

IN THE SUPREME COURT OF OHIO

STATE EX REL. JUNE L. BLANK &
ESTATE OF RICHARD L. BLANK

Relators

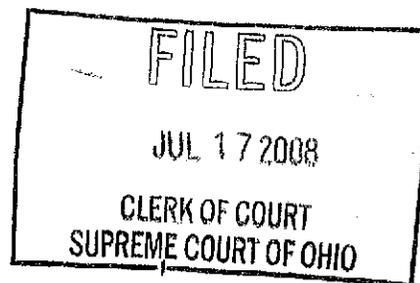
vs.

JAMES G. BEASLEY, DIRECTOR
OHIO DEPARTMENT OF
TRANSPORTATION

Respondent

CASE NO. 2007-2217

MERIT REPLY BRIEF OF RELATORS JUNE L. BLANK, et al.



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I. RELATORS' ALLEGATIONS DO INDEED RISE TO THE LEVEL OF A "TAKINGS CLAIM" AND ARE RELATED TO A PUBLIC USE.

- A. *Respondent Admits At Page 2 Of Its Statement Of Facts That Its Construction Project Was Sold To A Private Contractor Who Was Obligated To Follow ODOT Construction And Materials Specifications And That Respondent Monitored And Supervised The Project.*

Respondent, as an employer of the Contractor, had an obligation to see that the Contractor followed the ODOT construction and material specifications. This is admitted in the Affidavit of Respondent's Engineer, Philip Crish, who acknowledged that he was the supervisor who monitored the highway project and was responsible for the project. [See Respondent's Evidence Vol. 1 of 3-Crish Affidavit]

The construction plans and specifications did not include:

1. The backup of sewage into the commercial restaurant building and permanent damage to Relators' sewer;
2. Invasion and use of Relators' property outside the limits of easements acquired by appropriation;
3. Physical damages to a commercial florist building outside the limits of Respondent's right-of-way;
4. Permanent physical damages to the commercial restaurant building walls and the blocking of access to the delivery door of the restaurant;
5. Highway surface water running into the front doors of the florist shop;
6. Deprivation of access to a drive used for deliveries to the commercial florist building; and
7. Damages to Relators' sanitary sewer line of the commercial florist building.

Respondent, at page 4 of its brief, does not dispute the invasion of these property rights by the Contractor. Instead Respondent takes the position that these direct encroachments were not needed for a public use or function and therefore the Relators are not entitled to a writ of mandamus.

These property encroachments were not included in the plans and specifications and it is apparent that the Contractor therefore was violating the contract when he performed the admitted transgressions while the Respondent sat idly by and failed to require the Contractor to perform the work in accordance with the contract and limits of the areas appropriated even though the project was directly monitored and supervised by the Respondent's Engineer Crish.

In *Cowell v. Ohio Department of Transportation No. 2003-09343-AD; 2004-Ohio-151* decided January 14, 2004, the court concluded at page 5 ¶18 as follows:

“{¶18} Contrary to defendant's contention, the court concludes roadway construction is an inherently dangerous activity and the duty to safely conduct the activity is nondelegable. DOT cannot avoid its responsibility by employing an independent contractor once it has determined to undertake an inherently dangerous activity. “Where danger to others is likely to attend the doing of certain work unless care is observed, the person having it to do is under a duty to see that it is done with reasonable care, and cannot, by the employment of an independent contractor, relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants.” *Richman Bros. v. Miller* (1936), 131 Ohio St. 424, 6 Ohio OP. 119, 3 N.E. 2d 360, at paragraph one of the syllabus; *Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick* (1899), 61 Ohio St. 215, 55 N.E. 618, at paragraph one of the syllabus. A construction site is an inherently dangerous setting. See *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 600. In *Bohme, Inc. v. Sprint International Communications Corp.* (1996), 115 Ohio App. 3d 723, discretionary appeal not allowed (1997), the court explained inherently dangerous work involves “work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others.” *Bohme*, supra at 736 (quoting Restatement of the Law 2d, Torts (1965), Section 427, Comment C).”

If Respondent determines that the encroachments to Relators' property were not for a public use or public purpose then it had a duty, through its supervisory engineer, to see that it was done with reasonable care pursuant to the highway plans and specifications and within the limits of the rights appropriated. Its failure to perform that duty contradicts the self-serving, after the fact affidavits of its agents, that these additional encroachments or takings were not necessary or a part of the public use ordained and declared necessary in its pending appropriation proceeding as part of the taking of private property.

B. The Various Encroachments To Relators' Property Is Part Of Public Use To Reconstruct The Highway For Which The Relators Are Entitled To Compensation Pursuant To Article I §19 Of The Ohio Constitution.

The highway reconstruction was for the benefit of the public. Respondent prescribed the plans and specifications to do the job and monitored and supervised the project. As such it was required to anticipate what rights were needed to be taken to accomplish its purpose. If the Contractor exceeded the limits set forth in the contract, plans and specifications it was the Respondent's responsibility to curtail such activity through its supervisor in charge of the project.

If Respondent needed the additional rights it should have anticipated their need and appropriated them in their pending appropriation. If it didn't need the additional property rights then it had a duty to require the Contractor to perform his contract without confiscating the additional rights that were not a part of original highway plans and specifications not included in its pending appropriation proceedings against the Relators.

To determine that a State Agency can appropriate a temporary and permanent easement for the reconstruction of a highway and sit idly by while the Contractor confiscates additional property rights while performing its contract as agent for the public and then say that the

admitted encroachments are not for a public use is in direct violation of Article I §19 of the Ohio Constitution.

If the public agency can so easily evade its responsibility to its citizens to pay for the private property rights taken from an owner than it invites abuse by public agencies to minimize or ignore takings by allowing the contractor to use the additional rights and then state that the encroachments were not necessary for a public use.

As an example, if in order to widen a roadway if the public agency appropriated a temporary easement of 5' for construction purposes, when in fact the contractor needed 10' in order to avoid encroaching on the owner's land, the contractor could, without permission or interferences by the public agency, use the additional 5'. The public agency could then argue the contractor only needed 5' instead of 10' and then say that additional property was not for a public use therefore it was unnecessary to appropriate and pay for the taking. The owner's property would then be taken but the public agency would avoid having to pay for its use even though the purpose was to use it for the public purpose of reconstructing the roadway.

Obviously, there are circumstances in any highway construction project that cannot always be anticipated or even if anticipated cannot be ultimately determined to its fullest extent until the construction is in progress.

Respondent maintains, at page 2 of its statement of facts, that none of the damage claims asserted by Relators were anticipated or designed as part of Respondent's highway improvement project. On page 3 of Engineer Kinnick's Affidavit Respondent claims that any work performed by the contractor outside of Parcel 34-S and/or 34-T would not have been authorized as part of the appropriation of property for completion of the project. [State's Exhibit 3]

All of the property rights or encroachments to the Relators' real estate were the direct result of the work being performed within the easements taken. The backup of sewage into the commercial restaurant building and damage to its sewer connection to the restaurant, due to improper workmanship, was within the State right-of-way. But this caused damages to the restaurant building beyond the limits of the acquired highway easements. [Relators Evidence Pg. 2]

Likewise the damages to the Relators' sanitary sewer line, which caused sewage to back up into the commercial florist shop, was performed in an unworkmanlike manner but lies within the temporary easement acquired by Respondent. [Relators Evidence Pg. 5]

The highway surface water running into the front doors of the commercial florist shop from the State's right-of-way where the State eliminated existing catch basins, raised the grade of the highway and replaced the existing drains with an inadequate drain was work done within the right-of-way. But the condition and damages caused by the reconstruction of the highway casting water onto the Relators' property from the existing right-of-way owned and controlled by Respondent. [Relators Evidence Pg. 5]

The temporary blocking of access to the Relators' back delivery door of the commercial florist shop with permanent curbing occurred within the right-of-way but affected the access to and from the real estate until it was finally removed by Respondent. [Relators Evidence Pg. 3]

The permanent physical damage to the commercial florist shop occurred at the temporary right-of-way line, which was on the very edge of the Relators' sidewalk so that when the heavy equipment came to the line to remove blacktop it gouged the sidewalk and damaged a support column. The Respondent should have anticipated that the use of heavy machinery next to a

sidewalk with no tolerances could cause damage to the Relators' real estate. [Relators Evidence Pg. 3]

The pounding of shale rock with the bucket of a 100,000 pound earth digger only 9' from the wall of a restaurant is a situation that Respondent should have anticipated. The cracking and bowing of the restaurant wall would be expected where the vibrations from such machinery are so close to a building and the sewer was laid in a bed of rock. In addition the equipment blocked the back delivery entrance to the commercial restaurant. [Relators Evidence Pg. 4]

Respondent did not provide a staging area for the huge buckets, excavators, backhoes, wheel loader, pick up trucks, 6 axle tandem trucks, tri-axle dump trucks, sweepers, trench boxes and other machinery. Consequently, this mass of equipment was used and stored on the Relators' parking lot cracking up blacktop and gouging the slag lot with ruts, mud and tire tracks. [Relators Evidence Pgs. 2-3; Exhibits A1-A28] Respondent also should have anticipated this. To say that this area was not necessary for a staging area for use of equipment in the construction of a highway defies common sense and is the Respondent's attempted alibi to use the Relators' property without having to pay for a temporary easement.

These uses fall squarely within the public purpose of reconstructing the highway for the benefit of the public. Respondent should not be relieved of its responsibility to properly acquire the necessary private property rights used for construction of a public highway or if the property rights acquired were not necessary than to require the contractor to stay within the limits of the right-of-way acquired as shown by its contract, plans and specifications. This is especially so where it admits the transgressions to the Relators' property and admits that it had an engineer supervising the project but attempts, after the fact, to avoid its responsibility by claiming the additional rights taken were not necessary for a public purpose or use.

II. MANDAMUS IS THE APPROPRIATE ACTION TO COMPEL THE RESPONDENT TO INSTITUTE APPROPRIATION PROCEEDINGS WHERE AN INVOLUNTARY TAKING OF PRIVATE PROPERTY RIGHTS IS ALLEGED.

Respondent repeated its position that it raised in its motion to dismiss filed in this case on April 1, 2008. In its motion for dismissal Respondent maintained that the Court of Claims had exclusive original jurisdiction over Relators' complaint. This Court did not grant Respondent's motion to dismiss.

This Court has already decided that mandamus is the proper remedy in this type of case where an involuntary taking of private property is alleged. In the recent case of *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati* (2008) 110 Ohio St.3d 131 this Supreme Court quoted and affirmed *State ex rel. Shemo v. Mayfield Hgts.* (2002) 95 Ohio St.3d 59 at ¶17 pg. 131 of its *Hilltop* opinion stating:

“Mandamus is the appropriate action to compel authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.”

In all cases cited by Respondent ODOT the property owner sought monetary damages instead of a sole writ of mandamus requiring the authorities to institute appropriation proceedings. In the case at bar Relators do not request money damages. Relators' complaint is strictly an action to compel Respondent to appropriate the property rights it has already confiscated. This is in accordance with the *Hilltop* and *Shemo* cases cited supra.

Respondent's reliance on *Thompson, et al., v. ODOT* (10th Dist. November 26, 1996), *Franklin App. 96API04-497* is not tenable. In that case the court rejected the mandamus action because the owner sought an award of money and not the performance of some specific act upon the subject property.

In simple terms the Respondent has confiscated additional property rights from the Relators, which it should have acquired by appropriation. The failure of Respondent to follow the proper procedure prescribed by O.R.C. Chapter 163 and Article I §19 of the Ohio Constitution requires that a writ of mandamus issue to Respondent to appropriate those property rights temporarily or permanently taken.

III. CONCLUSION

1. Respondent does not dispute the unwarranted “activities” that took place on the property of the Relators and which are cited in Relators’ complaint. There is considerable evidence presented by Relators, including photographs, of the encroachments and the result of the invasion of their private property.

2. Respondent had a supervisory engineer at the construction site to see that the construction of the roadway proceeded according to its plans and specifications within the land appropriated in the pending appropriation proceeding. The plans and specifications did not include the taking of the additional property rights, which were taken and used by the Respondent in the reconstruction of the highway, which is for a public purpose.

3. Relators are entitled to a writ of mandamus ordering Respondent to appropriate, pursuant to O.R.C. §163 and Ohio Constitution Article I §19, the rights temporarily and permanently taken. These additional takings should be appropriated in a separate case and consolidated with the pending Trumbull County appropriation case number 2001-CV-2422 waiting for trial or Respondent’s Petition for Appropriation in case number 2001-CV-2422 should be amended to include the additional property rights taken.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF was submitted this 16th day of July 2008 to L. Martin Cordero & Richard J. Makowski, Associate Assistant Attorney General, Chief Transportation Section, 150 E. Gay Street-17th Floor, Columbus, Ohio 43215-3130 via regular U.S. mail, postage pre-paid.



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