

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, : Case No. 10 AP 840
 :
 v. : Case No. 11-1396
 :
 City of Columbus, :
 :
 Respondent-Appellee. :

MEMORANDUM CONTRA JURISDICTION TO OHIO SUPREME COURT

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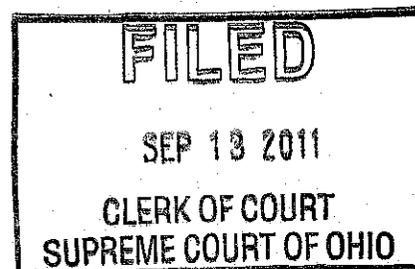


TABLE OF CONTENTS

TABLE OF CONTENTS..... i

EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

STATEMENT OF THE CASE..... 4

STATEMENT OF THE FACTS 4

PROPOSITIONS OF LAW..... 5

 Proposition of Law No. 1: Appellants have misconstrued the holding in *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126, in an effort to avoid the application of res judicata..... 5

 Proposition of Law No. 2: The Tenth District Court of Appeals did not violate the Supremacy Clause in its analysis of the Supreme Court’s decision in *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126..... 6

 Proposition of Law No. 3: The Tenth District Court of Appeals properly found that Appellants’ claims were barred by res judicata using the standards established by this Court in *Grava v. Parkman* (1995), 73 Ohio St. 3d 379, 1995-Ohio-331, 653 N.E.2d 226..... 7

CONCLUSION..... 8

CERTIFICATE OF SERVICE..... 9

**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Appellants' lament about the difficulty of protecting property rights in Ohio and the fact that they have spent nineteen years pursuing this litigation against the City of Columbus is disingenuous and self-serving. In particular, Appellants' reference to this Court's decision in *Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, does nothing to further their contention that jurisdiction is appropriate in this case since the facts in *Norwood* are light years away from those in the instant matter. The only reason why this litigation has been pending since 1992 is Appellants' failure to bring a mandamus action until the present state court action. Although Appellants have for whatever reason ignored the well-established jurisprudence in this area of law, the proper mechanism for compelling appropriation proceedings in Ohio has been available since 1994 when this Court decided *State ex rel. Levin v. City of Sheffield Lake* (1994), 70 Ohio St. 3d 104, 108, 637 N.E. 2d 319, two years after Appellants' first lawsuit was filed in the Franklin County Court of Common Pleas.

In their Memorandum in Support of Jurisdiction, Appellants attempt to argue that the decision by the Tenth District returns the law in Ohio to a state of confusion concerning takings claims, maintaining that their claims were grounded in purported violations of the Ohio and U.S. Constitution. They even assert that the appellate court has violated the Supremacy Clause of the U.S. Constitution by rejecting Appellants' tortured interpretation of *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126. Interestingly, at the trial court level Appellants specifically stated that they were not pursuing a takings claim under federal law in the present dispute. In particular, on page 5 of Appellants' Memorandum Contra to the City of Columbus' Motion for Summary Judgment,

Appellants emphasize that “[t]his is a state law claim pursuant to Chapter 163 of the Ohio Revised Code and Section 2731.05 of the Ohio Revised Code. This is not a federal claim brought pursuant to 42 U.S.C. Section 1983.” Although Appellants vigorously assert otherwise, Ohio courts are not confused about the proper mechanism by which to compel appropriations proceedings.

The record reveals that Appellants made an ill-advised decision to file multiple lawsuits subsequent to their original 1992 action without making a mandamus claim, resulting in an appropriate determination by the lower courts that an effort to bring such an action at this point is barred by res judicata. Appellants appear to at least obliquely acknowledge this fact on page 4 of their Memorandum in Support of Jurisdiction when they state “[i]t exposes property owners who fail to discern a pleading maneuver, to the loss of that ability to claim just compensation for property that has been taken.” Appellants’ efforts to appeal to the sympathies of this Court are misleading because this is not a case in which Appellants may be at a disadvantage by proceeding without legal representation. To the contrary, Appellants have retained counsel who has led this parade through state and federal court multiple times over the course of nineteen years. It is the responsibility of counsel to discern the appropriate claims to plead on behalf of his or her clients and the failure to do so may well result in an action being dismissed.

Appellants further claim that the Tenth District has decided a constitutional issue of first impression in Ohio. Specifically, they assert that the appellate court’s finding that an unconstitutional taking of property occurs when the state substantially interferes with a property right is an issue that has not previously been decided by this Court. This proposition is simply false. In 2008, the Tenth District relied on precedent established by this Court in 1996 when it stated that the taking of property under Ohio law “occurs when the state substantially or

unnecessarily interferes with a property right.” *State ex rel. Thieken 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, 1996-Ohio-411; 667 N.E.2d 8. Again, Appellants have resorted to misrepresenting the relevant case law as a means to present this dispute as something that justifies consideration by this Court.

Previously, this Court declined to accept jurisdiction in *State ex rel. McNamara v. Rittman* (2009), 122 Ohio St. 3d 1479, 2009 Ohio 3625; 910 N.E.2d 478, the companion case to this lawsuit from the Ninth Appellate District involving very similar facts and the same counsel for the plaintiffs as the present dispute. At the appellate level, the Ninth District found that res judicata barred the plaintiffs in that action from pursuing a mandamus claim, stating that the plaintiffs could not “now litigate a mandamus action that they could have, but did not, litigate in a previous suit.” *State ex rel. McNamara v. Rittman* (July 14, 2008), 9th Dist. No. 08CA0011, 2009-Ohio-911 at ¶17. If Ohio did not have rules requiring litigants to bring all claims and defenses when before the Court, parties could hold back theories and perpetually litigate the same facts under different legal theories in separate actions in the hope of eventually prevailing. This scenario is exactly the situation in which Appellee finds itself due to Appellants’ recycling of the same facts in the series of lawsuits that have been filed against the City of Columbus. This Court chose to allow the decision of the Ninth Appellate District to stand and should do the same in this matter as well.

Appellants’ alleged out of pocket expenses are completely self-induced as a result of their previous failure to bring the mandamus action against the City of Columbus although they have had numerous opportunities to do so in the almost two decades since the alleged injury to

Appellants' property occurred. As a result, this case does not merit a review by this Court and jurisdiction should therefore be denied.

STATEMENT OF THE CASE

Appellants' chronology of the procedural history is essentially accurate although, unsurprisingly, they neglect to mention that the City of Columbus has prevailed in every forum in which Appellants have filed suit due to Appellants' failure to timely file their claims as well as such claims being barred by res judicata.

STATEMENT OF THE FACTS

Appellee would direct this Court's attention to the Tenth District Court of Appeals decision in *Hensley v. New Albany Co.* (Dec. 31, 1997), 10th Dist. No. 97AP-189, for a detailed recitation of the underlying dispute between the parties. To briefly summarize, the City of Columbus constructed a storm sewer to service the northeast area of Columbus as well as New Albany and Plain Township. The approximate dates of construction for this project were September 1990 through February 1992. In order to install the sewer lines, a well point water system was employed to temporarily lower the water table. Appellants allege that the dewatering process and sewer line construction diverted the groundwater, which resulted in the drying up of their water wells. See *State ex rel. Hensley v. Columbus*, 2011 Ohio 3311 at ¶2.

At no time during the course of these proceedings has a court established a proximate causal relationship between the actions of the City of Columbus and any specific damages to any named plaintiff. As a result, Appellants' assertions with respect to these claims are allegations, not undisputed facts.

PROPOSITIONS OF LAW

Proposition of Law No. 1: Appellants have misconstrued the holding in *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126, in an effort to avoid the application of res judicata.

Throughout this litigation, Appellants have cited to the *Williamson* decision as support for their contention that the mandamus claim could not be brought until they exhausted their legal remedies. In Appellants' view, they could not seek just compensation for the alleged taking until after the conclusion of their state court tort action and their federal claims under 42 U.S.C. §1983. This interpretation of the Supreme Court's holding in *Williamson* has been repeatedly rejected by the courts in this case and should not be used as a basis for accepting jurisdiction over this matter.

The Tenth District found Appellants' reliance on *Williamson* to be misplaced. Specifically, the court explained:

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. Theiken 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.

State ex rel. Hensley v. Columbus, 2011 Ohio 3311 at ¶27.

The record in this case shows that Appellants were aware of the alleged damage to their wells by the end of 1991. Under the authority of this Court's ruling in *State ex rel. Levin v. City of Sheffield Lake* (1994), 70 Ohio St. 3d 104, 108, 637 N.E. 2d 319, Appellants easily could have filed a mandamus claim as an alternative basis for relief when they filed their second state court action in 1995. Appellants' claim of the alleged taking without compensation would have been

preserved even if the trial court chose to resolve the tort claim prior to dealing with the mandamus action.

The Tenth District correctly recognized the illogical and circular result of Appellants' interpretation of the *Williamson* decision when it stated:

[I]f 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 appropriation 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.

Hensley, supra, at ¶28.

Consequently, Appellants' mandamus claim ripened when the alleged taking took place and their failure to assert this claim in the prior state court action results in the application of res judicata. However, there is nothing novel about this result that warrants a review by this Court and Appellants' Memorandum in Support of Jurisdiction should be denied on that basis alone.

Proposition of Law No. 2: The Tenth District Court of Appeals did not violate the Supremacy Clause in its analysis of the Supreme Court's decision in *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126.

In their second proposition of law in support of jurisdiction, Appellants make the dubious claim that the Tenth District has violated the Supremacy Clause of the United States Constitution, but they ultimately rehash the same tired argument that the *Williamson* decision requires the state court tort action and the federal claims based upon purported violations of 42 U.S.C. §1983 to be litigated prior to the institution of a mandamus action.

In *State ex rel. McNamara v. Rittman* (March 2, 2009), 9th Dist. No. 08CA0011, 2009-Ohio-911 at ¶18, the Ninth District rejected the notion that a mandamus action could only be

brought after the litigation of the state tort claims and federal takings claims when it found that the petitioners' mandamus action in that case were barred by res judicata:

Residents filed their initial claim against Rittman * * * well after the Supreme Court established a writ of mandamus as the proper mechanism for the type of injury that Residents alleged. Residents never requested a writ of mandamus, as an alternative means of relief or otherwise, in their initial action. * * * Residents never sought to amend their complaint in their initial action to include a writ of mandamus. There was nothing to prevent Residents from pursuing a mandamus action against Rittman at the time of the initial suit. Residents may not now litigate a mandamus action that they could have, but did not litigate in a previous suit.

Simply because the Tenth District disagreed with Appellants' interpretation of the jurisprudence concerning the timing of state court mandamus actions in the context of an alleged taking of property without compensation does not render the decision unconstitutional. This is yet another example of Appellants' efforts to keep this litigation on life support. The Tenth District's decision is grounded in an appropriate analysis of the relevant case law and should stand.

Proposition of Law No. 3: The Tenth District Court of Appeals properly found that Appellants' claims were barred by res judicata using the standards established by this Court in *Grava v. Parkman* (1995), 73 Ohio St. 3d 379, 1995-Ohio-331, 653 N.E.2d 226.

Appellants maintain that the decision by the Tenth District was in error because it found that Appellants should have filed their mandamus claim at the same time as their state law tort claim. They contend that this is the first time that a court has ever made such a finding. This assertion is false as well.

As discussed above, the Ninth District Court of Appeals in *McNamara v. Rittman* indicated that the Residents in that case should have filed a mandamus action along with their other causes of action since the *Levin* decision specifically provided that mandamus was the appropriate vehicle to compel appropriation proceedings against a public entity. By 1995,

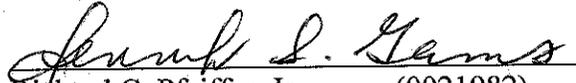
Appellants should have been on notice when they refilled their state court proceeding that it was necessary to include a mandamus claim at this point if they intended to do so. In every complaint that has been filed by Appellants, either in state or federal court, the conduct of the City of Columbus giving rise to the cause of action is the same – the sewer project that allegedly resulted in the dewatering of Appellants' wells. The purported injury to Appellants, whether it be monetary damages due to the loss of the underground water, a takings claim pursuant to 42 U.S.C. §1983, or a mandamus claim in order to compel state appropriation proceedings, stems entirely from the City's construction of additional sewer lines as part of an infrastructure project and that has remained constant over the course of this long lasting dispute. Appellants may assert new theories of liability but this is nothing more than an effort to disguise the fact that they are attempting to relitigate the same conduct in perpetuity. If only Appellants had followed this Court's directive in *Levin* and filed a mandamus claim during the course of their 1995 action, Appellants would likely have had their day in court. Unfortunately for them, they chose not to and the consequence of that decision is that their mandamus action is barred by res judicata.

CONCLUSION

This Court should deny jurisdiction over the instant matter. Appellants have presented nothing new and, in fact, their Memorandum in Support of Jurisdiction reveals the extent to which these issues have been continuously rehashed. Appellants have resorted to mischaracterizing the case law in an effort to demonstrate the novelty of their claims but they fail to demonstrate why the Court should disturb the ruling of the Tenth District. This Court properly declined jurisdiction over the companion case of *McNamara v. Rittman* from the Ninth District and should likewise do so here.

Respectfully submitted,

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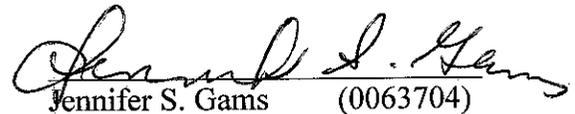
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing **Memorandum Contra Jurisdiction To Ohio Supreme Court** was served via regular U.S. Mail, posted prepaid, upon Steve J. Edwards, Attorney for Petitioners-Appellants, 4030 Broadway, Grove City, Ohio 43123, this 13th day of September 2011.



Jennifer S. Gams (0063704)