ORIGINAL

IN THE SUPREME COURT OF OHIO

City of Fremont, et al.

Appellant,

v.

State of Ohio, ex rel.

Stanley J. Wasserman, et al., Appellees.

Case No. 11-0683

On Appeal from the

Sandusky County Court of Appeals

Sixth Appellate District

MERIT BRIEF OF APPELLANT CITY OF FREMONT

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STATEMENT OF FACTS

In 1915 Roberta McKenney, the Appellants' predecessor in title, and George H. Guth, the Appellees' predecessor in title, entered into a written agreement to allow Guth to construct and maintain a 12" drainage tile across McKenney's property. (March 14, 2011 Decision and Judgment, Appendix A. Page 1).

Appellees claim that Appellants damaged the drainage tiles in the course of the construction of a reservoir on city-owned land. (March 14, 2011 Decision and Judgment, Page 2, ¶1).

On June 25, 2010, Appellees filed a petition for a writ of mandamus in the Sixth Appellate District to compel the City of Fremont to commence a proceeding in eminent domain. Relators alleged that the city's action in replacing and relocating a drainage tile was a public taking and that they had no adequate remedy at law.

On March 14, 2011 the court granted the writ, finding only that:

1. The Appellees had alleged a public taking and that an action for mandamus is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred, and

2. That the parties' agreement created an easement. Therefore even though the agreement was contractual in nature, it does not in any way prevent Appellees from pursuing a remedy by way of a mandamus action.

On April 26, 2011, Appellants filed a timely notice of appeal to this Court.

ARGUMENT

A WRIT OF MANDAMUS TO COMPEL A PUBLIC AUTHORITY TO COMMENCE A PROCEEDING IN EMINENT DOMAIN SHALL ISSUE ONLY IF THE COURT FINDS THAT A PUBLIC TAKING HAS OCCURRED AND THAT THE PROPERTY OWNER HAS NO ADEQUATE REMEDY AT LAW

PROPOSITION OF LAW #1:

A mere allegation of a public taking does not support a writ of mandamus.

The Court of Appeals never made a finding whether a public taking occurred. Instead the Court found "that relators are entitled to a writ of mandamus to determine whether or not a taking actually occurred in this case..." (Decision and Judgment ¶9). The Court simply deferred the determination to the common pleas court.

The Court recognized *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶12, citing *State ex rel. Coles v. Granville*, 116 Ohio St.3d 331, 2007-Ohio 6057, ¶21, citing *State ex rel. Shemo v. Mayfield* Hts., 95 Ohio St.3d 59, 2002-Ohio-1627, and approvingly quoted from it stating that an action for mandamus is the proper avenue for a

private individual to compel a public authority to commence eminent domain proceedings when a public taking has occurred. However, it appears that the Court interpreted this rule of law to eliminate the need to prove a public taking in order to be entitled to a writ of mandamus.

The rule set forth in Beasley, supra, although specific to eminent domain cases, does not trump or even modify the general rule of law applicable to all mandamus actions. That is, to establish a right to a writ of mandamus, the party seeking the writ must demonstrate: (1) that there is a clear legal right to the relief sought, (2) that the public authority is under a clear legal duty to perform the requested act, and (3) that there is no plain and adequate remedy in the ordinary course of law. See, *Beasley,* supra, ¶9, citing *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912.

In the context of writ of mandamus to compel an eminent domain proceeding, the first two elements of the general rule would, at least, require proof that a public taking occurred.

Since the Court never considered whether the Appellants' action constituted a taking, it never considered whether any alleged interference with Appellees' property right was substantial or unreasonable, *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203, 1996-Ohio-411, or whether the fact that the Appellant was, in essence, a party to a private agreement that any breach of the agreement would be considered "public". The availability of a writ of mandamus to compel the appropriation of property is, after all, to balance the public authority's power to appropriate private owner's property for public use.

PROPOSITION OF LAW #2:

A finding that the agreement between the parties creates an easement does not establish that Appellees do not have an adequate remedy at law.

The Court of Appeals found that the original agreement between George H. Guth and Roberta McKenney, although contractual in nature, created an easement over the Appellants' property. The Court concluded that "the contractual nature of the agreement does not in any

way prevent relators from pursuing a remedy by way of a mandamus action." (Decision and Judgment ¶7). Contrary to the specific rule of law expressed in *Beasley,* supra, the Court never considered whether the general laws of breach of contract provided a plain and adequate remedy in the ordinary course of law.

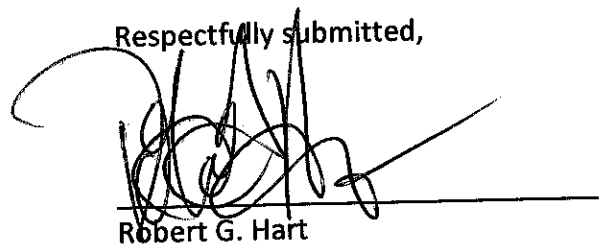
To be entitled to a writ where the parties have a prior contractual relationship regarding the alleged property interest, a taking must be more than a breach of contract, and the Court must exercise sound, legal and judicial discretion based upon all the facts and circumstances in the individual case and the justice to be done. *State ex rel. Pressley v. Industrial Commission (1967),* 11 Ohio St.2d 141, 228 N.E.2d 631, Syllabus No 7.

CONCLUSION

The decision below must be reversed. Appellants respectfully request this Court to find that the court below has not made a finding that a public taking has occurred. Without such a finding, a writ of mandamus cannot issue.

In addition, the court below has subtly attempted to expand the extraordinary remedy of a writ of mandamus to compel a proceeding in eminent domain to any situation in which the relator can show that it has a property interest that has met some interference or encroachment by a public authority, regardless of the extent of the interference or encroachment and regardless of the parties' prior contractual relationship and the remedies available at law.

Respectfully submitted,



Robert G. Hart
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this merit brief was sent by ordinary U.S. Mail to Corey J. Speweik, Esq. and J. Douglas Ruck, Esq., Davies, Ruck & Speweik, Ltd., Counsel for Appellee, 47 W. College Ave., Pemberville, OH 43450 on August 24, 2011.

Robert G. Hart
Counsel for Appellant

IN THE COURT SUPREME COURT OF OHIO 11-0683

City of Fremont

Appellant,

v.

State of Ohio, ex rel.
Stanley J. Wasserman and
State of Ohio, ex rel.
Kathryn A. Wasserman

Appellees,

On Appeal from the
Sandusky County Court
of Appeals
Sixth Appellate District

Court of Appeals No. S-10-031

NOTICE OF APPEAL OF APPELLANT CITY OF FREMONT

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APR 26 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
APR 28 2011
CITY OF FREMONT, OHIO

Notice of Appeal of Appellant City of Fremont

Appellant City of Fremont hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Sandusky County Court of Appeals, Sixth Appellate District, entered in Court of Appeals case No. S-10-031 decided on March 14, 2011.

This is an appeal as of right from a case that originated in the court of appeals.

Respectfully submitted,

Robert G. Hart
Counsel for Appellant

Proof of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to Counsel for Appellees, Corey J. Speweik and J. Davies Rick, 47 W. College Avenue, Pemberville, OH 43450 on April 22, 2011.

Robert G. Hart
Counsel for Appellant

COPY

SANDUSKY COUNTY
COURT OF APPEALS
FILED
MAR 14 2011

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio, ex rel. Stanley J. Wasserman — Court of Appeals No. S-10-031

and

State of Ohio, ex rel. Kathryn A. Wasserman

Relators

v.

City of Fremont

and

Terry Overmyer

Respondents

DECISION AND JUDGMENT

Decided: MAR 14 2011

* * * * *

Corey J. Speweik and J. Douglas Ruck, for relators.

Robert G. Hart, Director of Law, for respondents.

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State of Ohio, Sandusky County, SS:
I hereby certify that this is a true copy of the original document now on file in my office this 14 day of March 20 11.
TRACY M. OVERMYER
Sandusky County Clerk of Courts
By: Deputy Clerk

1.

OSOWIK, P.J.

{¶ 1} On June 25, 2010, relators, Stanley and Kathryn Wasserman, filed a petition for a writ of mandamus against respondents, the city of Fremont, Ohio, and Fremont's Mayor, Terry Overmyer.[1] In the petition, relators asked this court to order respondents to commence an eminent domain action to compensate relators for the partial taking of an easement that provided drainage of excess water from relators' property, across property owned by the city of Fremont, and into nearby Minnow Creek. In support, relators alleged in the petition that drainage tiles running from their property across respondents' property were damaged when respondents began creating a reservoir on the city-owned land.

{¶ 2} On July 20, 2010, this court issued an alternative writ, in which we ordered respondents to either commence eminent domain proceedings or show cause as to why they have not done so. On August 6, 2010, respondents filed a motion to dismiss, a motion to strike and for attorney fees, and a motion to add additional "indispensable" parties.[2] On January 18, 2011, this court issued a decision in which we found that: (1) respondents' motion to dismiss was not well-taken because relators have no adequate remedy at law other than a mandamus action, and respondents' actions, if found to be an

[1]The facts in this mandamus action are more fully set forth in our decision issued on January 18, 2011, which is attached hereto as Appendix A.

[2]Respondents sought to add adjacent landowners, Sharon and Thomas Kipps, as parties in this mandamus action. In support, respondents argued that the Kipps are "indispensable parties" pursuant to Civ.R. 19(A), because a possibility exists that the Kipps may bring a similar action for damages against respondents.

unlawful taking of relators' easement, are the proper subject of a mandamus action; (2) respondents did not put forth sufficient evidence of misconduct by relators and their attorneys to support a motion to strike or an award of attorney fees; and (3) respondents' motion to add a party was not well-taken because respondents did not show that the Kipps' absence would prevent either party in this action from obtaining complete relief, and the mere possibility that respondents may be exposed to multiple litigation is insufficient to render the Kipps, or any other party, "indispensable" pursuant to Civ. R. 19(A).

{¶ 3} Based on the foregoing findings, respondents' motions to strike, dismiss and to add a party were denied on January 18, 2011. Pursuant to 6th Dist.Loc.App.R. 6, both parties were ordered to submit their cases to this court in written form within 20 days of our decision. On February 7, 2011, relators and respondents complied by timely submitting merit briefs to this court.

{¶ 4} In their merit brief, relators reassert their earlier arguments in favor of a remedy by way of a mandamus action. Specifically, relators state that respondents' encroachment on their drainage easement constitutes a taking of their property without just compensation; the amount of reduced earning capacity of their farmland due to such encroachment is an issue to be determined by a jury; and respondents' argument that the drainage issue has been resolved is not relevant to the issue of whether or not a compensable taking ever occurred.

{¶ 5} In addition to the foregoing, relators now ask this court to grant them an injunction that prohibits respondents from "further encroaching upon Relators' property rights during the pendency of the eminent domain proceedings." Relators cite *State ex rel. Bilmour Realty, Inc. v .Mayfield Hts.*, 119 Ohio St.3d 11, 2008-Ohio-3181, ¶ 10-12, 14, as authority for their position that a property owner may seek both mandamus and an injunction in cases where an injunction alone does not afford complete relief from a taking of private property.

{¶ 6} In their merit brief, respondents attempt to reassert the issue of whether or not a writ of mandamus is the proper remedy in this case. In support, respondents once again argue that no taking has occurred. Alternatively, respondents argue that, if relators have suffered damage because of respondents' actions, relators have an alternative remedy at law through a lawsuit for damages due to breach of contract.

{¶ 7} As to the parties' arguments for and against the issuance of a writ of mandamus, in our decision issued on January 18, 2011, we held that "an action for mandamus 'is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred.'" *State ex rel. Wasserman v. City of Fremont* (Jan. 18, 2011), 6th Dist. No. L-10-031, quoting *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶ 12. We further found that, in this case, "relators' petition alleges a taking that, if proved, is compensable

through an eminent domain action." Id. Finally, we held that the written agreement through which relators' easement was originally formed, "although contractual in nature, created an easement over respondent's property." Accordingly, the contractual nature of the agreement does not in any way prevent relators from pursuing a remedy by way of a mandamus action. Id.

{¶ 8} As to relators' request for a preliminary injunction pending the outcome of eminent domain proceedings, we disagree with relators' assertion that *State ex rel. Bilmour Realty, Inc.*, is applicable to this case. In *Bilmour Realty*, an action for a declaratory judgment and an injunction were sought by the relator in the trial court. The ultimate decision of the Ohio Supreme Court in that case was that a mandamus action brought in the court of appeals was not precluded by prior filings in the trial court, since those actions were inadequate to afford complete relief. Id. In contrast, in this case, relators are attempting to simultaneously bring an injunction and a mandamus action in this court. Ohio courts have held that "neither the [Ohio] Supreme Court nor the Court of Appeals has original jurisdiction in injunction * * *." *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St.2d 141, paragraph four of the syllabus. Accordingly, a petition that purports to be in mandamus must be dismissed by the court of appeals for want of jurisdiction, if its real objective is to obtain an injunction. Id. Relators' request for a preliminary injunction in this court pending the outcome of eminent domain proceedings is, therefore, not well-taken and is denied.

{¶ 9} Upon consideration of the entire record in this case, we find that no evidence has been presented to change our prior finding that relators are entitled to a writ of mandamus to determine whether or not a taking actually occurred in this case and how much compensation, if any, is due from respondents. Pursuant to R.C. 2731.07, we hereby issue a writ of mandamus and order respondents to commence eminent domain proceedings to determine if a taking has occurred and what, if any, compensation is due to relators.

{¶ 10} Writ granted. Costs assessed to respondents.

{¶ 11} To the clerk: Manner of Service.

{¶ 12} The sheriff of Sandusky County shall immediately serve, **upon the respondents** by personal service, a copy of this writ in a manner pursuant to R.C. 2731.08. The clerk is directed to immediately serve upon all other parties a copy of this writ in a manner prescribed by Civ.R. 5(B).

{¶ 13} It is so ordered.

State of Ohio, ex rel. Stanley J. Wasserman and
State of Ohio, ex rel. Kathryn A. Wasserman
v. City of Fremont and Terry Overmyer

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

SANDUSKY COUNTY
COURT OF APPEALS
FILED
JAN 18 2011

APPENDIX "A"

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio, ex rel.
Stanley J. Wasserman and
State of Ohio, ex rel.
Kathryn A. Wasserman

Relators

v.

City of Fremont and Terry Overmyer

Respondents

Court of Appeals No. S-10-031

DECISION AND JUDGMENT

Decided: JAN 18 2011

* * * * *

On June 25, 2010, relators, Stanley and Kathryn Wasserman, filed a petition for a writ of mandamus against respondents, the city of Fremont, Ohio, and Terry Overmyer, Mayor of Fremont, Ohio. In support, relators stated that, pursuant to the terms of an "Agreement" signed by relators' predecessor-in-interest, George H. Guth, and respondents' predecessor-in-interest, Robert McKenney, in 1915, relators possess an easement through which they placed drainage tiles to drain excess water from their own farm property, across respondents' parcel, and into nearby Minnow Creek. Relators

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further claim that, due to certain acts performed by respondents, the drainage tile was destroyed when respondents excavated the land to make a reservoir, causing excess water to back up and flood relators' farm fields. Relators asked this court to order respondents to commence eminent domain proceedings to compensate them for the loss in value and crop yield of their property.

On July 20, 2010, this court issued an alternative writ, in which we ordered respondents to either do the act requested by relators in their petition, or show cause why they are not required to do so by filing either an answer pursuant to Civ.R. 8(B) or a motion to dismiss relators' petition pursuant to Civ.R. 12. On August 6, 2010, respondents filed a motion in which they asked this court to strike the mandamus petition and order relators to pay respondents' costs and attorney fees pursuant to Civ.R. 11 and R.C. 2323.51. Alternatively, respondents asked us to dismiss the petition pursuant to Civ.R. 12(B)(6).

In support of their motion to strike respondents stated that relators, through counsel, made untrue statements and "intentionally omitted certain facts," knowing that such omissions and misstatements "would utterly and completely change the nature of their pleadings and lead this Court to make inaccurate and untrue inferences." Specifically, respondents assert that relators intentionally omitted key relevant facts from their petition in an effort to increase the likelihood of its success in this court. Respondents further state that the drainage tile was repaired and/or fixed in a "timely

fashion," and that relators' property has since been restored to the same condition it was in before the reservoir was created.

In support of their motion to dismiss, respondents state that relators are not entitled to a writ of mandamus because they have suffered no damage as a result of respondents' actions, and they have an adequate remedy at law through an action for breach of contract. Finally, respondents state that relators' mandamus petition must be denied because relators' neighbors, Sharon and Thomas Kipps, are indispensable parties who have not been joined in this action.

On August 16, 2010, relators filed a motion for extension of time to respond, which this court granted on September 1, 2010. On September 15, 2010, a response was filed, in which relators assert that: (1) they are entitled to a writ of mandamus because respondents' acts amount to a taking of relators' drainage easement without due process of law; (2) relators' right to relief in mandamus is not dependent on the amount of monetary damages, if any, which have yet to be determined by a jury in an eminent domain action; (3) mandamus is proper in this case because, even if the easement was created pursuant to a contract, it is still a property right; and (4) the Kipps, which respondents claim are indispensable parties, have no property interest in the easement which is the subject of this action.

We note initially that, to establish the right to a writ of mandamus, the party seeking the writ must demonstrate: "(1) that the relator has a clear legal right to the relief sought, (2) that the respondent is under a clear legal duty to perform the requested act,

and (3) that the relator has no plain and adequate remedy in the ordinary course of law." *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶ 9, citing *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780. Ohio courts have held that an action for mandamus "is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred." *Beasley*, supra, ¶ 12, citing *State ex rel. Coles v. Granville*, 116 Ohio St.3d 331, 2007-Ohio-6057, ¶ 21, citing *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 2002-Ohio-1627.

We will first address respondents' motion to dismiss. A Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of a complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. For a court to grant a motion to dismiss pursuant to Civ.R. 12(B)(6), "it must appear that, accepting all of the allegations of the complaint as true, it appears beyond doubt that the complaining party can prove no set of facts entitling that party to the relief sought." *Beasley*, supra, at ¶ 10, citing *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242. Accordingly, if a complaint seeking a writ of mandamus alleges both the existence of a legal duty and the lack of an adequate remedy at law, and it appears that the party seeking the writ "might prove some set of facts entitling him to relief," the complaint is not subject to dismissal pursuant to Civ.R. 12(B)(6). *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 95-96; *Beasley*, supra.

In support of their motion to dismiss, respondents first assert that relators have an alternative remedy through which to obtain relief. Specifically, respondents argue that the relationship between the parties is "fundamentally contractual," entitling them to seek recovery for any damage to the drainage tiles or for denial of access to the servient estate through a contract action. Alternatively, relators argue that any decrease in the value of relators' land that is allegedly due to respondents' actions does not constitute a compensable "taking."

As to respondents' first argument, an "easement" is defined as "a property interest in the land of another that allows the owner of the easement a limited use of the land in which the easement exists." *McCumbers v. Puckett*, 183 Ohio App.3d 762, 2009-Ohio-4465, ¶ 14, citing *Colburn v. Maynard* (1996), 111 Ohio App.3d 246, 253. An easement may be created by an express grant. *McCumbers*, supra. Thus, even in cases where a document between parties states that it is a "contract," an easement can be created where the document clearly and unambiguously grants a right of way that is perpetual in nature and is to be used for a specific purpose. *Hinman v. Barnes* (1946), 146 Ohio St. 497, 504-507.

In this case, the agreement between the parties' predecessors in interest states the location and purpose of a right-of-way, which was created for the purpose of draining excess water from relators' property, over respondents' property, and into adjacent Minnow Creek. The Agreement further states that "this contract shall extend to the heirs and assigns of the parties hereto and shall continue in force forever unless terminated as

herein before provided. * * *" In addition, the record contains undisputed evidence that the city of Fremont and relators shared the cost of repairing and replacing the drainage tile across respondents' property in July 2005, pursuant to the terms of the original agreement. For the foregoing reasons, we find that the agreement, although contractual in nature, created an easement over respondents' property. Respondents' argument that the contractual nature of that agreement prevents relators from pursuing a remedy by way of a mandamus action is without merit.

As for respondents' second argument, Ohio courts have long held that, "[i]n order to establish a taking, the property owner must show a substantial or unreasonable interference with a property right, which may involve an actual physical taking of the property, or deprivation of an intangible interest in the property." *Beasley*, supra, ¶ 12, citing *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203; *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135. In addition, "'[a]ny taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises, entitles the owner to compensation.'" *State ex rel. OTR v. Columbus*, supra, at 206, quoting *Smith*, supra, paragraph one of the syllabus; *Mansfield v. Balliett* (1902), 65 Ohio St. 451.

Relators' petition states that, because of respondents' actions, the value of their land has been diminished through "decreased yields * * * as well as increased expenses related to the lack of drainage of the Dominant Parcel." Relators further state that respondents' actions have deprived them of their right to enter onto the servient parcel

and repair or replace the drainage tiles that were damaged by respondents' excavation of that property.

On consideration, we find that relators' petition alleges a taking that, if proved, is compensable through an eminent domain action. Accordingly, respondents' argument to the contrary is without merit.

For the foregoing reasons, respondents' motion to dismiss pursuant to Civ.R. 12(B)(6) is not well-taken and is denied. We will now address respondents' motion to strike the petition and for attorney fees and expenses pursuant to Civ.R. 11 and R.C. 2323.51.

Civ.R. 11, which governs the signing of pleadings, motions, or other documents in a civil action states, in pertinent part, that:

"The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. * * *"

In contrast, R.C. 2323.51 provides for an award of attorney's fees, costs and expenses "to a party who has been adversely affected by frivolous conduct in connection with a civil action. Any party who has commenced or persisted in maintaining a

frivolous action may be assessed sanctions." *Guy v. Axe*, 3d Dist. No. 14-09-31, 2010-Ohio-986, ¶ 10, citing *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 24434, 24436, 2009-Ohio-5148, ¶ 31-32. R.C. 2323.51(A)(2) sets forth the following relevant definitions of "frivolous action":

"(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

"(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief."

On consideration of the foregoing, and our determination that relators' petition has set forth facts sufficient to survive respondents' motion to dismiss, we find that the allegations and other factual representations made in relators' petition do not rise to the level of "frivolous conduct" as defined in R.C. 2323.51(A)(2). We further find that the record contains no evidence that relators' counsel has violated Civ.R. 11 at this stage of these proceedings. Accordingly, respondents' motion to strike is not well-taken and is denied.

Finally, we will address respondents' motion to join the Kipps as parties in this mandamus action. Civ.R. 19(A), which governs the joinder of persons needed for just adjudication states, in relevant part, that:

"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impeded his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest * * *." If he has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H). * * *"

A party is deemed "indispensable" if his or her "absence seriously prejudices any party to the action or prevents the court from rendering an effective judgment between the parties, or is one whose interests would be adversely affected or jeopardized by a judgment between the parties to the action." *State Farm Mut. Auto Ins. Co. v. Swartz*, 5th Dist. No. 2005CA0086, 2006-Ohio-2096, ¶ 14, citing *Layne v. Huffman* (1974), 43 Ohio App.2d 53.

Although not specifically stated in their motion, respondents arguably raised the defense of failure to join a party pursuant to Civ.R. 12(B)(7). Accordingly, the defense was not waived.

In support of their motion respondents state that the Kipps are "indispensable" parties because, if they are not joined, the city of Fremont may not be allowed "complete

relief" or may be subjected "to double or inconsistent obligations." Respondents further argue that the Kipps have an interest in the subject of this action by virtue of an "Easement Agreement" they entered into with relators on August 23, 2006. The Easement Agreement, attached to respondents' motion to dismiss as Exhibit 2, provides for an easement that runs from relators' property, over the Kipps' property, for the purpose of draining excess water from relators' property into the tile that eventually runs through the easement across respondents' parcel. We disagree, for the following reasons.

As set forth above, an easement appurtenant, such as the one in this case, is "a property interest in the land of another that allows the owner of the easement a limited use of the land in which the easement exists." *McCumbers v. Puckett*, supra, at ¶ 14. Another definition of an easement is "a right that the owner of one estate, referred to as the 'dominant estate,' may exercise for his benefit in or over another's estate, referred to as the 'servient estate.'" *McCumbers*, supra, citing *First Natl. Bank v. Mountain Agency, L.L.C.*, 12th Dist. No. CA2008-05-056, 2009-Ohio-2009. See, also, *Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008-Ohio-4166, ¶ 10.

Exhibit 2 establishes rights between the Kipps and relators. Although the agreement states that the drainage line across the Kipps' property will eventually connect with a tile that runs through respondents' property, it does not create any rights between the Kipps and respondents. Accordingly, respondents have failed to show that a failure to join the Kipps as parties will prevent complete relief from being accorded among those who are already parties in this mandamus action. Similarly, respondents have not shown

that the Kipps claim an interest relating to the subject of the action, or that they are so situated that the disposition of the action in their absence may impair respondents' ability to protect their interest or respondents.

Finally, Ohio courts have held that "[a]n 'indispensable' party may be one who might expose the defendant to the threat of multiple liability as distinguished from the threat of multiple litigation." *Layne v. Huffman*, supra, at 57, citing Civ.R. 19. The term "indispensable connotes that which cannot be done without that which is absolutely essential." Id. at 58-59. Accordingly, parties are considered "indispensable only where they have an interest of such a nature that a final judgment cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Id., citing *United States v. Aetna Casualty & Surety Co.* (1949), 338 U.S. 366, 73 S.Ct. 207, 94 L.Ed. 171. The merely possibility of exposure to multiple litigation "is not a sufficient basis to render one an indispensable party." Id. at syllabus.

On consideration, we find that: (1) the mere possibility of future litigation between respondents and the Kipps is not sufficient to justify joining them as indispensable parties; and (2) respondents have not otherwise demonstrated that the failure to join the Kipps as parties in this action will prevent either respondents or relators from obtaining complete relief in this action. Respondents' motions to join the Kipps as parties, and to dismiss this mandamus action for failure to join an indispensable party are

not well-taken and are denied. Pursuant to 6th Dist.Loc.App.R. 6, the parties are hereby ordered to submit their cases to this court within 20 days of the date of this decision.

The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal pursuant to Civ.R. 5(B). It is so ordered.

Mark L. Pietrykowski, J. JUDGE

Thomas J. Osowik, P.J. JUDGE

Keila D. Cosme, J. JUDGE
CONCUR.