

11-1396

IN THE SUPREME COURT OF OHIO

State ex rel. Dorothy Hensley, et al.,	:	On Appeal from the Franklin
	:	County Court of Appeals
	:	Tenth Appellate District
Petitioners-Appellants.	:	Court of Appeals
vs.	:	Case No. 10 AP-840
	:	
	:	
City of Columbus	:	
	:	
Respondent-Appellee.	:	
	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PETITIONERS-
APPELLANTS**

Steve J. Edwards (0000398)
4030 Broadway
Grove City, Ohio 43123
(614) 875-6661
Fax (614) 875-2074
Sedw4030@aol.com

Counsel for Appellants

Richard C. Pfeiffer, Jr. (0021982)
Columbus City Attorney
Janet Hill Arbogast (0061955)
Jennifer S. Gams (0063704)
Assistant City Attorneys
City of Columbus, Department of Law
90 West Broad Street
Columbus, Ohio 43215

Counsel for Appellee, City of Columbus

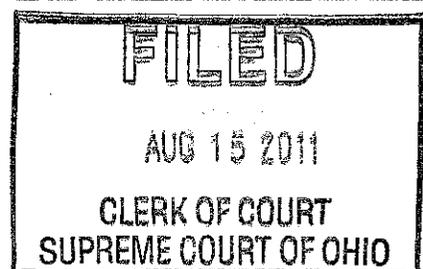


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION**

“The right of private property is an *original* and *fundamental right* existing anterior to the formation of the government itself; the civil rights, privileges, and immunities authorized by law, are *derivative*—mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power, to be exercised for the public benefit. ***

Government is the necessary burden imposed on man as the only means of securing protection of his rights. And this protection—the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right*, which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges *** which are created by law and conferred upon a few *** The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, *** were evidently designed to protect the right of private property as one of the primary and original objects of civil society ***” (Emphasis sic) *Bank of Toledo* 1 Ohio St. at 632.

Norwood v. Horney (2006), 110 Ohio St. 3d 353, 362.

If Ohio places such importance on property rights, then why is it so difficult to protect those rights under Ohio law? Petitioners have been pursuing the City of Columbus for 19 years to get reimbursed for out of pocket costs caused by Columbus pumping water out of the ground in extending a sewer line to New Albany. **19 years.**

This case fundamentally alters the manner in which a taking of property under Section 19, Article I of the Ohio Constitution is plead and adds a layer of uncertainty without any corresponding benefit. It exposes property owners who fail to discern a pleading maneuver, to the loss of the ability to claim just compensation for property that has been taken. Not only does it affect the claims brought under the Ohio Constitution but also affects claims brought in federal court because takings claims cannot be brought in federal court until state procedures are used. *Williamson Cty. Planning Comm. v. Hamilton Bank* (1985), 473 U. S. 172. This law on takings in Ohio was in a state of

confusion for a period of time. *Kruse v. Village of Chagrin Falls* (6th Cir. 1996), 74 F. 3d 694. The Sixth Circuit recognized that this confusion has now been cleared up. *Coles v. Granville* (6th Cir. 2006), 448 F. 3d 853. The Court of Appeals decision below returns us to a state of confusion. Citizens of Ohio deserve a clear procedure to protect their fundamental property rights which *Norwood*, supra, stated deserve protection.

Appellants' taking claim was based upon **both**, Section 19, Article I of the Ohio Constitution and the 5th and 14th Amendments to the United States Constitution and therefore had a separate basis in the United States Constitution. The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires that state courts obey decisions of the U. S. Supreme Court on issues of Federal constitutional rights. The Court of Appeals' decision ignores a United State Supreme Court, *Williamson*, supra, on an issue of Federal Constitutional law, as to when a takings claim arises. This is in violation of the Supremacy Clause. It is this Court's duty to correct this error. Not only does the Court of Appeals' decision violate Article VI, Clause 2, it interprets Section 19, Article I of the Ohio Constitution as providing less protection to the citizens of Ohio with regards to their property rights than does the United States Constitution. "The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall." *State ex rel. Ohio AFL-CIO. Ohio Bur. Worker's Compensation* 2002), 97 Ohio St. 3d 504, 514, citing from *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, syllabus. The Court of Appeals' decision falls below this floor.

The Court of Appeals, below, decides a constitutional issue of first impression in Ohio. The Court of Appeals has decided that a violation of Section 19, Article I, for a

taking of property “occurs when the state substantially interferes with a property right.” *State ex rel. Hensley v. City of Columbus*, 2011 Ohio 3311 at ¶ 27. This issue has never been decided by this Court. The corresponding provisions of the United States Constitution, the 5th and 14th Amendments, have been interpreted differently and require both a taking **and** the denial of just compensation in order to establish a takings claim. *Williamson, supra*. This case presents this Court with the opportunity to decide the scope of Section 19, Article I and whether it differs from the scope of the 5th and 14th Amendments.

This Court has consistently referenced Section 19, Article I and the 5th and 14th Amendments as a source of protection for a citizen’s property rights without distinguishing between them or noting any significant differences in their scope or reach. *State ex rel. OTR v. Columbus* (1996), 76 Ohio St. 3d 203, 206; *State ex rel. Trafalgar v. Miami Bd. of Commrs.* (2004), 104 Ohio St. 3d 350, 354; *State ex rel. Duncan v. Mentor City Council* (2005), 105 Ohio St. 3d 372, 374. If there are significant differences between Section 19, Article I and the 5th and 14th Amendments, then it should be this Court to announce the contours of those differences and how those differences affect the underlying property rights. This Court’s decision in *City of Norwood, supra* would seem to have some bearing on the contours of Section 19, Article I.

Seeking a writ of mandamus has become increasingly more frequent through the years, as the number of cases cited herein demonstrates. In none of these cases was the request for a writ of mandamus joined with the remedy in the ordinary course of the law, yet in none of these cases was the defense of *res judicata* raised in this context. If there is to be a change in this procedure it should be done by this Court in a clear manner.

While *Kruse v. Village of Chagrin Falls, supra*, has been overruled, a quotation aptly describes what has transpired herein:

After reviewing this record and listening to counsel at oral argument, it is obvious to us that, left to the devices of the Village's counsel, this case will become another *Jarndyce v. Jarndyce*, with the participants "mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their ... heads against walls of words, making a pretense of equity" CHARLES DICKENS, *BLEAK HOUSE* 2 (Oxford University Press ed. 1989) (London 1853). For nearly ten years, the Kruses have endeavored to vindicate their property rights guaranteed by the Constitution and by state statutes. The Village's actions threaten to turn the Kruse family into generations of "ruined suitors" pursuing legal redress in a system "which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope" as to leave them "perennially hopeless." *Id.* at 3-4. **Enough is enough and then some.** (emphasis added).

Kruse, *supra*, 701.

If "nearly 10 years" is "enough is enough and then some", then what is 19 years?

STATEMENT OF THE CASE

A. Petitioners' State Action Seeking Compensation through a Tort Claim.

In 1992, a lawsuit was filed in the Franklin County Common Pleas Court alleging that Columbus had caused Petitioners unreasonable harm under the decision of *Cline v. American Aggregates* (1984), 15 Ohio St, 3d 384, and pursuant to R.C. 1521.17. This case was *Dorothy Hensley, et al. v. City of Columbus, et al.* Case No. 92 CV 6673. This unreasonable harm was as a result of the Columbus pumping groundwater during the construction for a sewer line and the construction of the sewer line which diverted and controlled the flow of groundwater thereby drying up Petitioners' water wells. Petitioners brought a state law tort claim to be compensated for their injuries to satisfy R.C. § 2731.05, "The writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law". There was an interlocutory appeal

based on class action certification. Upon remand and due to a couple of unusual trial court rulings by then Judge Deborah O'Neil, that case was dismissed, pursuant to Civil Rule 41 and refiled the same day under case no. 95 CV 5465. There, the trial court granted summary judgment to Columbus on the basis of governmental immunity. The Court of Appeals affirmed the trial court, holding that Columbus was immune from liability. *Dorothy Hensley, et al. v. City of Columbus*, Case No. 97 APE 02 189. This Court refused to hear the appeal. 81 Ohio St.3d 1516 (1998).

B. District Court Dismisses Federal Claims

On September 15, 1999, Petitioners filed their complaint in U.S. District Court, pursuant to 42 U.S.C. § 1983, seeking compensation under the Fifth Amendment Takings Clause. This was filed because at that time, for a physical taking, there was no further requirement to resort to state procedures. *Kruse, supra*. Columbus moved for summary judgment arguing that: 1. there was no taking; 2. the claims were barred by the statute of limitations; and 3. *res judicata* barred plaintiffs' claims. The District Court issued its decision holding that there was no constitutionally protected property interest in groundwater. Petitioners appealed to the Sixth Circuit.

C. Court of Appeals, Sixth Circuit

The Sixth Circuit Court of Appeals, after oral arguments, certified the following question to this Court:

Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?

This Court answered the question affirmatively and held that "Ohio landowners have a property interest in the groundwater underlying their land and that governmental

interference with that right can constitute an unconstitutional taking.” *McNamara v. Rittman*, 107 Ohio St. 3d 243, 838 N.E. 2d 640 (2005).

On remand back from this Court, the Sixth Circuit reversed the district court, holding that plaintiffs did have a constitutionally protected interest in groundwater. *Hensley, et al. v. City of Columbus, et al.*, 433 F. 3d 494 (6th Cir. 2006).

D. Remand to District Court

On remand, the issue was briefed and the District Court held that petitioners’ claims were barred by the statute of limitations in a decision on October 1, 2007.

E. Second Appeal to Court of Appeals

Petitioners appealed the decision of the district court to the Sixth Circuit. There the Sixth Circuit affirmed the district court. *Hensley, et al. v. City of Columbus, et al.* 557 F. 3d 693 (6th Cir 2009).

F. Return to State Court.

Having exhausted their plain and adequate remedies, pursuant to R.C. §2731.05, *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St. 3d 447, 449; *State ex rel. Denton v. Bedinghaus* (2003), 98 Ohio St. 3d 298, 304-305, Petitioners filed their petition seeking a writ of mandamus on May 10, 2007 seeking compensation for the taking of their protected interest in ground water. The complaint seeks a writ of mandamus requiring Columbus to institute appropriation proceedings pursuant to Chapter 163 of the Ohio Revised Code to compensate them for the taking of their property.

The trial court adopted the magistrate’s findings, on a motion for summary judgment, that Petitioners’ claims were barred by the statute of limitations and by *res judicata*. Petitioners filed a timely appeal. The Court of Appeals affirmed the trial court

that *res judicata* barred Petitioners' claims and declined to reach the statute of limitations issue. The decision and judgment entry were filed on June 30, 2011.

STATEMENT OF THE FACTS

The relevant facts herein can be found in *McNamara v. Rittman*, 107 Ohio State 3d 242, 244. *McNamara v. Rittman* and the case at bar were consolidated in the Sixth Circuit for purposes of appeal.

Hensley evolved in much the same way. In *Hensley*, the City of Columbus and others, in order to extend sewer lines, dug a trench up to 60 feet deep near petitioners' property. To keep water out of the trench during construction, groundwater was pumped out from under the petitioners' property. That "dewatering" caused petitioners' wells to go dry.

Id., at 244

ARGUMENT

Proposition of Law No. 1: A claim for a taking of property, under Section 19, Article I of the Ohio Constitution, arises, for purposes of *res judicata*, from the denial of just compensation brought according to "the plain and adequate remedy in the ordinary course of the law". R.C. 2731.05 followed.

Res judicata has been defined as:

(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action.

Bd. of Commrs. v. City of Akron (2006), 109 Ohio St. 3d 106, 122

The Court of Appeals below held that *res judicata* barred Appellants' writ of mandamus and specifically that the 3rd and 4th elements were met.

Presently the procedure for bringing a takings claim under Section 19, Article I of the Ohio Constitution or the 5th and 14th Amendments to the United States Constitution is

to first prosecute any plain and adequate remedy in the ordinary course of the law, as required by R.C. 2731.05. This might consist of an administrative appeal, *State ex rel. Shelly Materials v. Clark Bd. of Commrs.* (2007), 115 Ohio St. 3d 337, a declaratory judgment action, *State ex rel. Coles v. Granville* (2007), 116 Ohio St. 3d 231, an injunction, *State ex rel. Danford v. Karl* (1967), 9 Ohio St. 2d 79, a claim to recover money, *State ex rel. Levin v. Schremp* (1995), 73 Ohio St. 3d 733, or any other legal remedy. *State ex rel. Jennings v. Noble* (1990), 49 Ohio St. 3d 71, 73. If this remedy is unsuccessful then a petition seeking a writ of mandamus is filed in a separate lawsuit asking that the government be ordered to file an appropriation claim under Chapter 163 of the Ohio Revised Code. *Ibid.*

This Court has long held that Article 19, Section I of the Ohio Constitution and the 5th and 14th Amendments to the United States Constitution generally provide coterminous protection in all major respects.¹ *Coles*, supra 236, *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St. 3d 59, 63; *State ex rel. Gilbert v. Cincinnati* (2010), 125 Ohio St. 3d 385, 388; *State ex rel. Preschool Dev. Ltd. v. Springboro* (2003), 99 Ohio St. 3d 347, 349; As a consequence there was no distinguishing between these alternate sources of protecting property rights. A violation of one was also a violation of both.

Williamson, supra, provides “because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied” *Id.* at fn. 13. Since Article 19, Section I of the Ohio Constitution and the 5th and 14th Amendments to the United States Constitution provide coterminous coverage then applying *Williamson*, to Section 19, Article I, there can be no violation until just

¹ The only exception to this was *Norwood*, supra, which defined “public use” more narrowly than in *Kelo v. New London* (2005), 545 U.S. 469.

compensation has been denied. This view of Section 19, Article I is not only consistent with *Williamson*, supra, but also with R.C. 2731.05, which provides “that a writ of mandamus shall not issue if there is a plain and adequate remedy in the ordinary course of the law.” A plain and adequate remedy in the ordinary course of the law can provide just compensation and thereby avoid a constitutional violation. *Norwood*, supra, indicates that the denial of just compensation must be proven before Section 19, Article I is violated. *Id.* at 363.

This Court has never decided the comparable issue under the Ohio Constitution that was decided in *Williamson*, supra. That is, whether a violation under Section 19, Article I occurs when (1) there is a substantial interference with property or (2) there must also be a denial of just compensation **and** a substantial interference with property. This determination as to when a constitutional taking arises has relevance to the 4th element of *res judicata*, “both actions arise out of the same transaction or occurrence”. Under *Williamson*, the takings claim arises out of the denial of just compensation. The Court of Appeals noted this holding in *Williamson* but distinguished Section 19, Article I “Thus [under *Williamson*] a just compensation claim under the Fifth and Fourteenth Amendments does not arise until the property has been taken *and* [emphasis in original] just compensation for that taking is denied. However under Ohio law, the taking itself ‘occurs when the state substantially or unreasonably interferes with a property right’. *State ex rel. Thielen v. Proctor*, 180 Ohio App. 3d 154, 2008 Ohio 6960, ¶14, citing *State ex rel. OTR v. Columbus* (1996), 75 Ohio St. 3d 203, 206.” *State ex rel. Hensley*, supra at ¶ 27. The Court of Appeals created this difference as to when a violation arises between Section 19 Article I and the 5th and 14th Amendments. While the Court of Appeals is undoubtedly correct as to when the taking occurs, a taking is not a violation of the Article

19, Section I of the Ohio Constitution; it is only a taking without just compensation that triggers a constitutional violation. The issue is therefore squarely presented in this case. If Section 19, Article I of the Ohio Constitution is to be interpreted like its federal counterparts, the 5th and 14th Amendments, then this Court should follow *Williamson*, supra, and hold that no violation occurs until just compensation has been denied through any plain and adequate remedy in the ordinary course of the law.² The Court of Appeals held to the contrary of *Williamson* thereby arriving at the conclusion that the takings claim and the underlying tort claim both arose from the initial taking of the water and therefore the 4th element of *res judicata* was met.

If *Williamson* is followed then the initial claim arose from the dewatering while the takings claim arose from the denial of just compensation, which was the denial of the initial dewatering claim and the denial of the federal civil rights claim. *Zimmerman*, supra; *Denton*, supra. Therefore, the 4th element of *res judicata* is not met.

This holding threatens how taking claims are prosecuted in Ohio. If the constitutional violation of a taking occurs when the underlying facts happen, i.e. the building permit is denied, and not when just compensation is denied, then a mandamus action must be joined with any “plain and adequate remedy in the ordinary course of the law”, R.C. 2731.05 or the claimant faces *res judicata*, when bringing the mandamus claim at a later time after the plain and adequate remedy is found to be unsuccessful. That holding would mean that *res judicata* would have been a successful defense in the following cases: *Coles*, supra, *Shelly*, supra, *State ex rel. Nickoli v. Metroparks* (2010), 124 Ohio St. 3d 449, and *State ex rel. BSW Development Group v. City of Dayton* (1998),

² If there is no plain and adequate remedy in the ordinary course of the law to be pursued, then a constitutional violation has occurred and a writ of mandamus may be sought because just compensation has been denied.

83 Ohio St. 3d 338 because in those cases, as well as all others decided by this Court, the mandamus claim was not joined with the plain and adequate remedy in the ordinary course of the law but instead was filed in a subsequent lawsuit. In these 4 cases the procedure also sent the parties through federal court before returning to state court to file their mandamus action. In none of those 4 cases was *res judicata* raised as a successful defense.

Is Ohio now changing the procedure to be followed in a takings case? This Court should accept this case to resolve this issue.

Proposition of law No. 2: A state court is bound by a decision of the United States Supreme Court when interpreting a Federal Constitutional right. Article VI, clause 2 of the United States Constitution followed.

Petitioners-Appellants' mandamus claim was “ *** asserted that Appellee [City of Columbus] took their property—i.e., the groundwater beneath their land – without compensation, in violation of Section 19, Article I, of the Ohio Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.” *State ex rel. Dorothy Hensley v. City of Columbus*, supra at ¶ 7. Therefore petitioners' mandamus claim had a basis in both the Ohio and Federal Constitution. In deciding Petitioners' Federal Constitutional rights, Ohio courts are bound by the interpretation placed on those rights by the United States Supreme Court. Article VI, clause 2 of the United States Constitution, otherwise known as the Supremacy Clause, provides that state courts must follow the decisions of the United States Supreme Court when interpreting Federal Constitutional rights. *United States v. Board of Tax Appeals* (1945), 145 Ohio St. 257, 259; *State v. Storch* (1993), 66 Ohio St. 3d 280, 291.

In *Williamson*, supra, the Court held:

FN.13. *** As we have explained, however, because the Fifth Amendment proscribes takings without just compensation, **no constitutional violation occurs until just compensation has been denied.** The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a §1983 action. (emphasis added).

Therefore under *Williamson*, a takings claim based upon the 5th and 14th Amendments arises from the denial of just compensation. The Court of Appeals below acknowledged this “Thus, a just compensation claim under the Fifth and Fourteenth Amendments does not arise until the property has been taken *and* (emphasis in original) just compensation for that taking is denied.” *State ex rel. Hensley v. City of Columbus*, supra, at ¶ 27. The Court of Appeal then went on to illustrate the difference between a takings claim under the Ohio Constitution and under the Federal Constitution, “However, under Ohio law, the taking itself ‘occurs when the state substantially or unreasonably interferes with a property right’ (citations omitted). The *Williamson Cty.* Decision governs when a plaintiff may bring a federal claim for redress of a taking without compensation, not a state claim seeking to invoke the method of obtaining compensation under state law.”³ *Ibid.*

In ruling on plaintiffs’ 5th and 14th amendment takings claims, the Court of Appeals below was required to follow *Williamson* that the takings claim arises from the denial of just compensation. As to the 4th element of *res judicata*, “a second action arising out of the transaction or occurrence that was the subject matter of the previous action” it is absent as to plaintiffs’ 5th and 14th amendment claims. The first action, petitioners’ state law claims, arose out the initial dewatering whereas the federal takings

³ The Court of Appeals is answering the wrong question. The issue is not when the taking occurs but when does a constitutional violation occur and for that there must not only be taking but the taking must be without just compensation. So while the taking may occur when there is substantial interference with a property right, a constitutional violation arises only when the taking is coupled with the denial of just compensation.

claims arose only when petitioners were denied just compensation, under *Williamson*, which was when plaintiffs' state law claim and their federal civil rights claim were denied. The Court of Appeals ignored this distinction it created as to what events give rise to a takings claim depending on whether it is the Ohio Constitution or the U.S. Constitution.

The effect of the Court of Appeals dismissal of the mandamus claim based on *res judicata* was to hold that the takings claim arose out of the same transaction or occurrence as the first lawsuit, which was the initial dewatering. This directly contradicts the holding in *Williamson*. The Court of Appeals is not free to disregard the holding in *Williamson* as to when a claim arises under the 5th and 14th Amendment, thereby violating Article VI, Clause 2 of the United States Constitution.

Proposition of Law No. 3: A writ of mandamus bringing a takings claim under Section 19, Article I of the Ohio Constitution could not have been brought, for purposes of *res judicata*, in the prior "plain and adequate remedy in the ordinary course of the law". R.C. 2731.05 followed.

The Court of Appeals held that the 3rd element of *res judicata*, "the present action raises claims that were or could have been litigated in the prior action", was met herein "Because appellants could have included a mandamus claim as an alternative form of relief in the initial state law claim". *State ex rel. Hensley*, supra at ¶24. This is the first time that in a takings claim, the failure to join a claim for a writ of mandamus in the lawsuit seeking a plain and adequate remedy in the ordinary course of the law pursuant to R.C. 2731.05 has resulted in the writ of mandamus being barred by *res judicata*. Two courts of appeals have specifically held that *res judicata* does **not** bar filing a legal remedy after losing a mandamus claim initially. *Strategic Capital Investors v. McCarthy*

(1998), 126 Ohio App. 3d 237; *Liposchak v. Bureau of Worker's Compensation* (2000), 138 Ohio App. 3d 368.

The Court of Appeals relied on *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Services* (2009), 123 Ohio St. 3d 54 for its holding. There, a declaratory judgment action was filed and subsequently dismissed for failure to state a claim. Shortly thereafter a petition seeking a writ of mandamus was filed and “Except for pleading the claim in mandamus instead of as an action for declaratory judgment, the complaint is substantially the same...” *Id.* at 56. This Court went on to hold that the writ of mandamus was barred because it arose out of the same transaction as the prior declaratory judgment action and therefore could have been brought in the prior lawsuit.

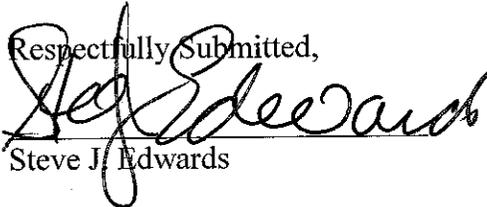
Applying *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Services*, *supra*, to the takings claim herein was error. In *State ex rel. Nickoli v. Erie Metro Parks*, 124 Ohio St. 3d 449 (2010) and *State ex rel. Coles v. Granville* (2007), 116 Ohio St. 3d 231, both presented a declaratory judgment actions in state court which were denied. Thereafter, in both cases, the aggrieved landowners filed in federal court for a takings only to be told by the Sixth Circuit that their claims were premature and they must return to state court to bring a state law claim for mandamus. The parties returned to the Ohio Courts to file their mandamus claims. In *Coles*, *supra*, this Court discussed *res judicata* and specifically held it did not bar the subsequent mandamus claim. *Coles*, *supra* at 238.

In *Arcadia Acres*, *supra*, a declaratory judgment was dismissed and the same identical facts were subsequently pleaded as a mandamus claim. The dismissal was clearly proper. However under a takings claim, only when just compensation is denied, as herein, does the constitutional violation arise and the mandamus claim is based on that denial of just compensation. *Res judicata* has never been permitted as a defense under

the facts herein. This case should be accept for review to make clear whether a citizen must join a writ of mandamus at the same time relief is sought for a plain and adequate remedy in the ordinary course of the law.

CONCLUSION

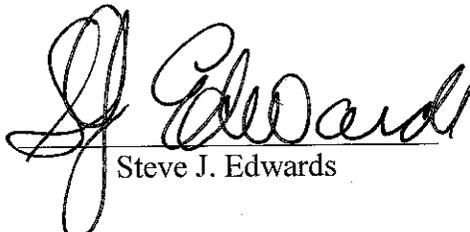
For the reasons stated herein this case involves matters of public and great general interest and a substantial constitutional question and this court should exercise it discretion and accept this appeal.

Respectfully Submitted,

Steve J. Edwards

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via regular U.S. Mail, postage paid on this 15th day of August 2011, upon:

Janet Arbogast
Columbus City Attorney's Office
90 West Broad Street, 2nd Floor
Columbus, Ohio 43215


Steve J. Edwards

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
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FRANKLIN CO. OHIO

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CLERK OF COURTS

State ex rel. Dorothy Hensley et al., :

Petitioners-Appellants, :

v. :

City of Columbus, :

Respondent-Appellee. :

No. 10AP-840

(C.P.C. No. 07CVH02-2208)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 30, 2011

Steve J. Edwards, for appellants.

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, *Janet Hill Arbogast* and *Jennifer S. Gams*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Petitioners-appellants, Dorothy Hensley ("Hensley") and other property owners (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas overruling appellants' objections and adopting a magistrate's decision granting summary judgment in favor of respondent-appellee, City of Columbus ("appellee"), on appellants' claim for a writ of mandamus. For the reasons that follow, we affirm.

{¶2} This court's decision in *Hensley v. New Albany Co.* (Dec. 31, 1997), 10th Dist. No. 97AP-189 ("*Hensley II*"), details the underlying dispute between the parties. We

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will briefly summarize the facts before turning to the procedural history leading to the present appeal. The dispute stems from appellee's construction of a storm sewer system to service the northeast Columbus and Plain Township—New Albany areas. Construction on the project lasted from approximately September 1990 through February 1992. Part of the construction involved the use of a well-point dewatering system to temporarily lower the water table and allow installation of the sewer lines. Appellants allege that the dewatering process and the construction of the sewer line diverted and controlled the flow of groundwater, thereby drying up appellants' water wells.

{¶3} On August 21, 1992, Hensley and other property owners filed suit in the Franklin County Court of Common Pleas asserting that they had been damaged by the dewatering conducted by appellee and various contractors and subcontractors on the sewer line project. The property owners sought damages under *Cline v. Am. Aggregates Corp.* (1984), 15 Ohio St.3d 384, and sought to have the case certified as a class action. The trial court denied class certification, and on appeal this court affirmed the denial of class certification. *Hensley v. New Albany Co.* (Aug. 25, 1994), 10th Dist. No. 93AP-1562 ("*Hensley I*").

{¶4} Following this court's decision in *Hensley I*, the property owners voluntarily dismissed their claims. On the same day, August 10, 1995, the plaintiffs from *Hensley I* filed a new complaint in the Franklin County Court of Common Pleas. The new complaint added additional plaintiffs and defendants, but the substance of the claims mirrored the 1992 complaint.¹ On January 31, 1997, the trial court granted summary judgment in favor

¹ For purposes of our analysis, we will refer to the 1992 and 1995 cases collectively as the "initial state claim."

of the defendants, holding that sovereign immunity shielded the defendants from liability. An appeal followed, and on December 31, 1997, this court affirmed the grant of summary judgment, although the decision on appeal was "grounded on slightly different reasoning" than the trial court's decision. *Hensley II*.

{¶5} On September 30, 1999, some of the property owners who had participated as plaintiffs in the initial state claim filed a complaint in federal court against appellee and some of the contractors and subcontractors on the sewer construction project (the "federal claim"). *Hensley v. Columbus* (C.A.6, 2006), 433 F.3d 494, 495 ("*Hensley III*"). The plaintiffs asserted a federal takings claim and procedural and substantive due process claims. *Id.* The federal trial court granted summary judgment for the defendants, based on its conclusion that Ohio law did not recognize a property interest in groundwater. *Id.* On appeal, the Sixth Circuit Court of Appeals certified a question of law to the Supreme Court of Ohio as to whether a homeowner has a property interest in the groundwater beneath the homeowner's property. *Id.* at 496. The Supreme Court responded by ruling that "Ohio recognizes that landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking." *McNamara v. Rittman*, 107 Ohio St.3d 243, 2005-Ohio-6443, ¶10. On January 10, 2006, the Sixth Circuit remanded the case to the trial court for proceedings consistent with the Supreme Court's decision. *Hensley III* at 496.

{¶6} After the remand, on October 1, 2007, the federal trial court granted the defendants' motion for summary judgment, holding that the statute of limitations barred the plaintiffs' claims. *Hensley v. Columbus* (Oct. 1, 2007), S.D. Ohio No. 2:99-CV-00888. On appeal, the Sixth Circuit affirmed the trial court's ruling, holding that the plaintiffs'

claims accrued in 1991 or 1992 and that, therefore, the two-year statute of limitations for those types of claims under Ohio law expired before the plaintiffs filed their federal lawsuit in 1999. *Hensley v. Columbus* (C.A.6, 2009), 557 F.3d 693, 697 ("*Hensley IV*"). The court also rejected the plaintiffs' claim that there was a continuing violation that would extend the limitations period. *Id.* at 697-98.

{¶7} On February 14, 2007, while the federal claim was pending on remand, appellants filed the present action in the Franklin County Court of Common Pleas. Appellants asserted that appellee took their property—i.e., the groundwater beneath their land—without compensation, in violation of Section 19, Article I, of the Ohio Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. Appellants sought an alternative writ of mandamus compelling appellee to institute appropriation proceedings under R.C. Chapter 163. Appellee moved for summary judgment, asserting that the statute of limitations and the doctrine of res judicata barred appellants' claims. The trial court referred the case to a magistrate for a hearing on appellee's motion for summary judgment. The magistrate granted appellee's motion for summary judgment, finding that appellants' claims were barred by the statute of limitations and by the doctrine of res judicata. Appellants filed objections to the magistrate's decision; the trial court overruled appellants' objections and adopted the magistrate's decision granting summary judgment for appellee.

{¶8} Appellants appeal from the trial court's order adopting the magistrate's decision granting summary judgment in favor of appellee, setting forth two assignments of error:

[1.] The trial court erred to the prejudice of Petitioners-Appellants in affirming the Magistrate's decision granting City of Columbus' Motion for Summary Judgment because Petitioners' claims are barred by the statute of limitations at R.C. 2305.09(E).

[2.] The trial court erred to the prejudice of Petitioners-Appellants in affirming the Magistrate's decision granting City of Columbus' Motion for Summary Judgment because Petitioners' claims are barred by *res judicata*.

{¶9} "Appellate review of summary-judgment motions is de novo." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶16, citing *Andersen v. Highland House Co.* (2001), 93 Ohio St.3d 547, 548. "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶9 (internal citations omitted). Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III* at ¶16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6. Therefore, we undertake an independent review to determine whether appellee was entitled to judgment as a matter of law.

{¶10} We begin by considering appellants' second assignment of error, which asserts that the trial court erred in adopting the magistrate's decision that appellee was entitled to summary judgment because *res judicata* barred appellants' claims.

{¶11} *Res judicata* encompasses both claim preclusion and issue preclusion. Claim preclusion, which is at issue here, "provides that a valid, final judgment rendered on

the merits after a fair and full opportunity to litigate all claims bars all subsequent actions between the same parties or their privities arising out of the transaction or occurrence that gave rise to the prior action." *Rabin v. Anthony Allega Cement Contractor, Inc.*, 10th Dist. No. 00AP-1200, 2001-Ohio-4057, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382-83, 1995-Ohio-331. Res judicata applies where four elements are present: "(1) there was a prior valid judgment on the merits; (2) the second action involved the same parties as the first action; (3) the present action raises claims that were or could have been litigated in the prior action; and (4) both actions arise out the same transaction or occurrence." *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, ¶5.

¶12} The magistrate's decision, adopted by the trial court, found that res judicata applied to appellants' claims, based on the summary judgment ruling issued in 1997 on the initial state claim. Appellants argue on appeal that their claims are not barred by res judicata because the third and fourth elements of the test for res judicata are not met. Appellants also claim that the doctrine of res judicata has never been applied to this type of takings claim, except by the Ninth District Court of Appeals in *State ex rel. McNamara v. Rittman*, 9th Dist. No. 08CA0011, 2009-Ohio-911, which appellants argue was wrongly decided.

¶13} Generally, it is clear that res judicata may apply to a mandamus claim. See, e.g., *State ex rel. Welsh v. Ohio State Medical Bd.* (1964), 176 Ohio St. 136, paragraph two of the syllabus; *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, ¶15; *State ex rel. Simpson v. Cooper*, 120 Ohio St.3d 297, 2008-Ohio-6110, ¶7. In *Welsh*, an individual sought a writ of mandamus ordering the state medical board to restore his license to practice medicine. *Id.* at 136. The Supreme Court of Ohio found

that the individual had previously sought reinstatement of his license and had taken a direct appeal from the medical board's denial of reinstatement. *Id.* at 137. The Supreme Court found that "the same issues between the same parties were raised and determined in that case as are presently being urged in this action in mandamus." *Id.* Accordingly, the mandamus claim was barred by *res judicata* arising from the earlier decision. *Id.* at 138. Similarly, in *Mora*, a convicted prisoner sought a mandamus order compelling various corrections officials to reduce his aggregate minimum term of imprisonment. *Id.* at ¶7. The Supreme Court noted that a year earlier the prisoner had filed a complaint for declaratory and injunctive relief seeking a correction of his minimum prison term, and that the trial court had granted summary judgment for the defendants in that case. *Id.* at ¶6. The Supreme Court held that the prisoner's mandamus action was barred by *res judicata* because it raised the same claim that had been at issue in his action for declaratory judgment and injunctive relief. *Id.* at ¶15. Finally, in *Simpson*, a convicted prisoner sought a writ of mandamus to compel a common pleas court to vacate his conviction. *Id.* at ¶1. The Supreme Court found that the prisoner had previously raised claims regarding the sufficiency of the evidence supporting his conviction on direct appeal and that the prior appeal functioned as *res judicata* for his later mandamus claim. *Id.* at ¶7. Thus, where the elements of *res judicata* are present, the doctrine may bar a claim for writ of mandamus.

{¶14} There is no dispute that the first two elements of the *res judicata* test are present here. The trial court granted summary judgment on the initial state claim. Summary judgment, other than for lack of jurisdiction or failure to join a party under Civ.R. 19 or 19.1, "constitutes a judgment on the merits." *Stuller v. Price*, 10th Dist. No. 03AP-

30, 2003-Ohio-6826, ¶19, quoting *Bishop v. Miller* (Mar. 26, 1998), 3d Dist. No. 4-97-30. Likewise, each of the parties to the mandamus claim was a party to the initial state claim. Appellants only challenge whether the third and fourth elements of the res judicata test are satisfied.

{¶15} Appellants argue that their mandamus claim is not barred by res judicata because it was not and could not have been litigated in the same action as the initial state claim. Appellants did not seek a writ of mandamus in the initial state claim, when originally filed in 1992 or when re-filed in 1995; therefore, we must determine whether appellants *could have* sought a writ of mandamus as part of that earlier case.

{¶16} Ohio law provides that mandamus is an extraordinary writ that "must not be issued when there is a plain and adequate remedy in the ordinary course of the law." R.C. 2731.05. Before issuing a writ of mandamus, " 'a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law.' " *State ex rel. Eliza Jennings, Inc. v. Noble* (1990), 49 Ohio St.3d 71, 72, quoting *Freshour v. Radcliff* (1988), 35 Ohio St.3d 181, 182 (internal citations omitted).

{¶17} We acknowledge that, prior to 2006, the federal courts characterized Ohio law regarding the method of obtaining compensation for a taking of private property by a public authority as unclear or uncertain. See *Kruse v. Village of Chagrin Falls* (C.A.6, 1996), 74 F.3d 694, 700 (characterizing Ohio case law on the issue of the method of obtaining compensation for taking of private property by public authorities as "anything but certain"); *Coles v. Granville* (C.A.6, 2006), 448 F.3d 853, 865 (finding that "Ohio has 'reasonable, certain, and adequate procedures' for plaintiffs to pursue compensation for

an involuntary taking"); *River City Capital, L.P., v. Bd. of Commrs.* (C.A.6, 2007), 491 F.3d 301-07. In *Kruse*, the court found significant the differentiation between a physical and a regulatory taking, among other factors; whereas, in *Coles* and *River City*, the court held that Ohio law does not differentiate between physical and regulatory takings for the purpose of mandamus.² Nevertheless, our review of the case law demonstrates that the Supreme Court of Ohio clearly declared in 1994 that mandamus was the appropriate means to compel statutory appropriations proceedings to compensate for a taking of private property by a public entity similar to the taking in the instant case. Moreover, even prior to 1994, there was substantial case law indicating that mandamus was the proper remedy for a taking, whether physical or regulatory.

{¶18} In 1994, the Supreme Court of Ohio declared that "mandamus is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged." *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 108, 1994-Ohio-385. The plaintiffs in *Levin* sought to compel appropriations proceedings to compensate for flooding on their property, resulting from obstruction of a drainage ditch. The Supreme Court reviewed its prior decisions and held that "mandamus lies to determine if property has been appropriated and to compel initiation of statutory proceedings." *Id.* at 107. In the years following *Levin*, this court issued decisions consistent with the Supreme Court's ruling. See, e.g., *Consolidated Rail Corp. v.*

² We note as well that the federal courts, in determining whether Ohio had a "reasonable, certain, and adequate" procedure for plaintiffs to pursue compensation for a taking, were considering the larger question of whether a federal claim of a taking was ripe for review. Here, we consider a different question—the third prong of our *res judicata* analysis—whether appellants could have brought a mandamus action with their initial state claim.

Gahanna (May 16, 1996), 10th Dist. No. 95AP-1578; *State ex rel. Livingston Court Apartments v. Columbus* (Dec. 17, 1998), 10th Dist. No. 98AP-158.

{¶19} Moreover, even before *Levin*, there was substantial case law indicating that a mandamus claim to compel statutory appropriations proceedings was the proper remedy for a taking of private property by a public entity. In 1961, in *Wilson v. Cincinnati* (1961), 172 Ohio St. 303, the Supreme Court of Ohio held that "[w]here a taking is made by the state, the property owner's redress must be obtained by bringing an action in mandamus to compel the director [of the relevant state agency] to appropriate the property so taken." *Id.* at 308. In that case, the Supreme Court also noted that the plaintiff "could have, by mandamus, compelled [an appropriation] proceeding" by the city and state authorities involved in the case. *Id.* at 306. This court issued similar decisions in takings cases after *Wilson*. See, e.g., *J.P. Sand & Gravel Co. v. State* (1976), 51 Ohio App.2d 83, 89 ("Where a property owner claims that his property in fact has been taken by the state and that he has been damaged and appropriation proceedings have not been instituted, the property owner may proceed to seek a writ of mandamus to compel the initiation by the state of such appropriation proceedings."); *Kermetz v. Cook-Johnson Realty Corp.* (1977), 54 Ohio App.2d 220, 228 ("[W]e hold that the property owner, who alleges that the state has taken his property, may, in the alternative, still bring an original action in mandamus in the courts having this original action jurisdiction."). The Supreme Court had also ruled, prior to *Levin*, that mandamus would lie against a city government to compel appropriations proceedings for the taking of private property. See *State ex rel. Royal v. Columbus* (1965), 3 Ohio St.2d 154; *State ex rel. Partlow v. Columbus* (1970), 22 Ohio St.2d 1.

{¶20} Appellants became aware of problems with their wells in the spring, summer, and autumn of 1991. Appellants knew that a government entity was involved in the construction project allegedly causing the loss of groundwater and asserted a takings claim against that government entity as part of the federal claim in 1999. Thus, when appellants re-filed the initial state claim in 1995 they were aware that the case implicated a takings issue. Only a year earlier, the Supreme Court had declared in *Levin* that a writ of mandamus to compel appropriations proceedings was the proper remedy for a taking of private property by a government entity. Although *Levin* involved the flooding of the landowners' property and appellants' claim involved the removal of water, the cases are similar. In both instances, private landowners sought recovery for a government entity's interference with the use and enjoyment of their property. The decision in *Levin* was directly relevant to appellants' case. At the time the initial state claim was re-filed in 1995, the *Levin* precedent clearly established that a mandamus claim to compel appropriations proceedings was the proper vehicle for the relief appellants sought. The initial state claim was not decided on summary judgment until January 1997, leaving ample opportunity for appellants to amend their claim to seek alternative relief through a mandamus claim before the case was terminated. Further, as demonstrated by the decisions cited above that were issued prior to *Levin*, when appellants originally filed the initial state claim in 1992, existing precedent strongly suggested that a mandamus claim was the proper remedy to obtain compensation for the taking of their property. Despite this, appellants did not assert a mandamus claim as part of the initial state claim when it was originally filed or when it was re-filed.

{¶21} Appellants argue, however, that the mandamus claim could not have been brought in the initial state claim, either when it was originally filed in 1992 or re-filed in 1995, because they had to unsuccessfully litigate both the initial state claim and the federal claim to establish that they had no adequate remedy at law. Appellants assert that "[b]oth the state law tort claim and the federal civil rights claim were adequate remedies that would have prevented the writ of mandamus from issuing if it had been brought in the initial lawsuit." (Appellant's brief at 23.) Appellants cite *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 1996-Ohio-211, and *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, in support of this assertion.

{¶22} By contrast, appellee argues that if appellants' contention is correct, then mandamus would not be proper here. Appellee notes that the *Zimmerman* decision also declared that "[w]here a plain and adequate remedy at law has been unsuccessfully invoked, a writ of mandamus will not lie to relitigate the same issue." *Zimmerman* at 449, citing *State ex rel. Nichols v. Cuyahoga Cty. Bd. of Mental Retardation & Dev. Disabilities*, 72 Ohio St.3d 205, 209, 1995-Ohio-215. Thus, appellee argues, if recovery under the initial state claim would have constituted an adequate remedy at law, appellants may not relitigate the matter via a mandamus claim.

{¶23} However, our analysis does not turn on application of the aforementioned issue. Rather, we find the present case analogous to *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176. In *Arcadia Acres*, two nursing homes initially filed a complaint for declaratory relief seeking an adjustment in certain reimbursement rates from the Ohio Department of Job and Family Services. *Id.* at ¶4. The trial court dismissed the declaratory judgment action based on lack of subject-

matter jurisdiction because mandamus was the "sole vehicle" for the relief sought. This court affirmed the dismissal based on its conclusion that the complaint failed to state a viable claim for relief. *Id.* at ¶¶4-5. The nursing homes then filed an original action in this court seeking a writ of mandamus compelling the same reimbursement adjustments sought in the prior declaratory judgment claim. This court dismissed the mandamus claim, holding that it was barred by the doctrine of res judicata. *Id.* at ¶9. The Supreme Court of Ohio affirmed, holding that res judicata barred a subsequent action based on any claim arising out of the same transaction or occurrence as the prior declaratory judgment claim. *Id.* at ¶15. The Supreme Court noted that the nursing homes "had a full and fair opportunity to plead mandamus when they brought the declaratory judgment case." *Id.* at ¶17. At the time the nursing homes filed for declaratory judgment, multiple prior court decisions indicated that mandamus was the proper vehicle for the relief sought. *Id.* Moreover, the Supreme Court declared that "nothing prevented the nursing homes from adopting the cautious approach of pleading two alternative causes of action." *Id.*

{¶24} In *Arcadia Acres*, the nursing homes initially sought a declaratory judgment, which may constitute a "plain and adequate remedy at law." See *State ex rel. Viox Builders, Inc. v. Lancaster* (1989), 46 Ohio St.3d 144, 145. Likewise, here appellants sought legal remedies under the initial state claim and the federal claim. In both *Arcadia Acres* and this case, judicial precedent indicated that a mandamus claim was the proper vehicle for the relief sought. Yet in *Arcadia Acres*, the Supreme Court of Ohio noted that the nursing homes could have pursued alternative claims for declaratory judgment and mandamus as part of their initial lawsuit, and the failure to do so meant that a subsequent claim for mandamus was barred by res judicata. Similarly, in the present case, "nothing

prevented [the appellants] from adopting the cautious approach of pleading two alternative causes of action." *Arcadia Acres* at ¶17. Because appellants could have included a mandamus claim as an alternative form of relief in the initial state claim, the third element of res judicata has been satisfied in this case.

¶25 Appellants also argue that the fourth element of the test for res judicata has not been met because their mandamus claim does not arise out of the same transaction or occurrence as the initial state claim. For the doctrine of res judicata to bar a claim, it must "arise out of the same transaction or occurrence" that gave rise to the prior action. *Reasoner* at ¶5. Appellants argue that the taking of their groundwater in 1990 and 1991 gave rise to the initial state claim for tort damages, but that a mandamus claim did not arise until they were denied compensation for that taking following the failure of the initial state claim and the federal claim. (Appellants' brief at 23-24.) Appellants cite *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 105 S.Ct. 3108, and assert that "[u]ntil one is denied compensation through state procedures, such as a state law tort claim, there has been no taking of property without just compensation because just compensation can be provided through a state law tort claim." (Appellants' brief at 24.)

¶26 Appellants' argument misconstrues the holding in *Williamson Cty.* That decision, which was accepted by the Supreme Court of Ohio in *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 15, dictates that if a state provides a "reasonable, certain, and adequate provision for obtaining compensation" for a taking of private property, a property owner may not assert a claim under the Fifth and Fourteenth Amendments until he has "used the [state's] procedure and been denied just compensation." *Williamson Cty.*, 473

U.S. at 194-95, 105 S.Ct. at 3120-21. This is because "no constitutional violation occurs until just compensation has been denied." *Id.*, 473 U.S. at 194, 105 S.Ct. at 3120, fn.13. Under *Williamson Cty.*, a claimant who asserts that a government entity in Ohio has taken his property must fully exhaust his state remedies by filing a mandamus claim to compel appropriation proceedings before bringing a claim for Fifth and Fourteenth Amendment violations. See, e.g., *River City Capital* at 306-07.

{¶27} The *Williamson Cty.* court acknowledged that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.*, 473 U.S. at 194, 105 S.Ct. at 3120. Thus, a just compensation claim under the Fifth and Fourteenth Amendments does not arise until the property has been taken *and* just compensation for that taking is denied. However, under Ohio law, the taking itself "occurs when the state substantially or unreasonably interferes with a property right." *State ex rel. Thielen v. Proctor*, 180 Ohio App.3d 154, 2008-Ohio-6960, ¶14, citing *State ex rel. OTR v. Columbus* (1996), 756 Ohio St.3d 203, 206. The *Williamson Cty.* decision governs when a plaintiff may bring a federal claim for redress of a taking without compensation, not a state claim seeking to invoke the method of obtaining compensation under state law.

{¶28} The mandamus claim at issue seeks to compel appropriation proceedings to compensate for a government taking of private property. Because such a claim is the vehicle for obtaining compensation for a taking, *Levin* at 108, the government taking of the property necessarily triggers the claim. However, if taken literally, appellants' interpretation of *Williamson Cty.* would provide that a property owner could never file a claim for a writ of mandamus to compel appropriation proceedings to compensate for a

taking. Appellants claim that such a cause of action does not arise until after property has been taken and compensation has been denied. In effect, appellants argue that a property owner cannot sue in mandamus to compel appropriations to compensate for a taking until he has been denied compensation for the taking—which must be sought via a suit in mandamus to compel appropriation proceedings. We cannot endorse this result.

{¶29} The alleged taking in this case occurred when the government entity "interfere[d] with a property right," *Thieken* at ¶14—i.e., when appellants' wells were dewatered during the original sewer construction project in 1990 and 1991. The Supreme Court recognized this in *McNamara*, when it held that "governmental interference with [a landowner's property interest in the groundwater underlying his land] can constitute an unconstitutional taking." *McNamara* at ¶34. Appellants admit that the dewatering process formed the basis for their initial state claim. (Appellant's brief at 23.) Because both the initial state claim and the mandamus claim arose from this same event, the fourth element of the res judicata test has been satisfied.

{¶30} Finally, appellants cite to four purportedly similar cases and argue that "[r]es judicata has never been a defense when a second lawsuit is filed and presents a request for a writ of mandamus after a first lawsuit attempting to exhaust the plain and adequate remedies requirement in R.C. 2731.05." (Appellants' brief at 25.) However, each of those cases is factually or procedurally distinguishable from the present matter and, therefore, those cases do not preclude the application of res judicata to bar appellants' claims.

{¶31} Appellants assert that *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 1998-Ohio-287, and *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, have "identical" procedural histories and

that res judicata was not applied to bar a mandamus claim following prior state and federal lawsuits in those cases. (Appellant's brief at 27-28.) However, appellants' analysis neglects one key distinction between those cases and the present matter. In both *BSW* and *Shelly Materials*, the property owners initially sought permits to allow certain uses of their property—in *BSW*, a permit to demolish an existing building, and in *Shelly Materials*, a conditional-use permit for sand and gravel mining. *BSW* at 339; *Shelly Materials* at ¶4. In each case, the initial court action resulted from an appeal of the denial of the permit application. *BSW* at 339; *Shelly Materials* at ¶10. Under R.C. 2731.02, only the Supreme Court, courts of appeals, or common pleas courts may issue writs of mandamus. The property owners in those two cases could not have brought a mandamus action as an alternative claim to their permit applications because the administrative agencies considering the permit applications lacked authority to issue an extraordinary writ. They could not have sought mandamus in the appeal of denial of the permit because that would have exceeded the scope of the court's review. By contrast, in this case, the initial action was a lawsuit filed in the common pleas court. As explained above, in this case appellants could have sought a writ of mandamus as an alternative theory of recovery as part of the initial state claim. Given this distinction, the fact that res judicata was not applied in *BSW* or *Shelly Materials* does not preclude its application in the present case.

~~¶32~~ Appellant further cites two additional cases, *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, and *State ex rel. Nickoli v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, as examples of property owners undertaking multiple lawsuits in connection with a taking of their property and not being met by the defense of

res judicata. Both those cases arose from the creation of a recreational trail by the Board of Commissioners of Erie MetroParks ("MetroParks") and the claims of certain property owners that MetroParks had taken their property to create the trail. Because these cases share a common history, we will analyze them together.

{¶33} In 1997, Edwin and Lisa Coles filed an action for declaratory judgment seeking to establish that they held title to certain property, including a portion of the land where the recreational trail was to be built (the "Coles declaratory judgment action"). Because the relevant portion of the land had been specifically excepted in the Coles' deed, the trial court dismissed this case based on a finding that the property owners were not real parties in interest. *Coles* at ¶5. In 1999, MetroParks filed a declaratory judgment action seeking to establish its rights to certain property under a historical lease (the "Key Trust declaratory judgment action"). That case resulted in a trial court judgment, appeal, remand, and a second appeal; ultimately the courts determined that the lease was in effect and that it covered certain specified property. *Id.* at ¶7-13.

{¶34} The Coles and other property owners then filed a federal lawsuit asserting that their land had been taken without compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at ¶17. The federal court dismissed the property owners' claims as not ripe for review because they had not sought compensation for the taking through an action in mandamus to compel appropriation proceedings, and the Sixth Circuit Court of Appeals affirmed the dismissal. *Id.*

{¶35} Following the Sixth Circuit's decision, the Coles and other property owners filed a state court action for a writ of mandamus to compel MetroParks to commence appropriation proceedings to compensate them for the taking or, in the alternative, to

relinquish the seized property and not pursue acquisition of the property through eminent domain proceedings. *Id.* at ¶18. In the mandamus case, both sides claimed that the Key Trust declaratory judgment action functioned as *res judicata* for any claims that could have been, but were not, litigated in that action. *Id.* at ¶36. However, the Supreme Court of Ohio noted that " 'a declaratory judgment determines only what it actually decides and does not preclude other claims that might have been advanced.' " *Id.* at ¶37, quoting *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 69, 2002-Ohio-1627. The court further stated that " '[f]or a previous declaratory judgment, *res judicata* precludes only claims that were *actually decided*.' " (Emphasis sic.) *Id.*, quoting *State ex rel. Trafalgar Corp. v. Miami Cty. Bd. of Commrs.*, 104 Ohio St.3d 350, 2004-Ohio-6406, ¶22. Therefore, the Key Trust declaratory judgment action only functioned as *res judicata* with respect to the claims that had actually been raised in that case. *Id.* at ¶48.

{¶36} In *Nickoli*, a separate group of property owners filed a claim for a writ of mandamus to compel MetroParks to initiate appropriations proceedings to compensate them for taking their land. *Nickoli* at ¶16. The Supreme Court of Ohio held that the Key Trust declaratory judgment action did not function as *res judicata* for certain defenses that the MetroParks sought to assert because those issues had not actually been settled in that prior action. *Id.* at ¶27. The Supreme Court also held that the decision in the *Coles* mandamus case did not function as *res judicata* because the relators in *Nickoli* were not in privity with the relators in *Coles*. *Id.* at ¶23-26.

{¶37} Unlike *Coles* and *Nickoli*, the present action does not involve a declaratory judgment action followed by a mandamus claim. As explained above, in this case, appellants filed a substantive state law claim, then a federal law claim, and then the

present mandamus claim. Although this case is similar to *Coles* and *Nickoli* because all three involve procedural histories with multiple lawsuits, the similarities end there. The res judicata effect of a prior declaratory judgment action is different from other types of claims because it only precludes the claims that were actually decided. *Coles* at ¶37; *Nickoli* at ¶27. The analysis of the res judicata doctrine in *Coles* and *Nickoli* does not control our analysis in the present case because there was no declaratory judgment action here. Thus, although the four cases appellants cite have some similarities to the present action, the fact that res judicata did not bar subsequent mandamus claims in those cases does not bar the application of the doctrine to this case.

¶38} As explained above, the third element of the res judicata test has been satisfied because appellants could have brought an alternative claim for mandamus relief as part of the initial state claim. The fourth element of the res judicata test is present because the mandamus claim arises from the alleged dewatering of appellants' wells, which was the same event underlying the initial state claim. The trial court properly concluded that appellants' mandamus claim is barred by the res judicata effect of the summary judgment ruling on the initial state claim. Appellee is therefore entitled to judgment as a matter of law. Accordingly, the second assignment of error is without merit and is overruled.

¶39} Appellants' first assignment of error asserts that the trial court erred in finding that the mandamus claim was barred by the statute of limitations. Given our ruling that the trial court did not err in finding that res judicata bars appellants' mandamus claim, the statute of limitations issue is moot.

{¶40} For the foregoing reasons, we overrule appellants' second assignment of error and render appellants' first assignment of error moot. The judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 JUN 30 PM 3: 22
CLERK OF COURTS

State ex rel. Dorothy Hensley et al., :
 :
 Petitioners-Appellants, :
 :
 v. : No. 10AP-840
 : (C.P.C. No. 07CVH02-2208)
 :
 City of Columbus, : (REGULAR CALENDAR)
 :
 Respondent-Appellee. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 30, 2011, appellants' second assignment of error is overruled, and appellants' first assignment of error is moot. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

RECEIVED
JUL 05 2011
CLERK OF COURTS

DORRIAN, J., BRYANT, P.J., & SADLER, J.

By


Judge Julia L. Dorrian