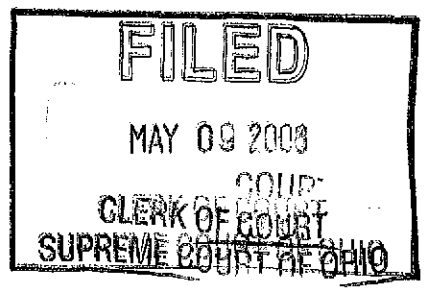
In the
Supreme Court of Ohio

State ex rel. Vincent J. DiGiacobbe, et al. Relators, v. James G. Beasley, Director Ohio Department of Transportation, Respondent.	: : : : : : : : : : : : :	Case No. 2008-0093



MEMORANDUM CONTRA OF RESPONDENT TO MOTION OF RELATOR FOR RECONSIDERATION OF DISMISSAL OF ORIGINAL COMPLAINT OF RELATOR FOR A WRIT OF MANDAMUS

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MEMORANDUM CONTRA

Respondent, the Director of the Ohio Department of Transportation ("ODOT"), moved this Court for an Order dismissing Relators DiGiacobbes' Complaint for Writ of Mandamus for lack of subject matter jurisdiction on the basis that their "mandamus" request was merely a disguised claim for money damages for which the Court of Claims has exclusive, original jurisdiction. This Court granted ODOT's motion to dismiss and the DiGiacobbes are now pressing this Court to reconsider its decision for many of the same reasons already contained in their original pleading. See, *Complaint for Writ of Mandamus with Attached Memorandum in Support & Affidavit* filed January 14, 2008. The DiGiacobbescontinue to assert that they are not seeking money damages, but rather only mandamus relief. No matter how vigorously the DiGiacobbes protest, they can't obscure their real action.

I. Relators' claims are for money damages and within the exclusive, original jurisdiction of the Court of Claims.

The parties appear to agree that the Court of Claims does not have jurisdiction to hear complaints for writs of mandamus, but does have exclusive original jurisdiction for claims of money damages. The issue then is to what category to place the DiGiacobbes' claims.

The DiGiacobbes repeatedly contend that they are seeking mandamus relief. However, courts have learned to not blindly accept assertions of parties to litigation.

> "At times, creative pleading may obscure the conceptual line between damages for loss sustained and claims for specific form of relief. Thus, we must look to the nature of the relief itself, because how [claimants] choose to characterize or phrase their claims is not dispositive of where the action is properly commenced." (Citations omitted.) *Zeleank v. Indus. Comm.* (10th Dist.), 148 Ohio App.3d 589, 2002-Ohio-3887, at ¶15.

In the present case, the DiGiacobbes allege that their property was damaged by a single "deluge" of water some two years after ODOT's project. It is asserted that on that fateful day in

2004, the water collected on the recently reconstructed highway, cascaded off the roadway, and into the interior of the DiGiacobbes' property, resulting in damage. The DiGiacobbes then point the finger at the "design and reconstruction" of a highway project as the cause of the damage.

The DiGiacobbes do not seek an order to repair damages or redesign of the highway; instead, their ultimate goal is to get before a jury in an unresolved appropriation case pending in Trumbull County Common Pleas Court. However, this Court recently held that, subject only to limited statutory exceptions, all claims for relief against the Director of ODOT must be prosecuted in Franklin County, even those that could be brought as counterclaims. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838. Faced with this hurdle, and knowing that if they directly seek compensation, reimbursement, or other remuneration from ODOT their suit must be heard by the Court of Claims, the DiGiacobbes couch their claims as "additional property rights taken and damages caused." Using this novel theory, the DiGiacobbes hope to obtain a declaration that their property rights have been taken as a means of having its construction related damage claims heard in Trumbull County. However, such legal calisthenics, if permitted, would undermine the Court of Claims Act.

> "... 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." *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 87-88.

Other than the self-serving protestations that they are seeking mandamus, the DiGiacobbes have yet to provide a cognizable legal basis for this Court to conclude anything but that they are seeking to avoid the exclusive original jurisdiction of the Court of Claims. As the following argument will show, the cases cited in their Motion for Reconsideration are inapposite.

In *Brockman v. Ohio Dept. of Public Welfare* (10th Dist. 1982), 7 Ohio App.3d 239, the appellate court found that the Court of Claims did not have jurisdiction over an "action in the Court of Claims seeking an order directing the defendant to pay $2,190.45, the balance due Mount Washington Care Center for the cost of his nursing home care in January, February and March 1981." Because "the nature of plaintiff's complaint is to seek performance of an act by the Department of Public Welfare and to make the determination within a specific time period," the complaint in *Brockman* sounded in mandamus and therefore jurisdiction would not lie. In the present case, the DiGiacobbes are not asking for an order to pay a third party and an administrative determination of a benefit. Instead, they seek reimbursement for damages caused and/or payment for property taken. Therefore, they are unlike the complainants in *Brockman.*

In *J.P. Sand & Gravel Co. v. State* (10th Dist. 1976), 51 Ohio App.2d 83, 85, a property owner had alleged that ODOT's notification to the City of Columbus of an unspecified intention to acquire some of property owner's land had "prevented the issuance by the city of any building permits, any lot split approvals, any subdivision plat approvals, and any zoning change approvals," which was marketable for potential commercial use. Not until some two years later, when the real estate market had turned unfavorable, did ODOT specify that it intended to acquire 5.74 acres of the larger 24.8 acre tract. In finding that the Court of Claims did not have jurisdiction, the appellate court determined that the complaint alleged the Director's notification to the City of a future appropriation amounted to a claim for a taking of property rights. *Id.* at 89. Moreover, since no physical taking had been alleged in the complaint, the property owner had at most alleged a taking *pro tanto*. Id. at 89-90. Ultimately, the appellate court recognized that the complaint was not seeking money damages, but rather an initial determination whether a taking had in fact occurred when the Director contacted the City under R.C. 5511.01.

Consequently, the Court of Claims lacked jurisdiction to make that determination. Conversely, the DiGiacobbes are not asking this court for a determination whether ODOT has taken its land or not. Instead, they affirmatively state that the taking has occurred and the only issue remaining is valuation. Thus, *J.P. Sand & Gravel* is irrelevant to their position.

In *Ohio Edison Co. v. Ohio Dept. of Transp.* (10th Dist. 1993), 86 Ohio App.3d 189, 191, a utility company claimed that ODOT had "refused either to pay the [statutory] relocation expenses or provide Ohio Edison with a formal hearing." The appellate court determined that "[i]mplicit in the three claims for relief was the hope that ODOT and [Director] Wray would allow Ohio Edison's claim under R.C. 163.51 et seq. and award Ohio Edison the $13,032.10 amount." *Id.* The appellate court in *Ohio Edison* determined that jurisdiction in the common pleas court was proper because the complainant was not seeking monetary damages but rather enforcement of a statutory reimbursement process. In the present case, by contrast, the DiGiacobbes are not seeking payment that may be due under a specific statutory reimbursement process; rather, their claims are ordinary damage claims that would, but for the Court of Claims Act, be barred by sovereign immunity.

Lastly, the DiGiacobbes cite *State, ex rel. Mahoning Cty. Community Corr. Assn., Inc., v. Shoemaker* (10th Dist. 1983), 12 Ohio App.3d 36. That case involved the reimbursement rate under a contract for the care and treatment of parolees, probationers, and furloughees. The complaint sought an order directing the reimbursement rate equal the rate of actual cost rather than the rate contracted, alleging that the contract rate had been entered "under protest." *Id.* at 36-37. The appellate court recognized the dispute was contractual, rather than one in which relief would lie in ordering a governmental agent to perform an act. Therefore, the request for mandamus was improper in the Common Pleas Court and was within the province of the Court

of Claims. Likewise, the present case is one alleging defect in "design and reconstruction" that caused damages resulting from a single flooding event. The relief the DiGiacobbes seek is for the Director eventually to pay money for alleged damages.

The DiGiacobbes suggest that if this Court accepts ODOT's position, then R.C. Chapter 163 is rendered a nullity because all appropriation actions ultimately involve the payment of monies. Such exaggeration is misplaced. There is harmony between eminent domain and other claims arising when an owner is being deprived of the rights of ownership. A highway project which acquires an advertising sign, and a snow plow that knocks it down, each deprive an owner of a property right. However, that does not mean that each is to be resolved by Article I Sec. 19 of the Ohio Constitution. To label the snow plow accident a "taking" would eviscerate the State's sovereign immunity rights and the General Assembly's decision to establish a centralized filing and adjudication process for claims that otherwise would be barred.

In this case, the DiGiacobbes claim that because ODOT was negligent in its "design and reconstruction," two years after a highway improvement project a flood caused damage to a roller skating rink. Simply couching those damages as "property rights taken and damaged caused" does not make them a "taking" for public use.

II. Relator's claims do not allege a "taking" for public use.

The DiGiacobbes next argue that the event alleged in the Complaint (i.e., flooding) is a "taking" for public use in and of itself. In support of their argument, the DiGiacobbes cite three cases. However, the DiGiacobbes' interpretation stops short of a complete analysis.

In *Masley v. Lorain* (1976), 48 Ohio St.2d 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 this case, in *Masley* there was no dispute that the city was using the landowner's property for public use. As the *Masley* court noted, "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." *Id.* at 336 (emphasis added). 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 *dammum absque injuria*. It is also not liable for increased flow caused simply by improvement of lots and streets..." *Id.* at 340. In finding that a claim for appropriation was made, this Court recognized the continual flooding of lower land *was part of the storm sewer system. Id.*

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

In *Lucas v. Carney* (1958), 167 Ohio St. 416, the county used land it owned to construct a county garage, which resulted in replacing porous grass and vegetation with heavily compacted clay, subsoil, rock, and debris. The county's property became impervious to water causing it to be ejected upon the neighboring lands after every rain and upon the melting of ice and snow. *Id.* at 418. The county attempted unsuccessfully to "retain and divert the repeated and excessive flow of surface water from the county's land or to prevent the washing of clay, rocks, and other debris onto the land of [owner]." *Id.* at 419. While this Court affirmed that a *pro tanto* taking had been alleged, it noted that the landowners acknowledged the county had *properly* acted in the performance of their public functions in operating the garage. *Id.* at 424.

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

The third case cited by the DiGiacobbes is *State ex rel. Livingston Court Apts. v. Columbus* (10th Dist. 1998), 130 Ohio App.3d 730. In that case, numerous illegal connections to the City's

sanitary sewer pipes would overwhelm the overall system causing raw sewage backup into some apartment buildings. The owner of the apartments "demanded that the city correct the problem, but that the city had failed and refused to make repairs." *Id.* at 731. Because of the inability to use the apartments' basements, the owner was forced to discount the monthly rental by twenty percent. *Id.* at 733. The owner then sued in mandamus alleged a taking of property rights. The appellate court found that mandamus was a proper remedy because "...relator's complaint did not seek damages based on alleged negligence by the city." *Id.* at 741. Here, by contrast, the DiGiacobbes <u>are</u> alleging negligence by ODOT when they state "that the [ODOT's] actions in designing and reconstructing the highway caused the highway waters to be cast and diverted on the lands of the [DiGiacobbes] creating damages to their real estate..." Complaint, ¶6. Therefore, *Livingston Court* is inapposite.

The DiGiacobbes' allegations that a taking has occurred for public use do not make it so, and this Court is not bound to assume the truth of such *conclusory* allegations, particularly in light of their claims of negligent design and construction.

<u>III. Conclusion</u>

The Court of Claims has exclusive, original jurisdiction to hear "design and reconstruction" related damage claims. Despite the DiGiacobbes' expectations to the contrary, this Court has properly looked beyond their allegations of a "taking" and recognized their attempt to escape the exclusive jurisdiction of the Court of Claims by cloaking their negligence claims as an appropriation of a property right. Simply because a singular flooding event occurred on the DiGiacobbes' property does not mean mandamus is appropriate. This Court should not reconsider its dismissal of the DiGiacobbes' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum Contra Of Respondent To Motion Of Relator For Reconsideration Of Dismissal Of Original Complaint Of Relator For A Writ Of Mandamus* was served by U.S. mail this 9th day of May, 2008, upon the following counsel:

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