

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. :
WAYNE T. DONER, ET AL. :

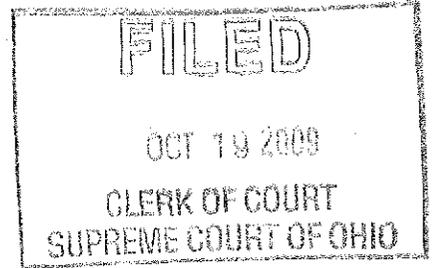
Relators, :

v. :

SEAN D. LOGAN, DIRECTOR :
OHIO DEPARTMENT OF :
NATURAL RESOURCES, ET AL. :

Respondents. :

Case No.: 2009-1292



**RELATORS' MEMORANDUM IN OPPOSITION TO
MOTION OF RESPONDENTS FOR EXPEDITED DISCOVERY, OR
ALTERNATIVELY, TO REFER THE ACTION TO MEDIATION**

Only after this Court ordered the parties to present simultaneously their evidence by October 30 did Respondents Sean D. Logan, Director, and the Ohio Department of Natural Resources ("Respondents") seek any discovery in this case. Despite three months to conduct discovery, Respondents were content to sit on their hands until now. Nowhere in their Motion do Respondents explain why, if they needed discovery from Relators, they did not seek that discovery months ago. Nowhere in their Motion do they explain why months ago they could not have served discovery consistent with the Rules of Civil Procedure. In fact, Respondents did not even mention any need for this discovery a week ago when they sought a 90 day extension from this Court. Furthermore, nowhere in their Motion do Respondents even explain why they need the discovery they now hastily ask this Court to permit -- demanding discovery within "one business day" and "immediately." Respondents have offered this Court no cause why they need the discovery they request. Indeed, they cannot provide such a reason because they have

litigated almost all of the issues in this case multiple times over the last eight years. Their Motion for Expedited Discovery should be denied.

As for mediation, Relators embrace the opportunity to mediate this action – provided mediation does not delay the presentation of evidence and briefing schedule. By making mediation contingent upon the resolution of the issue of expedited discovery, Respondents’ alternative request to refer the action to mediation is transparently disingenuous and designed only to obtain from this Court a delay in the presentation of evidence and briefing schedule. If Respondents raised the prospect of mediation in good faith, why is their request contingent upon the issue of expedited discovery? It should not be. Relators are willing to mediate, but their constitutional rights hanging in the balance are too important to delay the presentation of evidence and briefing schedule to do so.

A. Respondents Have Had Sufficient Time To Investigate This Matter And Conduct Discovery.

As noted in Relators’ Memorandum in Opposition to Combined Motion of Respondents to Refer the Action to a Master Commissioner and to Amend the Alternative Writ Schedule, Respondents had nearly three months to investigate this matter, conduct discovery, and gather evidence. Instead of doing so, Respondents chose to file a Motion to Dismiss, sat on their hands, and waited for the Court to issue a decision on their Motion to Dismiss. During the weeks that passed, Respondents propounded no discovery on Relators.

Even after the denial of their Motion to Dismiss by this Court, Respondents were in no hurry to investigate this matter. Rather, Respondents waited nearly another week (i.e., nearly a third of the time the parties had to prepare their evidence) before filing a Motion to Refer the Action to a Master Commission and to Amend the Alternative Writ Schedule. Significantly, in their Motion to Refer the Action to a Master Commissioner and to Amend the Alternative Writ

Schedule, Respondents never once mentioned the need to conduct discovery related to any expert witnesses of Relators as justification for extending the alternative writ schedule. The only specific chore identified by Respondents was the need to complete “[o]wnership verification through title searches for each parcel cited in the complaint.” Mot. of Resp’ts for Expedited Disc., or Alternatively, to Refer the Action to Mediation at 1.

Only now after this Court largely denied Respondents’ request – granting Respondents an additional 10 days for the presentation of evidence as opposed to the 90 days Respondents requested – did Respondents propound any discovery on Relators. Now, with only a few days remaining before the presentation of evidence is due, Respondents seek to burden Realtors with this request. And they seek to do so without any explanation why they need this discovery.

Respondents have no good cause for their hasty request for “expedited discovery.” They point to the Ohio Rules of Civil Procedure as authorizing their discovery requests, but complain that the time for Relators to respond to such discovery under the rules is much too long. Indeed, had Respondents undertook discovery in a timely manner, such discovery could have been completed within the time frame contemplated by the Civil Rules. After all, this mandamus action was filed on July 17. Respondents have given this Court no reason for their delay and no reason why a departure from the Civil Rules is necessary here at this late juncture in the proceedings. Respondents have no excuse for sitting idle, solely relying on the hope that a motion to dismiss on statute of limitations grounds would prevail. Relators should not pay the price for Respondents’ calculated decision to delay their investigation and discovery.

B. Respondents’ Efforts To Seek Expert Discovery Amount To An Impermissible Collateral Attack Upon Binding Precedent.

In propounding discovery regarding experts, Respondents must be intending to contest causation and liability; that is, that Respondents’ actions have caused and continue to cause

severe, frequent and persistent flooding downstream of the western spillway in the vicinity of the Beaver Creek and Wabash River. These issues have been determined as a matter of law in prior proceedings against Respondents, *see State ex rel. Post* (Ohio App. Dec. 4, 2006), 3rd Dist. No. 10-2006-001, 2006 WL 3477024, 2006-Ohio-6339 (“Post”); *Case Leasing & Rental, Inc. v. Ohio Dep’t of Natural Res.* (Ohio Ct. Cl. June 19, 2008), No. 2005-08034, 2008-Ohio-3411, and issue preclusion bars Respondents from doing so. *See Fort Frye Teachers Ass’n, OEA/NEA v. State Employment Relations Bd.*, 81 Ohio St. 3d 392, 395 (1998) (recognizing that under collateral estoppel or issue preclusion a fact or a point that was actually and directly at issue in a previous action and was determined by a court of competent jurisdiction may not be drawn into question in a subsequent action); *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 74 (1977) (“A party precluded under [the doctrine of collateral estoppel] from relitigating an issue with an opposing party likewise is precluded from doing so with another person . . .”).

In *Post*, five similarly situated landowners filed a mandamus action against the then director of the Ohio Department of Natural Resources (“ODNR”) in the Court of Common Pleas of Mercer County, *State of Ohio ex rel. Post v. Speck*, No. 01-CIV-091. Like the present action, the landowners in *Post* alleged ODNR had effected a taking of their property and sought a writ of mandamus compelling ODNR to initiate appropriation proceedings. *Post*, 2006-Ohio-6339 at ¶ 1. And like the present action, the landowners in *Post* based their taking claims on the severe flooding to their property as a result of the redesign of the west spillway of Grand Lake St. Marys and ODNR’s improper management of lake water levels. *Id.* at ¶ 5. In that litigation, the landowners and ODNR presented conflicting expert testimony on whether the new spillway increased downstream flooding and whether that increased flooding was permanent or would frequently and inevitably recur. *Id.* at ¶¶ 27-42. The trial court found the landowners’ expert

testimony more credible and concluded that the evidence showed that ODNR caused an increase in the extent and duration of the flooding by installing the new spillway and that the increased flooding was permanent or would frequently and inevitably recur. *Id.* at ¶¶ 51, 60-61. Based on those findings, the trial court concluded “that the modification of the west spillway of Grand Lake St. Marys is burdensome and constitutes a taking of the property of the Plaintiffs.” *Post*, No. 01-CIV-091, Dec. 14, 2005 Judgment Entry at 10. The Sixth District Court of Appeals, sitting by designation, affirmed the trial court’s decision. *Post*, 2006-Ohio-6339 at ¶¶ 56, 76.

In 2005, another similarly situated landowner and business owner filed suit against ODNR in the Court of Claims asserting claims of negligence, nuisance, trespass, absolute nuisance/nuisance per se, and taking. *Case Leasing*, 2008-Ohio-3411. At trial, the landowner contended that ODNR was negligent in the design and management of the spillway, that it did not comply with accepted engineering practices, that it failed to consider other economically feasible designs, and that ODNR knew or should have known that the installation of the replacement spillway would result in more frequent and more severe flooding to downstream landowners. *Id.* at ¶ 5. Again, both the landowner and ODNR presented expert testimony regarding ODNR’s spillway design and lake-level maintenance decisions, including expert testimony as to whether ODNR’s actions had caused more frequent and more severe flooding to downstream landowners. *Id.* at ¶ 24. And again, the Court found the testimony of the landowner’s expert better reasoned and more credible. *Id.* Based on that evidence, the court concluded: “ODNR knew or should have known that the installation of the replacement spillway as designed would result in more frequent and more severe flooding to downstream landowners.” *Id.* at ¶ 28. Thus, the Court determined that ODNR was negligent in redesigning the spillway,

was negligent in maintaining lake water levels, and that ODNR's negligence proximately caused severe and increased flooding and extensive property damage. *Id.*

Accordingly, in the prior litigation involving similarly situated landowners, ODNR had a full and fair opportunity to litigate the issues of causation and liability and did indeed fully and fairly litigate those issues. And in that prior litigation, Ohio Courts adopted the testimony of experts offered by those landowners and concluded that ODNR caused an increase in the extent and duration of the flooding by installing the new spillway and through their lake-level management practices and that the increased flooding was permanent or would frequently and inevitably recur. ODNR is now collaterally estopped from denying those factual findings and conclusions, and thus is unable to challenge causation and liability here. *See Fort Frye Teachers Ass'n*, 81 Ohio St. 3d at 395; *Hicks*, 52 Ohio St.2d at 74 (1977).

C. This Court's Alternative Writ And Rules of Practice Contemplate The Simultaneous Presentation Of Evidence.

This Court's alternative writ schedule based upon this Court's clear Rules of Practice provides for the presentation of evidence by October 30, 2009, and as Respondents concede, the writ and Rules of Practice provide that the parties present evidence simultaneously. Thus, both parties in preparing and presenting their evidence are on equal footing as to the evidence the opposing party will present. Accordingly, Respondents will not be prejudiced by this Court's denial of their request for expedited discovery.

Indeed, if any party will be prejudiced by the grant of this Motion it will be Relators. Instead of conducting their own investigation and preparing their own evidence, Respondents seek to piggyback on the efforts of Relators and dictate an improper schedule for discovery that unfairly favors Respondents. Such behavior is neither contemplated by this Court's Rules or the

Rules of Civil Procedure and will prejudice Relators. For this additional reason, Respondents' request should be denied.

Alternatively, in the event this Court grants Respondents' request for expedited discovery, Relators ask this Court to order Respondents to provide the same information to Relators with respect the expert related evidence Respondents intend to include in their presentation of evidence.

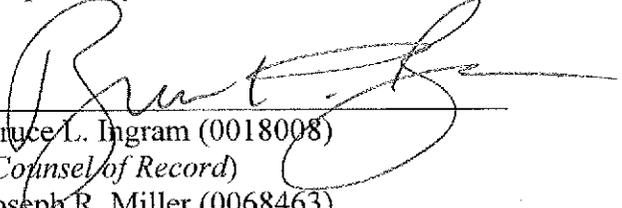
D. Respondents Have Provided No Basis For Referring This Matter To Mediation.

Respondents' request "in the alternative" to refer this matter to a mediator is transparently disingenuous. The very fact that Respondents condition their request on anything, especially upon the failure of their motion, reveals that Respondents, in reality, have no desire to mediate this matter. A sincere and good faith request for mediation would never be tied to the issue of expedited discovery. Indeed, Respondents are not taking Justice Pfeifer's suggestion that this action could be referred to mediation seriously. In contrast, Relators are willing to mediate this action, but they will not agree to do so at the expense of the presentation of evidence and briefing schedule. Their constitutional rights hang in the balance and the exoneration of those rights should not be delayed should mediation prove unfruitful.

For the forgoing reasons, Relators respectfully request that this Court deny Respondents' Motion for Expedited Discovery. Alternatively, in the event this Court grants Respondents' request for expedited discovery, Relators ask this Court to order Respondents to provide the same information to Relators with respect the expert related evidence Respondents intend to include in their presentation of evidence. Relators agree to mediate this action provided no delay in the presentation of evidence and briefing schedule occurs.

Dated: October 19th, 2009

Respectfully submitted,



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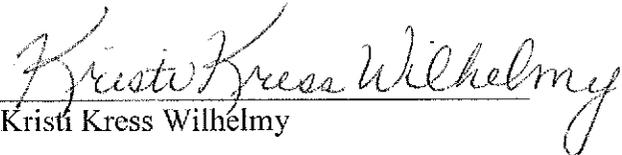
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via electronic mail and U.S. Mail postage prepaid, this 19th day of October, 2009:

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