

IN THE SUPREME COURT OF OHIO

New 52 Project, Inc.

Appellee,

v.

Gordon Proctor, Director, Ohio
Department of Transportation,

Appellant.

Case No. 08-0574

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate District

MEMORANDUM OF APPELLEE IN RESPONSE
TO MEMORANDUM IN SUPPORT OF JURISDICTION

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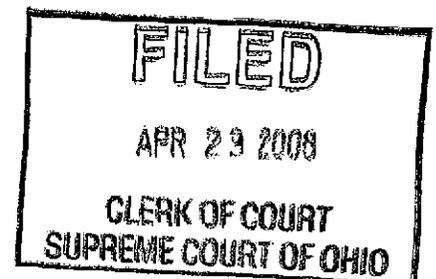


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MEMORANDUM IN RESPONSE TO MEMORANDUM
IN SUPPORT OF JURISDICTION

I. STATEMENT OF THE CASE AND FACTS

Appellee, New 52 Project, Inc. (“New 52”), is in general agreement with the Statement of the Case and Facts submitted by Appellant, Director, Ohio Department of Transportation (“ODOT”). As ODOT indicates, New 52’s complaint was dismissed for failure to state a claim after the trial court determined that R.C. 5511.01 sets forth the exclusive procedures for abandoning a highway easement. In reviewing a dismissal of a complaint for failure to state a claim, the court must presume that all factual allegations in the complaint are true and must draw all reasonable inferences in favor of the nonmoving party. See *State ex rel. Boccuzzi v. Cuyahoga Cty. Bd. of Commrs.*, 112 Ohio St.3d 438, 2007-Ohio-323, at ¶12. The averment in New 52’s complaint that the highway easement has ceased to be used as an exit or for any other highway purposes for over twenty-one years, therefore, must be taken as true.

This presumption of fact is important because it defies ODOT’s argument that this case involves matters of public or great general interest. ODOT asserts that New 52’s claim “threatens” the state highway system. But the instant case involves nothing of the sort. There is nothing in the record to support the implication that the highway easement was actually being used or that ODOT has plans to use the highway easement for lateral support, drainage and runoff control, or maintenance. (See Memorandum in Support of Jurisdiction at p. 1.) To the contrary, the only established facts are that the highway easement is not being used, and for over twenty-one years has not been used, for *any* highway purpose whatsoever.

Any suggestion that this case implicates the state’s other highway easements or the state highway system as a whole has no basis in fact.

II. STATEMENT AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case should not be accepted for review because it does not involve matters of public or great general interest. This case involves no novel issues, no conflict with Ohio Supreme Court case law or statutory law and, contrary to ODOT's embellishments, no threat to the role of ODOT in the state highway system. This case involves the simple issue of whether a cause of action exists for abandonment of a highway easement. Using well established principles, the Tenth District Court of Appeals unanimously determined that R.C. 5511.01 did not abrogate the common law and that a cause of action exists for abandonment of a highway easement. Nothing in this decision raises an issue that gives rise to this Court's discretionary jurisdiction.

A. The Court of Appeals' decision does not impede the Director's general supervision of the state highway system or otherwise undermine ODOT's ability to make use of its highway easements.

ODOT asserts that this case involves matters of public or great general interest because the court of appeals' decision will impede the director's general supervision of the state highway system. There is no support for such a bald assertion. ODOT's plea that this case addresses significant public interests rests largely on the faulty premise that the General Assembly, in R.C. 5511.01, has given ODOT the exclusive right to determine whether and when a highway easement has been or will be abandoned. But R.C. Chapter 5511 grants no such authority to ODOT, as the court of appeals unanimously determined.

Further, nothing in the court of appeals' decision diminishes ODOT's ability to invoke the procedures set forth in R.C. 5511.01, which procedures address a different set of circumstances from those at issue here. Under R.C. 5511.01, ODOT retains the authority to determine that a state highway is of minor importance or that territory is adequately served by another highway such that the highway should revert to a county, township or municipal street or

road. The instant case does not involve a highway, street or road; it involves an abandoned and unused easement.

The court of appeals' decision will not undermine ODOT's discretion as to how it uses state highway easements nor will it work to force an abandonment that was not intended by ODOT. ODOT asserts that servient estate owners will somehow be able to "compel" ODOT to relinquish its highway easements. (See ODOT's Memorandum in Support of Jurisdiction at p. 3.) But a cause of action for abandonment of an easement conveys no such advantage to servient estate owners. The standard for what constitutes an abandonment of an easement is well established and requires an intention to abandon as well as acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement. See *Bauerbach v. LWR Enterprises, Inc.*, 169 Ohio App.3d 20, 2006-Ohio-4991, at ¶¶18-19. Under this standard, the acts and intent of the easement holder are of paramount importance.

It is therefore disingenuous of ODOT to suggest that a court, in determining whether a highway easement has been abandoned, may disregard uses such as storm-water runoff, lateral support or maintenance. Nothing in the abandonment standard dictates the uses to which the state may put a highway easement, and nothing would permit a court to ignore a particular use. Thus, the only thing that may "compel" an abandonment under this standard would be the state's own actions or inaction and intentions with regard to a particular easement.

Stripped of its weak veneer, ODOT's jurisdictional argument advocates the remarkable proposition that it should be free to wholly abandon its highway easements and make no use of the land for decade upon decade, with no recourse for the owner of the servient estate. This is tantamount to ODOT obtaining an easement and turning it in to an outright fee simple ownership of the property—an interest ODOT surely did not compensate the servient estate owner for when

it obtained the easement. The legislature has provided no such authority to ODOT. R.C. 5511.01 does not address abandonment of a highway easement through non-use, and it has not abrogated the common law right of a servient estate owner to bring an action for abandonment of a highway easement. In such a cause of action, ODOT has every right and ability to protect the interest it has in the easement by submitting evidence of its use thereof.

The court of appeals' decision stands for the unremarkable proposition that a common law cause of action for abandonment of a highway easement exists in the absence of a statute that supersedes such a claim. The decision below does not implicate ODOT's general supervision of the state highway system and does not undermine ODOT's ability to use its highway easements. As such, this case does not involve matters of public or great general interest.

B. The Court of Appeals' decision is not in conflict with *Bigler v. Twp. of York* (1993), 66 Ohio St.3d 98.

The court of appeals applied a well established standard in determining that a cause of action for abandonment of a highway easement exists and has not been superseded by statute. Indeed, ODOT does not take issue with the standard applied by the court of appeals. Rather, ODOT asserts that the court of appeals' decision conflicts with this Court's decision in *Bigler v. Twp. of York* (1993), 66 Ohio St.3d 98. But the conclusion that *Bigler* is not dispositive was no rogue decision; it is clear that the statute at issue in *Bigler* is fundamentally different than the statute claimed to be at issue here.

In *Bigler*, this Court determined that R.C. 5553.042 provides the exclusive mechanism for abandoning and vacating a township road, thereby precluding a cause of action by abutting landowners for a claimed abandonment. The statute at issue here, R.C. 5511.01, has virtually none of the same elements that are contained in R.C. 5553.042. Unlike R.C. 5553.042, nothing

in R.C. 5511.01 evidences a legislative intent that its procedures abrogate the common law and preclude an action for abandonment of a highway easement. Thus, the court of appeals correctly determined that *Bigler* was inapposite.

ODOT may believe that its director should have, in relation to the abandonment of state highway easements, the same exclusive authority that R.C. 5553.042 grants to boards of county commissioners in relation to the abandonment of township roads. But the legislature has not provided the director with this exclusive authority. If the legislature had desired that R.C. 5511.01 set forth the exclusive mechanism by which a state highway easement may be abandoned, then it could have easily indicated as such in the statute, just as it did in R.C. 5553.042. It did not.

The court of appeals' decision is not in conflict with *Bigler*. It is a well reasoned, unanimous decision based on established case law. This case involves no novel legal issues or matters with significant general or public implications such that the Court's discretionary jurisdiction should be invoked. Accordingly, this appeal should not be accepted for review.

III. ARGUMENTS IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

- A. **Response to Proposition of Law No. 1: *Bigler v. Twp. of York* (1993), 66 Ohio St.3d 98 is inapposite to the matter presented here; therefore, its reasoning should not be extended to causes of action for abandonment of state highway easements.**

ODOT asserts that the reasoning set forth in *Bigler* is applicable to case at bar and leads to the conclusion that a common pleas court lacks jurisdiction to adjudicate whether a state highway easement has been abandoned. The reasoning set forth in *Bigler*, however, was based on an analysis of R.C. 5553.042. R.C. 5553.042 is not at issue here, and it is entirely distinguishable from R.C. 5511.01. The reasoning applied in *Bigler*, therefore, has no bearing on

the effect R.C. 5511.01 has, if any, on a common law cause of action for abandonment of a highway easement.

R.C. 5553.042 addresses the procedure for vacation of township roads where such roads have been abandoned and unused for twenty-one years. It provides two mechanisms for vacating a township road: (1) a formal proceeding for vacation pursuant to the procedures set forth in R.C. 5553.04 through 5553.11; or (2) a petition filed by abutting landowners with the board of county commissioners. Under either procedure, a township road may not be vacated unless it has been abandoned and unused for twenty-one years. Significantly, R.C. 5553.042 provides that the county commissioners may deny a landowner's petition even if the commissioners determine that a township road has been abandoned and unused for twenty-one years.¹

Given this language, the *Bigler* court determined that R.C. 5553.042 would be rendered meaningless if abutting landowners could bring an action to quiet title on the grounds of abandonment. *Id.* at 101. In other words, a cause of action for abandonment of a township road is necessarily inconsistent with the authority and discretion afforded county commissioners in R.C. 5553.042. Accordingly, *Bigler* held that a common pleas court has no jurisdiction to quiet

¹ The relevant section of R.C. 5553.042 states:

(B) A township shall lose all rights in and to any public road, highway, street or alley which has been abandoned and not used for a period of twenty-one years, after formal proceedings for vacation as provided in 5553.04 to 5553.11 of the Revised Code have been taken. Upon petition for vacation of such a public road, highway, street, or alley filed with the board of county commissioners by any abutting landowner, if the board finds that the public road, highway, street, or alley has been abandoned and not used for a period of twenty-one years as alleged in the petition, the board, by resolution, *may* order the road, highway, street, or alley vacated, and the road, highway, street, or alley shall pass, in fee, to the abutting landowners, as provided by law * * *. [Emphasis added.]

title to a township road. *Id.* at paragraph 2 of the syllabus. The statute at issue here, R.C. 5511.01, is nothing like R.C. 5553.042.

R.C. 5511.01 does not address the situation where a state highway or highway easement remains unused for any period of time, let alone for twenty-one years. Instead, R.C. 5511.01 provides that the director of ODOT may abandon a “highway” (the statute says nothing about a highway easement) that the director determines is of “minor importance or which traverses territory adequately served by another highway.”² Unlike a township road under R.C. 5553.042, if a highway is abandoned pursuant to R.C. 5511.01, ownership thereof is not transferred to the abutting landowners; rather, the highway reverts to a county or township road or municipal street. R.C. 5511.01 contains no provision giving the director of ODOT the discretion and authority to reject a petition or any other “claim” by a servient estate owner that a highway easement has been unused for twenty-one years and therefore has been abandoned.

In short, R.C. 5511.01 does not address the effect a twenty-one year abandonment may have on a state highway easement and the ability of the servient estate owner to quiet title in the underlying property. In contrast, the statute at issue in *Bigler*, R.C. 5553.042, does address the effect a twenty-one year abandonment of a township road may have on an abutting landowner’s ability to gain title to the township road. Under R.C. 5553.042, the county commissioners retain the sole authority to determine whether an abandonment will result in the transfer of title to the

² The relevant portion of R.C. 5511.01 states:

The director 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.

abutting landowners. R.C. 5511.01 grants no such exclusive authority to the director of ODOT in relation to state highway easements.

Because R.C. 5553.042 and R.C. 5511.01 are distinguishable, the reasoning in *Bigler* has no application to the meaning of R.C. 5511.01 or its effect, if any, on the common law cause of action for abandonment of a highway easement. The court of appeals, therefore, did not err in not extending its reasoning to this case.

B. Response to Proposition of Law No. 2: The Court of Appeals correctly determined that the statutory law addressing the abandonment or vacation of a state highway has not abrogated and superseded the common law cause of action for abandonment of a highway easement.

In its second proposition of law, ODOT asserts that a court of common pleas has no jurisdiction to decide whether a state highway easement has been abandoned, because R.C. Chapter 5511 allegedly gives the director of ODOT the exclusive authority to determine whether a portion of the state highway system has been abandoned or vacated. The standard applied in determining whether a statute or statutory scheme supersedes and replaces the common law is well established. Not every statute is to be read as an abrogation of the common law, and the legislature will not be presumed to have intended a repeal of the settled rules of the common law unless the language employed clearly expresses or imports such intention. See *Danziger v. Luse*, 103 Ohio St.3d 337, 2004-Ohio-5227, at ¶11.

This is the standard the court of appeals applied in reviewing R.C. 5511.01, and ODOT has never suggested that this was not the appropriate standard. Using this standard, the court of appeals correctly determined that R.C. 5511.01 does not concern claims by servient estate owners for abandonment of highway easements and that R.C. Chapter 5511 does not express an intention that its provisions are the exclusive means by which a highway easement may be deemed abandoned or vacated. Accordingly, the court of appeals concluded that the common

law cause of action for abandonment of a highway easement has not been abrogated. (See court of appeals decision at ¶24.) This decision was correct.

Even if one assumes that R.C. 5511.01 addresses the abandonment of highway easements as well as actual highways, nothing in R.C. 5511.01 evidences a legislative intent that the director of ODOT retains the sole and exclusive discretion to determine whether and when a highway easement has been abandoned. R.C. 5511.01 gives the director the authority to effectuate the abandonment of a highway, and the reversion thereof to a county or township road or municipal street, when the director determines that the highway is of minor importance or traverses territory that is adequately served by another state highway. But it does not follow that the statutory creation of *one means* by which a state highway may be abandoned (under one particular set of circumstances) results in the eradication of a separate means that has been provided in the common law (under a different set of circumstances). This abrogation of common law only results when the statute clearly expresses such a result.

Neither R.C. 5511.01 nor R.C. 5511.07 addresses the consequence of when a state highway easement has been abandoned through non-use for twenty-one years.³ These statutes, therefore, are distinguishable from the scheme set forth in R.C. 5553.042, which clearly evidences that only the county commissioners may effectuate the abandonment of a township road. As explained above, even if a township road has been abandoned and unused for twenty-one years, the county commissioners may still decide not to abandon the road. Thus, even though express words of abrogation are not used in R.C. 5553.042, it is clear that the legislature intended to preclude a common law action for abandonment.

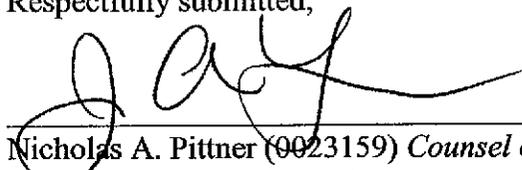
³ R.C. 5511.07 sets forth the procedures for how abutting landowners may be compensated for damages that arise when the state vacates an unnecessary highway.

There is nothing analogous in R.C. 5511.01. Nothing in R.C. 5511.01 indicates that the director of ODOT has the discretion to retain an abandoned state highway easement in perpetuity without risk that the abandonment may be successfully challenged by the owner of the servient estate. In short, R.C. 5511.01 does not abrogate the common right of a servient estate owner to bring an action for abandonment of a highway easement. Accordingly, the court of appeals did not err in determining that New 52 stated a claim upon which relief may be granted.

IV. CONCLUSION

The issues involved in this case do not involve matters of public or great general interest and, accordingly, this Court should not accept jurisdiction over the appeal.

Respectfully submitted,



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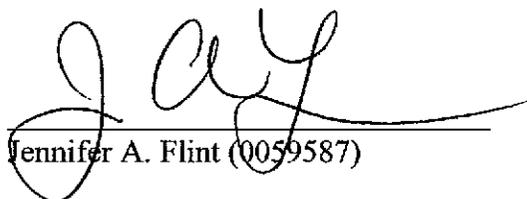
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Response was served upon the following, by regular United States mail, postage prepaid, this 23rd day of April, 2008.

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