

IN THE SUPREME COURT OF OHIO

STATE ex rel.
STANLEY J. WASSERMAN, et al.,

Relators-Appellees,

v.

CITY OF FREMONT, et al.,

Respondents-Appellants.

* Case No. 2011-0683
* On appeal from the Sandusky County
Court of Appeals, Sixth Appellate District
*
* Court of Appeals Case No. S-10-031
*
*
*

MERIT BRIEF OF APPELLEES
STANLEY J. WASSERMAN AND KATHRYN A. WASSERMAN

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STATEMENT OF THE CASE AND FACTS

This appeal arose from Relator-Appellees' Verified Petition for Writ of Mandamus (hereafter "Verified Petition") to compel eminent domain proceedings as a result of the City of Fremont having taken Appellees' easement appurtenant and physical chattels.

In response to the Verified Petition, the Sixth District Court of Appeals issued an alternative writ and ordered Appellants to either commence appropriation proceedings, show cause why they are not required to do so, or file a motion to dismiss the Petition. Appellants did not contest the factual basis of Appellees' Petition, but instead filed a combined Motion to Strike, Motion to Dismiss, and Motion to Join an Additional Party on or about August 6, 2010 (hereafter "Motion to Strike/Dismiss").

That Motion to Strike/Dismiss admitted the critical facts of the taking. Specifically, Appellants admitted that they physically interfered with Appellees' drainage chattels serving the dominant parcel of Appellees' easement appurtenant, though Appellants contend they later replaced them. "[T]he City, at its own expense, repaired damaged drainage tiles as the Reservoir project proceeded and, thereafter, replaced the entire drainage tile in a timely fashion." Motion to Strike/Dismiss, 2. "Counsel for the City contacted counsel for Relators to confirm that said counsel was aware that the City did not merely remove drainage tiles, but did indeed replace them." Id.

The Sixth District denied Appellants' motions in a Decision and Judgment of January 18, 2011. *State ex rel. Wasserman v. Fremont* (Jan. 18, 2011), 6th Dist. App. No. S-10-031 (hereafter, "Jan. 18 Judgment"). The Jan. 18 Judgment ruled, *inter alia*, that Appellees had an easement over Appellants' property, and that even though the easement was created through an

express writing, Appellees' rights were not merely contractual and Appellees were not precluded from seeking a writ of mandamus. Jan. 18 Judgment, 5-6.

Following the Jan. 18 Judgment, the parties timely submitted their merit briefs. In the Sixth District's Decision and Judgment of March 14, 2011, the Court of Appeals granted Appellees a writ of mandamus and ordered Appellants to commence eminent domain proceedings. *State ex rel. Wasserman v. Fremont*, 6th Dist. App. No. S-10-031, 2011-Ohio-1269, ¶ 10 (hereafter "Mar. 14 Judgment"). The Sixth District issued the writ after considering "the entire record." *Id.* at ¶ 3.

The Mar. 14 Judgment did not include separate written findings of fact and conclusions of law. Although Appellants could have requested such findings pursuant to Civ.R. 52, they did not feel it necessary to do so.

The Sixth District's issuance of a writ of mandamus was proper and warranted under the law and facts of the case. Appellees respectfully request this Court affirm the Court of Appeals.

ARGUMENT

Proposition of Law #1: The Sixth District Court of Appeals did not fail to find a taking when it issued a writ of mandamus and ordered appellants to commence eminent domain proceedings.

The Sixth District granted Appellees a writ of mandamus after considering “the entire record in this case.” Mar. 14 Judgment, ¶ 9-10. That record included timely submitted merit briefs from both parties, *id.* at ¶ 3, and Appellees’ Verified Petition. In its January 18, 2011 Judgment, the Sixth District stated the same standard for granting a writ of mandamus that Appellants now urge to this Court. Jan. 18 Judgment, 3-4; Merit Brief of Appellants, 3. Upon all this, the Sixth District concluded, “Writ granted. Costs assessed to respondents.” Mar. 14 Judgment, ¶ 10.

Appellants take issue with one sentence in the Sixth District’s decision and judgment. Merit Brief of Appellants, 2. In paragraph 9, the District Court states, “[p]ursuant 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.” Mar. 14 Judgment, ¶ 9. That sentence consists of a main clause – “we hereby issue a writ of mandamus and order respondents to commence eminent domain proceedings” – and a subordinate clause beginning “to determine ***.” The key to understanding the meaning of this sentence is to appropriately read the subordinate clause.

As an initial matter, the subordinate clause must be read within its proper scope. One might posit that the subordinate clause beginning “to determine ***” modifies not only the immediate antecedent noun, “eminent domain proceedings,” but also the preceding antecedent, “writ of mandamus.” However, reading the phrase so broadly violates the long-standing “last antecedent rule.” “[R]eferential and qualifying words and phrases, where no contrary intention

appears, refer solely to the last antecedent.” *Independent Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, quoting (1946), 146 Ohio St. 203, 209. While this rule is not an absolute, no contrary indicia of intent exist here that would suggest its application is unwarranted. The last antecedent rule is “quite sensible as a matter of grammar.” *Nobelman v. American Savings Bank* (1993), 508 U.S. 324, 330.

Understanding the subordinate clause’s proper scope, it becomes clear what the Sixth District did and did not order. The Sixth District did not “issue a writ of mandamus *** to determine if a taking has occurred.” What the Sixth District actually did was “issue a writ of mandamus and order respondents to commence eminent domain proceedings.” If the subordinate clause has any substantive value at all, it is only to modify the order that “respondents *** commence eminent domain proceedings.” The writ of mandamus is not an order that the court of common pleas determine whether a taking occurred.

The question, then, is how does the subordinate clause modify the order that “respondents *** commence eminent domain proceedings.” One way is to read the antecedent as dependent on the subordinate clause. Upon this reading, the Sixth District’s order was not simply that Appellants commence eminent domain proceedings, but rather that Appellants commence a certain kind of eminent domain proceedings, one that includes a finding as to whether a taking occurred.

On its face, this reading seems unlikely. Chapter 163 of the Ohio Revised Code governs the appropriation of property. See R.C. 163.63 (“Any reference in the Revised Code to any authority to acquire real property by ‘condemnation’ or *** eminent domain is deemed to be an appropriation *** pursuant to this chapter and any such taking or acquisition shall be made pursuant to this chapter.”). Appellants cannot control whatever procedures Chapter 163 sets forth

to govern appropriation proceedings.¹ It does not seem likely that the Sixth District intended its otherwise unequivocal grant, see Mar. 14 Judgment, ¶ 10 (“Writ granted.”), to be conditioned on something that Appellants cannot control.

But this reading also violates the generally accepted rule of construction that a judgment should be read to bring all its parts into harmony and give effect to its entirety. *Seitz v. Seitz* (1952), 92 Ohio App. 338, 342, 102 N.E.2d 24 (“If a judgment is susceptible to two possible interpretations[,] *** an interpretation will be adopted which gives effect to the judgment in its entirety rather than an interpretation which would eliminate a part.”).

“The legal operation and effect of a judgment must be ascertained by a construction and interpretation of its terms, and this presents a question of law for the court. If the language used in a judgment is ambiguous there is room for construction * * *

The judgment must be read in its entirety, and it must be construed as a whole so as to bring all of its parts into harmony as far as this can be done by fair and reasonable interpretation and so as to give effect to every word and part, if possible, and to effectuate the obvious intention and purpose of the court, consistent with the provisions of the organic law.”

Boyle v. Stroman (1950), 92 N.E.2d 693, 694, 56 Ohio Law Abs. 451, citing 49 C.J.S.

Judgments, § 436. If the subordinate clause operates as a substantive limit on the main clause, a limit to which Appellants have no control, then the otherwise unequivocal grant of a writ of mandamus would be a nullity from the outset. Mar. 14 Judgment, ¶ 10 (“Writ granted.”).

The other way to read the subordinate clause is as a statement of the antecedent’s purpose. As a purpose statement, the subordinate clause would not substantively limit the operative clause. By way of example, Appellee offers the Second Amendment to the U.S.

¹ *Amicus Curiae* State of Ohio contends that Chapter 163 does not “leave room for an appropriation court to determine whether a taking occurred.” Merit Brief of *Amicus Curiae* State of Ohio in Support of Neither Party, 4 (filed Aug. 29, 2011).

Constitution, which is similarly construed.² “The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.” *D.C. v. Heller* (2008), 554 U.S. 570, 577.

Apart from these rules of construction, when one considers the Mar. 14 Judgment in its entirety, the latter interpretation demonstrates itself to be the natural one. Decisions should, of course, be read in context and in their entirety. See, e.g., *Little v. State Medical Bd. of Ohio*, Franklin App. No. 10AP-220, 2010-Ohio-5627, ¶ 29; *Janis v. Janis*, 2nd Dist. App. No. 23898, 2011-Ohio-3731, ¶ 106. When the Sixth District wrote the Mar. 14 Judgment, it had before it the parties’ merit briefs, Mar. 14 Judgment, ¶ 3, and Appellee’s Verified Petition for Writ of Mandamus. In forming its conclusions, the Sixth District did not apply a standard of law that Appellants contend was erroneous. And finally, after considering “the entire record,” the Sixth District unequivocally granted Appellees a writ of mandamus to “commence eminent domain proceedings.” *Id.*, ¶ 9-10. From the whole decision and judgment, one sees that the Sixth District considered the entire record, applied the correct standard of law, and granted a writ of mandamus. One subordinate clause in paragraph 9 should not call that into question.

One should not discredit the Mar. 14 Judgment for not proclaiming, “thus, a taking.” A judgment’s entirety can permit an implication that the court made the necessary findings in support. See, e.g., *Roseman Bldg. Co., LLC v. Vision Power Sys., Inc.*, 5th Dist. App. No. 2009CA00009, 2010-Ohio-229, ¶ 33 (holding that trial court impliedly found “willful damage or theft” in granting summary judgment and awarding treble damages); *State v. Phelps*, Hamilton

² The Second Amendment to the U.S. Constitution states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend II.

App. No. C-100096, 2011-Ohio-3144 ¶ 14 (holding that the trial court impliedly found testimony credible when it overruled a motion to suppress); *Savage v. Am. Family Ins. Co.*, 178 Ohio App.3d 154, 897 N.E.2d 195, 2008-Ohio-4460, ¶ 33 (“By finding that the Savages had failed to comply with certain conditions precedent to the policy, the trial court impliedly found that those conditions were reasonable as a matter of law.”).

Setting aside grammar and rules of construction for the moment, another reason that Appellants cannot urge this Court to reverse the Sixth District is that Appellants waived any argument that ambiguity in the Mar. 14 Judgment warrants remand. “[E]rrors which arise during the course of a trial, which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal.” *Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Standards and Bldg. Appeals* (1975), 41 Ohio St. 2d 41, 43, 322 N.E.2d 629, citing (1968), 15 Ohio St.2d 31. If Appellants were uncertain about the findings of fact and conclusions of law that support the Mar. 14 Judgment, Appellants could and should have requested the Sixth District to prepare separate findings of fact and conclusions of law. Civ.R. 52.³ Rule 52 provided

³ Civ.R. 52 states in relevant part:

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

The Staff Notes to Civ.R. 52 explain the purpose in making requests for written findings of fact and conclusions of law. “[T]he court is free, [in a non-jury case,] without preparing written findings of fact and conclusions of law, to enter judgment on the basis of his decision.” Civ.R. 52, 1970 staff notes. “But findings may be prepared in writing at the option of the court or parties.” *Id.* “[F]indings of fact and conclusions of law are generally requested by the

Appellants that option for a full seven days after Appellants received notice of the Mar. 14 Judgment. Appellants chose not to exercise that option, and should now be precluded from asking this Court to decide a matter that should have been properly raised in the trial court.

From the entire Mar. 14 Judgment, it is evident that the Sixth District considered the merits of the parties' claims in light of the entire record, applied the correct standard of law, and granted Appellees a writ of mandamus compelling Appellants to commence eminent domain proceedings. Appellants take umbrage with a single clause which, while perhaps inartfully worded, neither calls into question the substance of the judgment nor necessarily means that the Sixth District failed to find that Appellees suffered a taking. Even if the Mar. 14 Judgment is unclear, Appellants did not request the Court of Appeals make separate written findings of fact and conclusions of law. Civ.R. 52 provided them a right to do so, and now, having failed to avail themselves of that right, Appellants should not now ask this Court to address a matter that Appellants did not feel compelled to preserve, and thus waived.

Proposition of Law #2: There is no genuine controversy as to whether a taking occurred.

Even if the Mar. 14 Judgment does not include a finding that Appellees suffered a taking, there is no reason to delay such a finding. Appellees particularly alleged sufficient facts to establish a taking in their Verified Petition for Writ of Mandamus; facts that Appellants do not contest. Appellants' true dispute regards the amount of damages, if any, that are owed to Appellees.⁴ That issue is the province of the appropriation proceedings and not the instant

disappointed party so that he may elicit the rationale for the court's decision. ***
[T]he findings become the basis for allegation of error on appeal." Civ.R. 52,
1971 staff notes.

⁴ Appellees join *Amicus Curiae* State of Ohio in asserting that the purpose of appropriation proceedings pursuant to Revised Code Chapter 163 is to determine how much

matter. Appellees may properly address the issue of damages in the takings proceeding they are so reluctant to commence.

The nature of the taking at issue is Appellants having damaged and removed certain drainage tile belonging to Appellees from the servient parcel of Appellees' easement appurtenant, have actually and constructively denied Appellees access to maintain their drainage system as provided for in the easement, and the effect these actions had on Appellees' farmland, the dominant parcel. In their Verified Petition for Writ of Mandamus, Appellees asserted the following operative facts that establish a taking:

- Pursuant to a certain Easement Agreement *** a predecessor in interest of the Servient Parcel granted to *** a predecessor in interest of the Dominant Parcel the perpetual right to install and maintain a tile drain from the Dominant Parcel through the Servient Parcel, emptying into Minnow Creek, for the purpose of draining the surface and subsurface water from the Dominant Parcel and the Servient Parcel into Minnow Creek. Verified Petition, ¶ 3.
- Prior to approximately May 12, 2009, the aforementioned Dominant Parcel utilized certain underground tile to drain surface and subsurface waters into and through other certain tile which was installed under the surface of the Servient Parcel. Verified Petition, ¶ 5.
- On or about May 12, 2009, agents for the City of Fremont, under the guise of constructing a reservoir on the Servient Parcel, excavated the Servient Parcel, and in the process permanently collapsed and blocked the two eight inch (8") plastic tile belonging to Relators. Verified Petition, ¶ 8.
- Further excavation work performed by the Respondent and/or its agents subsequent to May 12, 2009 permanently damaged and/or removed the two eight inch (8") plastic tile belonging to Relators. Verified Petition, ¶ 9.
- Since May 12, 2009, the Dominant Parcel has not drained properly and Relators have been denied access to the Servient Parcel for the purpose of repairing, installing, and maintaining a tile drain pursuant to the terms of the above-referenced Easement Agreement. Verified Petition, ¶ 10.

compensation is due a private property owner who suffered a taking. See Merit Brief of *Amicus Curiae* State of Ohio in Support of Neither Party, 4 (filed Aug. 29, 2011).

- On or about May 12, 2009, the City of Fremont, through its agents, effectuated a public taking of private property by damaging the draining to the Dominant Parcel and removing personal property in the form of field tile, belonging to Relators from said real property. Verified Petition, ¶ 21.

These verified facts establish a physical taking. A physical taking occurs when State action directly encroaches upon an owner's right of dominion and control over her property. *State ex. rel. Gilbert v. City of Cincinnati*, 125 Ohio St. 3d 385, 928 N.E.2d 706, 2010-Ohio-1473, ¶ 29. The taking need not be total; rather, “*any* direct encroachment *** that excludes or restricts the dominion and control of the owner over it, is a taking.” *Id.*, ¶ 28-29, quoting (1933), 126 Ohio St. 482 (emphasis added). The taking need not be permanent; a temporary taking is still a taking. *Id.*, ¶ 36.

In addition to the taking of Appellees' physical drainage chattels, Appellees suffered a taking of their easement. Easements appurtenant may be taken through State action and are compensable in appropriation proceedings. See *Ross v. Franko* (1942), 139 Ohio St. 395, 397, 40 N.E.2d 664 (“An easement constitutes a right and privilege belonging or appertaining to the dominant estate.”); *Cincinnati Entertainment Assn. v. Hamilton Cty. Bd. of Commrs.* (2001), 141 Ohio App. 3d 803, 812, 753 N.E.2d 884; *Proctor v. NJR Properties, LLC*, 175 Ohio App. 3d 378, 887 N.E.2d 376, 2008-Ohio-745, ¶ 15 (“In a partial takings case, the owner is entitled to receive compensation not only for property taken, but also for any damage to the residue as a result of the take.” (citations omitted)).

It is important to note that Appellants have never contested the operative facts of the taking; in fact, Appellants admitted them. In their Motion to Strike/Dismiss, Appellants admitted they damaged and removed the drainage tile. “[T]he City, at its own expense, repaired damaged drainage tiles as the Reservoir project proceeded and, thereafter, replaced the entire drainage tile in a timely fashion.” Motion to Strike/Dismiss, 2. “Counsel for the City contacted counsel for

Relators to confirm that said counsel was aware that the City did not merely remove drainage tiles, but did indeed replace them.” Id.

Appellants reaffirmed their admissions in their merit brief to the Sixth District.

“Construction of the upland reservoir began *** [and] repairs were made to the two 8” plastic lines that were damaged in the excavation of the site.” Presentation of Case, journalized Feb. 7, 2011, 4. “Since Respondents no longer needed to drain its property, its clay tiles were removed not re-connected to the new 12” drainage pipe.” Id. “Indeed, the position of the Relators has been bettered by the relocation and resizing of the drainage tile.” Id.

If Appellants contested a taking at all,⁵ they did so only with respect to Appellees’ assertion that Appellees have been denied access to the Servient Parcel to repair, install, and maintain their drainage tile. Verified Petition ¶ 10. Appellants stated, “Relators have never been denied access to the Respondents’ property and has never been told otherwise.” Presentation of Case, journalized Feb. 7, 2011, 4 (citation omitted). This assertion belies reason, however, since in the same paragraph of their Merit Brief, Appellants admit that “[a] ‘No Trespassing’ sign was posted to protect recently seeded ground on the reservoir site from further damage.” Id. at 5

⁵ Appellees are compelled to address a *non sequitor*. Appellants state, “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.” This statement seems to imply that the Sixth District should have first determined whether a taking occurred, and second, determined whether that taking was a substantial or unreasonable interference with Appellees’ property rights.

This is not the law. An actionable taking is not a two-step inquiry. Rather, *OTR* held that a “substantial or unreasonable interference with a property right” is a taking. Id. The requisite interference “may involve *** actual physical taking,” which is what Appellees alleged in their Verified Petition. Id., citing (1938), 134 Ohio St. 135. Having alleged an actual physical taking, Appellees are not required to additionally show that, qualitatively, the taking was sufficiently “substantial or unreasonable” to support relief. “Any direct encroachment *** is a taking.” *Gilbert*, 2010-Ohio-1473, ¶ 28-29, quoting (1933), 126 Ohio St. 482 (emphasis added).

(citation omitted). No reasonable fact-finder could find that when a person posts a “No Trespassing” sign they are not denying access to property.

Since there is no real dispute between Appellants and Appellees as to the operative facts of the taking, there is no just cause for requiring further proceedings on this point. The case or controversy principle requires courts to only decide those issues that are in dispute. See *Muskrat v. United States* (1911), 219 U.S. 346, 357 (“[Case or controversy] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.”); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 525, 715 N.E.2d 1062 (“Even as to proceedings seeking declaratory judgments, there must be a genuine controversy ‘between parties having adverse legal interests, of sufficient immediacy and reality.’ *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97”).

What Appellants really disputed is the amount of compensation Appellees are owed. Appellants routinely and improperly conflated the concepts of a taking and compensation for a taking. For instance, Appellants asserted, “It is clear that Respondents have not substantially or unreasonably interfered with Relators’ property interest. In fact, Respondents have improved Relators’ drainage, albeit, perhaps not exactly the way Relator would have done it himself. There has not been a taking.” Presentation of Case, journalized Feb. 7, 2011, 5.

The question of whether a taking occurred is separate and distinct from the question of how much compensation is due. This Court recently illustrated this point in *State ex. rel. Gilbert v. City of Cincinnati*. 125 Ohio St.3d 385, 2010-Ohio-1473. *Gilbert* was a mandamus case concerning the City of Cincinnati having deposited a substantial amount of sewage into a creek that flowed through private property. *Id.* at ¶ 30. This direct encroachment deprived the owners of the use and enjoyment of their property, and a writ of mandamus issued. *Id.* at ¶ 24, 31. The

concerning the City of Cincinnati having deposited a substantial amount of sewage into a creek that flowed through private property. Id. at ¶ 30. This direct encroachment deprived the owners of the use and enjoyment of their property, and a writ of mandamus issued. Id. at ¶ 24, 31. The City appealed the writ on the ground that the court of appeals did not permit the City to supplement the record with evidence that a sewage pump had been upgraded and that the taking had by then abated. Id. at ¶ 35. This Court did not find an abuse of discretion in that decision because “the issue of whether the upgrade has resolved the problem is more relevant to the issue of damages in the appropriation proceeding than to the issue of whether a taking has occurred.” Id. at ¶ 36.

A physical taking occurs when State action directly encroaches on private property; damages are irrelevant to the fact of the taking. Id. at ¶ 28-29. While Appellees admit that their prayed-for appropriation proceedings could result in a finding that Appellees suffered no damages, Appellees also understand that question is reserved for the appropriation proceedings and should be answered there. See R.C. 163.09. As to whether Appellees are entitled to a writ of mandamus, however, the damages issue is simply inapposite.

Appellants never contested the operative facts of the taking Appellees suffered. If the Sixth District failed to find that Appellees suffered a taking, there is no just cause to delay that finding, since, pursuant to the case or controversy principle, there is no actual dispute as to the taking. If this Court concludes that the Sixth District did not find that Appellees suffered a taking, Appellees request this matter be remanded to the Sixth District with instructions to enter such a finding.

Proposition of Law #3: By granting Appellees a writ of mandamus, the Sixth District concluded that Appellees lacked any other adequate remedy at law.

It is long-settled by this Court that when a private property owner suffers an involuntary taking and public authorities do not institute eminent domain proceedings, “mandamus is the appropriate action to compel *** appropriation proceedings.” *State ex rel. Blank v. Beasley*, 121 Ohio St.3d 301, 2009-Ohio-835 ¶12 (citation omitted); *State ex rel. McKay v. Kauer* (1951), 156 Ohio St. 347, 102 N.E.2d 703, paragraph three of the syllabus; *Seiler v. Norwalk*, 192 Ohio App.3d 331, 949 N.E.2d 63, 2011-Ohio-548, ¶ 49, citing 70 Ohio St.3d 104, 108, 637 N.E.2d 319, 1994-Ohio-385.

Appellants do not contest this well-established statement of the law. Appellants also do not assert that Appellees have a plain and adequate remedy at law other than mandamus. The only thing Appellants contend is that “the Court never considered whether the general laws of breach of contract provided a plain and adequate remedy in the ordinary course of law.” Merit Brief of Appellants, 4. Appellants’ contention is only that the Sixth District never asked the question; as to the answer, there seems to be no dispute.

Appellants’ contention has no merit. The Mar. 14 Judgment, in rejecting Appellant’s same argument that mandamus is not Appellees’ proper remedy, expressly reaffirmed the Jan. 18 Judgment on this point:

[I]n 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.’” [citations omitted] *** Accordingly, the contractual nature of the agreement [creating Appellees’ easement] does not in any way prevent relators from pursuing a remedy by way of a mandamus action. [citations omitted]

Mar. 14 Judgment, ¶ 7. The Jan. 18 Judgment also stated, “Respondents’ argument that the contractual nature of that [easement] agreement prevents relators from pursuing a remedy by way of a mandamus action is without merit.” Jan. 18 Judgment, 6. The Sixth District was aware

that the standard for granting a writ of mandamus includes an element “that relator has no plain and adequate remedy in the ordinary course of law.” *Id.* at 4 (citations omitted). Given that the District Court held that “the contractual nature of the agreement does not in any way prevent relators from pursuing a remedy by way of a mandamus action,” Appellant’s contention that “the Court never considered whether the general laws of breach of contract provided a plain and adequate remedy” simply has no basis.

Appellants’ contention that Appellees possess a mere contract right is another *non sequitur*. The Jan. 18 Judgment expressly stated that Appellees have an easement over Appellants’ property, not just a “contractual relationship.” Merit Brief of Appellants, 4; Jan. 18 Judgment, 6 (“[W]e find that the agreement, although contractual in nature, created an easement over respondents’ property.”).

The Sixth District succinctly explained the difference between a contract and an easement and why Appellees possess the latter:

[A]n “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 interest exists.” *McCumbers v. Puckett* (2009), 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 ***. 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[.]” *** [W]e 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.

Jan. 18 Judgment, 5-6. Appellees request this Court adopt the Sixth District's sound reasoning and recitation of the law, and once more reject Appellants' argument that Appellees ought pursue a breach of contract action rather than a writ of mandamus to seek relief for a taking of private property.

The law is well-settled that having suffered an involuntary taking, the only remedy private property owners may seek is a writ of mandamus to compel appropriation proceedings. Appellants do not contest this foundational principle of the law. What Appellants assert is that the Sixth District did not consider whether Appellees have an adequate remedy in the form of a breach of contract action. While certainly novel, that assertion has no merit because the Sixth District applied the correct standard of law for granting mandamus, which includes that Appellee have no other adequate remedy, and held that Appellees are not prevented from bringing a mandamus action. The contention that Appellants and Appellees merely stand in a contractual relationship is meritless and has already been rejected by the Sixth District.

CONCLUSION

The Sixth District granted Appellees a writ of mandamus after considering the parties' merit brief, the entire record in the case, and the appropriate standard of law. Appellants take issue with one clause in paragraph 9 of the Mar. 14 Judgment which, properly construed, should not call the entire judgment into question. Appellants did not even preserve this purported error and thus have waived it.

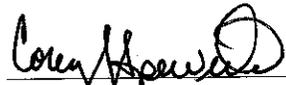
If the Sixth District did not make the requisite findings to support its judgment, Appellees request this matter be remanded to the District Court with instructions to enter such findings. Appellants have never contested the operative facts of the taking

Appellees suffered, and therefore, there is no just cause to order further proceedings on an issue which, until now, has never been in serious dispute. Appellants' real dispute is over the damages Appellees suffered as the result of the taking. Appellees request this Court affirm the Sixth District's judgment to enable this matter to proceed to appropriation hearings where the crux of this case can be litigated and at last, resolved.

Finally, there is no merit to Appellants' contention that the Sixth District never considered whether Appellees have an adequate remedy in the form of a breach of contract action. The Sixth District plainly did consider the appropriateness of seeking a writ of mandamus in this matter, and decided against Appellants. Appellants offer this Court no additional authority that calls the Sixth District's reasoning into question.

For all the foregoing reasons, Appellees respectfully request this Honorable Court affirm the Sixth District's grant of a writ of mandamus to compel Appellants to commence eminent domain proceedings.

Respectfully submitted,



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Counsel for Appellees



Nathan T. Oswald, Esq.
Counsel for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Appellees Stanley J. Wasserman and Kathryn A. Wasserman was sent this 22nd day of September, 2011, via ordinary U.S. mail, to the following:

Robert G. Hart
Director of Law
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Nathan T. Oswald, Esq.
Counsel for Appellees

Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

▣ Chapter 163. Appropriation of Property (Refs & Annos)

▣ Civil Actions; Procedure

→ **163.09 Declaration of value and damages; time for assessment of compensation by jury; hearings**

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, and no approval ordered by the court to a settlement of the rights of all necessary parties, the court, on motion of a public agency, shall declare the value of the property taken and the damages, if any, to the residue to be as set forth in any document properly filed with the clerk of the court of common pleas by the public agency. In all other cases, the court shall fix a time, within twenty days from the last date that the answer could have been filed, for the assessment of compensation by a jury.

(B)(1) When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. Upon those matters, the burden of proof is upon the agency by a preponderance of the evidence except as follows:

(a) A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.

(b) The presentation by a public utility or common carrier of evidence of the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation.

(c) Approval by a state or federal regulatory authority of an appropriation by a public utility or common carrier creates an irrebuttable presumption of the necessity for the appropriation.

(2) Subject to the irrebuttable presumption in division (B)(1)(c) of this section, only the judge may determine the necessity of the appropriation. If, as to any or all of the property or other interests sought to be appropriated, the court determines the matters in favor of the agency, the court shall set a time for the assessment of compensation by the jury not less than sixty days from the date of the journalization of that determination, subject to the right of the parties to request mediation under section 163.051 of the Revised Code and the right of the owner to an immediate appeal under division (B)(3) of this section. Except as provided in division (B)(3) of this section, an order of the court in favor of the agency on any of the matters or on qualification under section 163.06 of the Revised Code shall not be a final order for purposes of appeal. An order of the court against the agency on any

of the matters or on the question of qualification under section 163.06 of the Revised Code shall be a final order for purposes of appeal. If a public agency has taken possession prior to such an order and such an order, after any appeal, is against the agency on any of the matters, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (A)(2) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(3) An owner has a right to an immediate appeal if the order of the court is in favor of the agency in any of the matters the owner denied in the answer, unless the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure, for the purpose of making or repairing roads which shall be open to the public without charge, for the purpose of implementing rail service under Chapter 4981. of the Revised Code, or under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code or by a public utility owned and operated by a municipal corporation as the result of a public exigency.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court, with the consent of the parties, may order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

(F) If an answer is filed under section 163.08 of the Revised Code with respect to the value of property, the trier of fact shall determine that value based on the evidence presented, with neither party having the burden of proof with respect to that value.

(G) If the court determines the matter in the favor of the owner as to the necessity of the appropriation or whether the use for which the agency seeks to appropriate the property is a public use, in a final, unappealable order, the court shall award the owner reasonable attorney's fees, expenses, and costs.

CREDIT(S)

(2007 S 7, eff. 10-10-07; 2004 H 411, eff. 5-6-05; 1987 H 57, eff. 9-10-87; 1969 H 1; 132 v H 188, H 132; 131 v S 94)

Current through 2011 Files 1 to 27, 29 to 34, 36 to 39, 41 and 44 of the 129th GA (2011-2012), apv. by

Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

▣ Chapter 163. Appropriation of Property (Refs & Annos)

▣ Miscellaneous Provisions

→ **163.63 Condemnation or eminent domain deemed pursuant to chapter**

Any reference in the Revised Code to any authority to acquire real property by “condemnation” or to take real property pursuant to a power of eminent domain is deemed to be an appropriation of real property pursuant to this chapter and any such taking or acquisition shall be made pursuant to this chapter.

CREDIT(S)

(2007 S 7, eff. 10-10-07)

Current through 2011 Files 1 to 27, 29 to 34, 36 to 39, 41 and 44 of the 129th GA (2011-2012), apv. by 7/15/2011, and filed with the Secretary of State by 7/18/11.

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United States Code Annotated Currentness

Constitution of the United States

▣ Annotated

▣ Amendment II. Right to Bear Arms

→ **Amendment II. Right To Bear Arms**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Current through P.L. 112-28 approved 8-12-11

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