

ORIGINAL

In the  
**Supreme Court of Ohio**

STATE ex rel.	:	Case No. 2011-0683
STANLEY J. WASSERMAN, <i>et al.</i> ,	:	
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Sandusky County
v.	:	Court of Appeals,
	:	Sixth Appellate District
CITY OF FREMONT, <i>et al.</i> ,	:	
	:	
Defendants-Appellants.	:	Court of Appeals Case
	:	No. S-10-031
	:	

**MERIT BRIEF OF *AMICUS CURIAE*  
STATE OF OHIO  
IN SUPPORT OF NEITHER PARTY**

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## INTRODUCTION

Ohio law has a well-established procedure available to private property owners who believe that a public authority has taken their land without compensation. First, the property owners may file a mandamus action. Second, that court conducts fact-finding and determines whether or not a taking actually occurred. Finally, if the court finds a taking, it issues a writ, compelling the public authority to initiate appropriation proceedings in a trial court to ascertain compensation for the property owner.

The Sixth District skipped the critical second step. Stanley and Katherine Wasserman filed a mandamus action in that court, alleging that the City of Fremont took their drainage easement without compensating them for it. The Sixth District granted the writ, but without first determining whether a taking had actually occurred. The court instead left the fact-finding for the appropriation proceedings, directing the city “to commence eminent domain proceedings *to determine if a taking has occurred* and what, if any, compensation is due to relators.” *State ex rel. Wasserman v. Fremont* (“App. Op.”), 2011-Ohio-1269, ¶ 9 (emphasis added).

That was error. This Court has long required that, in mandamus actions to compel appropriation proceedings, “the court, as the trier of fact and law, must determine whether any property rights of the owner have been taken by the public authority.” *State ex rel. Levin v. City of Sheffield Lake* (1994), 70 Ohio St. 3d 104, 108. Only upon making that determination may the court issue the writ. *Id.* at 109. By departing from this order of operations, the Sixth District has scrambled the settled procedure for resolving takings claims. This Court should reverse that ruling.

## STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in ensuring that the procedures governing takings claims and appropriation proceedings are properly and consistently applied.

## STATEMENT OF THE CASE AND FACTS

Stanley and Katherine Wasserman have a drainage tile running from their property, across land owned by the City of Fremont, to an outlet at Minnow Creek. App. Op. ¶ 1. The drainage tile removes excess water from the Wassermans' land, and they allege that they own an easement for the portion that runs through City lands. *Id.* The Wassermans claim that the City destroyed the drainage tile when it began building a reservoir on its land. *Id.* And as a result, the Wassermans allege, water flooded their private property. *Id.* at App'x A, 2.

The Wassermans filed a mandamus action in the Sixth District Court of Appeals, seeking a remedy for what they believed to be a taking of their easement. They asked the court to order the City to "commence eminent domain proceedings to compensate them for the loss in value and crop yield of their property." *Id.*

The City moved to dismiss, arguing (among other things) that the Wassermans had not alleged a compensable taking. *Id.* at App'x A, 5. The Sixth District denied the motion, finding that the Wassermans had adequately alleged a taking by pleading claims of "decreased [crop] yield[]" and "increased expenses related to lack of drainage." *Id.* at App'x A, 6-7. The court ordered the parties to submit their cases for a decision on the merits. *Id.* at App'x A, 11-12.

After reviewing the parties' factual submissions and arguments, as well as the rest of the record, the appeals court granted the writ. It found "that no evidence ha[d] been presented to change [its] prior finding that [the Wassermans] 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 [the City]." *Id.* ¶ 9. The City filed a direct appeal to this Court.

## ARGUMENT

### Amicus Curiae State of Ohio's Proposition of Law:

*Before granting a writ of mandamus to compel a public entity to initiate appropriation proceedings for a public taking, the court must determine whether a taking occurred.*

“Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings when an involuntary taking of private property is alleged.” *State ex rel. Blank v. Beasley*, 121 Ohio St.3d 301, 2009-Ohio-835 ¶12 (quotation and citation omitted). And in a mandamus action, “the court, as the trier of fact and law, must determine whether any property rights of the owner have been taken by the public authority.” *Levin*, 70 Ohio St. 3d at 108. Accordingly, before an appropriation proceeding may be compelled by mandamus, “the court must initially determine that the pertinent property has been appropriated for public use.” *Id.* at 109. In other words, a government entity cannot be compelled to initiate appropriation proceedings in a trial court until the mandamus court first determines that there was a taking.

The Sixth District reached the wrong answer because it asked the wrong question. When a property owner brings a mandamus action, the question before the court is not whether the pleaded facts were enough to *allege* a taking. Rather, the owner must *prove* the taking. Specifically, the owner has “the burden of proving entitlement to extraordinary relief in mandamus, including the establishment of a clear legal right to appropriation proceedings.” *State ex rel. BSW Dev. Group v. City of Dayton* (1998), 83 Ohio St. 3d 338, 344. And to establish a clear legal right, the property owner must demonstrate through “clear[] and convincing” evidence that the public authority did, in fact, take the owner’s property. *State ex rel. Pressley v. Indus. Comm’n of Ohio* (1967), 11 Ohio St. 2d 141, 161; see also *BSW Dev. Group*, 83 Ohio St. 3d at 341; *State ex rel. Sekermestrovich v. City of Akron* (2001), 90 Ohio St. 3d 536, 537-39.

The Sixth District overlooked these fundamental principles and broke the ground rules for mandamus proceedings in at least two ways. First, rather than determine whether the City took property from the Wassermans—a threshold requirement before issuing the writ, *Levin*, 70 Ohio St. 3d at 108—it ordered appropriation proceedings and left the job of determining whether a taking occurred to the appropriation court. Second, and relatedly, it granted the writ based only on the Wasserman’s *allegations* of a taking, a move directly contrary to this Court’s requirement that a writ issue only if clear and convincing evidence demonstrates that a taking has actually occurred. See *BSW Dev. Group*, 83 Ohio St. 3d at 344. Because the Sixth District’s decision runs contrary to this Court’s precedent, it must be reversed.

Not only does the Sixth District’s opinion upset settled law, but if allowed to stand, it would require takings determinations to be made in proceedings entirely unsuited to making that call—appropriation proceedings. An appropriation is a specialized judicial proceeding where the question is not *whether* a taking occurred, but rather *how much* compensation the private landowner will receive for the taking. See R.C. 163.09, R.C. 163.14. In fact, from the beginning of an appropriation, it is presumed that a defined parcel of land (or an interest or right in that parcel) is taken; the only issues that remain are an assessment of compensation for the property taken and damages, if any, to the owner’s remaining land. *Masheter v. Blaisdell* (1972), 30 Ohio St. 2d 8, 10-11; R.C. 163.05; R.C. 163.14. And to that end, the appropriation statutes specify particular procedures—what the public authority must do before initiating proceedings, what it must file, and what it must show—none of which leave room for an appropriation court to determine whether a taking occurred. See generally R.C. 163.04, 163.05.

To be sure, requiring an appellate court to find sufficient facts to determine that a taking occurred before granting a writ would be unusual in any context outside of an original action.

Appellate courts, after all, are not typically regarded as finders of fact. But an original action in mandamus is an entirely different creature from an appeal—and one in which the appellate court is duty-bound to make findings of fact before granting the writ. Because the law does not allow the appellate court to delegate fact-finding to another tribunal—and because doing so in this context would upend the well-settled procedures governing takings claims—the Court should reverse.

### CONCLUSION

For the reasons discussed above, this Court should reverse and remand this case to the Court of Appeals for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

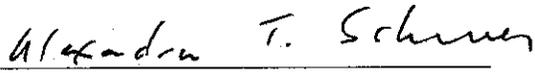
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Neither Party was served by U.S. mail this 29<sup>th</sup> day of August, 2011 upon the following counsel:

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