, and possesses the inherent authority to initially determine its own jurisdiction over both the person and subject matter in an action before it. *State ex rel. Ruessman v. Flanagan* (1992), 65 Ohio St.3d 464, 466; *Saxton v. Seiberling* (1891), 48 Ohio St. 554, 558-559. Generally, a party challenging a court's jurisdiction has a remedy at law by way of appeal if the court incorrectly decides it does have jurisdiction. *Flanagan*, supra, at 466. However, in an action against the state for money damages, "the common pleas court has no jurisdiction to render any judgment, other than that of dismissal of the cause for want of jurisdiction." *Hall v. Ohio State Highway Patrol* (Feb. 3, 1994), Franklin App. No. 93AP-784, citing *Buerger v. Office of Public Defender* (1984), 17 Ohio App.3d 29, 30.

Defendant ODOT essentially asks this court to "reverse" the order of the Stark County Common Pleas Court by declaring its earlier order to be void. This court is not a superior court with the authority to review an order of the Stark County Common Pleas Court. However, whether or not the order transferring the case from Stark County was proper is immaterial. Correctly or incorrectly, the Stark County Common Pleas Court transferred the entire case here, and this court has the inherent authority to determine

whether it has jurisdiction. While Defendant's motion to vacate the transfer order has previously been overruled, this renewed motion again raises the issue of subject matter jurisdiction, which can be raised at any time, either by motion or by the court itself. Civ.R. 12(H)(3). Moreover, it appears that Defendant ODOT's motion to dismiss for lack of subject matter jurisdiction was never ruled upon. Additionally, a court may review any interlocutory order it has issued at any time prior to the issuance of a final judgment resolving all issues and determining the rights of all the parties. Civ.R. 54(B).

The Court of Claims has exclusive, original jurisdiction over a civil suit for money damages against the state. *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 451, 2005-Ohio-5124. "Jurisdiction over the state as a defendant is obtained either by the filing of an original action in the Court of Claims, or by removal from another trial court of an action which originally did not involve a claim against the state, but where the state became a party-defendant through counterclaim or third-party practice." *Wirick v. Transport America, Inc.*, Franklin App. 01AP-1268, 2002-Ohio-3619.

The filing of a petition for removal "effects the removal of the action to the court of claims[.]" In other words, a removal petition is self-executing and does not require any court order. A common pleas court does not have the authority to remove the case to the court of claims. Any common pleas court "order of removal" can only be ministerial in nature, to ensure that the case file is properly transferred. R.C. 2743.03(E)(2). Where the cause of action is against the state, and where the relief sought is money damages, a common pleas court can take no other action than to dismiss the case for lack of subject matter jurisdiction. *Hall v. Ohio State Highway Patrol*, supra.

Count I of the complaint attempts to state a claim in mandamus, which the Court of Claims is powerless to grant. *Columbus Southern Power Co. v. Ohio Dept. of Trans.* (10th Dist. 1989), 63 Ohio App. 3d 612, 618, citing *State ex rel. Mahoning Cty. Community Corr. Assn., Inc. v. Shoemaker* (10th Dist. 1983), 12 Ohio App. 3d 36; R.C. 2731.02 (granting mandamus authority only to the Supreme Court, courts of appeals, and common pleas courts). However, to evaluate a cause of action a court must look to the nature of the relief the party seeks, rather than how the cause of action is pled. In *Zelenak v. Indus. Comm. of Ohio*, 148 Ohio App.3d 589, 593; 2002-Ohio-3087, the Tenth District Court of Appeals explained:

As was necessary for the court in *Friedman [v. Johnson]* (1985), 18 Ohio St.3d 85], we must decide whether the trial court has concurrent jurisdiction over this cause or whether the Court of Claims has exclusive subject matter jurisdiction. *Id.* at 87. There is a presumption that a claim against the state should be filed in the Court of Claims unless the plaintiff demonstrates otherwise. *Santos v. Ohio Bur. of Workers' Comp.*, Cuyahoga App. No. 80353, 2002 Ohio 2731, at P15. We must determine if the relief sought by appellants constitutes specific equitable relief or, by contrast, includes a claim for monetary damages. See *Keller [v. Dalley]* (1997), 124 Ohio App.3d 298], *supra*, at 303. If the redress sought by appellants includes monetary damages, the Court of Claims has exclusive jurisdiction over this cause and the decision of the trial court must be affirmed. *Santos*, *supra*, 2002 Ohio 2731 at P17, and *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 319.

At times, creative pleading may obscure the conceptual line between damages for loss sustained and claims for a specific form of relief. See *Veda, Inc. v. United States Dept. of Air Force* (C.A.6, 1997), 111 F.3d 37, 39. Thus, we must look to the nature of the relief itself, because how appellants choose to characterize or phrase their claims is not dispositive of where the action is properly commenced. *Swaney, [v. Ohio Bur. of Workers' Comp.]* (1998), Franklin App. No. 98 AP-299], *supra*. The prayer of appellants for "equitable recovery" does not in itself establish subject

matter jurisdiction in respect to claims for the payment of interest on funds collected or withheld from them.

The cases relied upon by appellants are among those decisions that distinguish between monetary damages and equitable relief. These decisions recognize that while in many instances an award of money is an award of damages, 'occasionally a money award is also a specie remedy.'" *Ohio Hosp. Assn.*, supra, 62 Ohio St. 3d at 105, citing *Bowen v. Massachusetts* (1988), 487 U.S. 879, 101 L. Ed. 2d 749, 108 S. Ct. 2722, and *Keller*, supra, at 303, citing *Ohio Hosp. Assn.* Monetary damages are normally associated with compensation for previous damage or injury. *Veda*, supra, at 41, fn. 2. They are a substitute for a specified loss. *Ohio Edison Co. v. Ohio Dept. of Transp.* (1993), 86 Ohio App.3d 189, 194, 620 N.E.2d 217. As stated in *Bowen*, supra, at 893:

"Our cases have long recognized the distinction between an action at law for damages--which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation--and an equitable action for specific relief--which may include an order providing for the reinstatement of an employee with backpay, or for "the recovery of specific property *or monies*, ejection from land, or injunction ***.'" [Emphasis sic.]

In Count I of the complaint, Plaintiff claims, "A mandatory duty to implement an appropriation petition is imposed upon ODOT by Ohio Revised Code 163.01 et seq." Complaint, ¶ 8. Plaintiff then asks this court to order Defendant ODOT "to purchase the aforementioned Property at a price equal to its market value prior to the damage resulting from the Project." *Id.*, ¶ 11. Plaintiff 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. Plaintiff does seek an award of money equal to the property's value before the project. Applying the principles set forth in *Zelenak*, Count I of Plaintiff's complaint is clearly one that seeks monetary damages and not equitable relief, though it is pled as seeking a writ of mandamus.

In Count II, Plaintiff alleges Defendant ODOT "created a condition causing damage to Plaintiff's Property, created a danger of future damage, and constitutes a nuisance." *Id.*, ¶ 14. Plaintiff seeks "damages in an amount which will reasonably and adequately compensate him for the damages to his Property in an amount in excess of \$25,000.00[.]" *Id.*, prayer for relief. Count II of Plaintiff's complaint clearly also seeks monetary damages and not equitable relief.

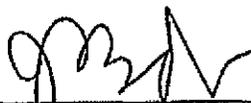
As previously stated, the Court of Claims has exclusive, original jurisdiction over a civil suit for money damages against the state. *Crawford*, *supra*. As neither this court, nor any other common pleas court, has subject matter jurisdiction to hear the merits of Plaintiff's claim for monetary damages against Defendant ODOT, Counts I and II of Plaintiff's complaint must be dismissed. *Hall v. Ohio State Highway Patrol*, *supra*.

Count III of Plaintiff's complaint states a negligence claim against Defendant Mahan, over which a common pleas court does have jurisdiction. While venue may have been proper in Stark County, the face of the complaint indicates Defendant Mahan is located in Franklin County, making venue also proper here. No motion to dismiss Count III against Defendant Mahan is presently before the court. At present, Defendant Mahan has not filed a crossclaim against Defendant ODOT, thereby invoking the jurisdiction of the court of claims. Therefore, absent any other cited authority, Count III remains pending for independent adjudication in this court.

Accordingly, and for the reasons set forth above, Defendant ODOT's motion to dismiss for lack of subject matter jurisdiction is sustained. Defendant ODOT's renewed motion to vacate judgment transferring venue to the Franklin County Court of Common

Pleas is overruled as moot. Because Plaintiff's claim against Defendant Mahan remains pending, this entry DOES NOT TERMINATE THIS CASE.

SO ORDERED.



John F. Bender, Judge

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