

No. 2013-1196

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IN THE SUPREME COURT OF OHIO

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STATE OF OHIO, Ex Rel. RICHARD ROHRS, *et al.*

Plaintiffs-Appellants

v.

RANDOLPH GERMANN, *et al.*

Defendants-Appellees.

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On Appeal from the Henry County Court of Appeals, Third Appellate District, Case No. 7-12-21  
2013-Ohio-2497

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DEFENDANTS-APPELLEES' MEMORANDUM  
IN OPPOSITION TO JURISDICTION

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I. EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE NOT OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Appellants' two propositions of law present neither an issue of public or great general interest nor suggests a substantial constitutional question. The Third Appellate District mainly relied upon and applied this Court's recent decisions in *State ex rel. Blank v. Beasley*, 121 Ohio St. 3d 301, 2009-Ohio-835, 903 N.E. 3d 1196 and *State ex rel. Doner v. Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N.E. 2d 1235 in unanimously affirming summary judgment for appellees and the denial of appellants' motion for issuance of a writ of mandamus brought pursuant to Article I, Section 19 of the Ohio Constitution. See *State ex rel. Rohrs v. Germann*, 2013-Ohio-2497 (3d Dist.) at ¶¶ 43-50. The Third Appellate District concluded the trial court did not err in overruling appellants' motion for a writ of mandamus on the merits, based on the record before it. *Id.* at ¶¶ 52-58.

Appellants' first proposition of law is irrelevant and immaterial. The Third Appellate District rejected appellants' request for a writ of mandamus on the merits, not because leaseholds and growing crops do not come within Article I, Section 19 of the Ohio Constitution or they lacked standing. This proposition also shows a lack of understanding of the Rules of Appellate Procedure and the role and function a reviewing court has when reviewing a lower court's judgment or final order.

Appellants' second proposition of law should be rejected because it violates Article I, Section 19 of the Ohio Constitution and undermines and reverses well-established, long-standing Ohio law on taking/mandamus claims brought under this constitutional provision. This proposition strikes the phrase "taken for public use" from Article I, Section 19 of the Ohio Constitution; reverses and overturns over 100 years of this Court's myriad consistent

decisions regarding mandamus actions and the three prerequisites a relator must show for the issuance of such a writ; and exempts relators from the burden of proof this Court recently and unanimously reaffirmed as a matter of Ohio law they must meet to be entitled to this extraordinary relief--clear and convincing evidence. *Doner*, at ¶3 of the syllabus. This second proposition of law also circumvents R.C. Chapter 2744 and abolishes governmental immunity to the extent it imposes absolute liability on political subdivisions regarding governmental functions. This Court in *Beasley* warned about and rejected this scenario. *Beasley*, at ¶25.

There is nothing unique about this case that makes appellants' two propositions of law of public or great general interest or presents a substantial constitutional issue. Appellants brought this claim for mandamus per Article I, Section 19 of the Ohio Constitution and filed a motion for the issuance of such a writ of mandamus in the trial court. On appeal, the Third Appellate District addressed appellants' claim as to whether they were entitled to relief in mandamus under Article I, Section 19 of the Ohio Constitution. The Court of Appeals noted the well settled Ohio law on mandamus this Court has promulgated and detailed; and followed the law and applied this Court's decisions in *Beasley* and *Doner* that involved claims of flooding. After such law and record review, the Third Appellate District unanimously affirmed summary judgment and rejected appellants' motion for the issuance of a writ of mandamus for the numerous reasons set forth in the opinion. *Rohrs*, 2013-Ohio-2497, ¶s 43-58. This Court would be going over the same legal grounds it has recently faced and addressed in *Beasley* and *Doner* in accepting this appeal.

Appellants' two propositions of law should be rejected and this Court should decline to exercise jurisdiction in this case.

## II. STATEMENT OF THE CASE AND FACTS.<sup>1</sup>

### A. The Events.

Gerald Westhoven at all times was the landowner of farm land located east and west of County Road 3 in Henry County. Westhoven approached Henry County Engineer Randolph Germann about cleaning the ditch on the east side of County Road 3, to help alleviate the drainage/flooding problems he was having with his property.

An inspection showed that lowering and widening the ditch was not a viable solution because the ditch was right next to the road. The proposed solution, one that met with Westhoven's approval, was to install a larger new plastic storm pipe in the open ditch and fill in the ditch. This plan would help address the existing draining/flooding situation in the area and enhance road safety. For economic reasons, this project was categorized as a road safety improvement project—all costs incurred by the County.

The County Engineer would carry out this project a section per year, in the fall after harvest. The project plans included tie-ins to the plastic pipe for working field tiles that came into the ditch from the east and those County metal crossover pipes still of use that came into the open ditch from the west underneath the road. No field tiles came under County Road 3 directly across from Westhoven's 81 acre field that appellants later rented. County crossover culvert pipes determined to be no longer in use would be filled with LSM 50 as a road safety measure, to help prevent any road hazard from the collapse of any such pipe. All work would be (and was done) on the County's right-of-way.

The work done by the County Engineer that underlies this action occurred in the fall

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<sup>1</sup>Each fact set out here is properly supported in the record. This is noted because appellants six times state and claim there was no drainage outlet from the subject rented field other than an unknown catch basin located 45 feet south of the rented field, directly across from a field owned by someone else. See Appellants' Memorandum in Support of Jurisdiction, pp 3-5. Questioning the relevance, this persistent assertion lacks any evidentiary basis and is simply not true.

of 2002 in Phase III. Carrying out Phase III, county employees Rick Murray and Paul Walker determined a County crossover pipe running perpendicular to the Saul Farm property approximately 45 feet south of Westhoven's 81 acre field was no longer in use, based upon the amount of debris where the pipe emptied into the open ditch. Aware that the Saul Farm had recently been retiled, with the drainage from that field going west toward the river and away from County Road 3, after reporting and consulting with the County Engineer's surveyor, the decision was made not to tie this pipe into the new drainage system, but fill it with LSM 50 slurry.

Beginning this procedure, the County Engineer discovered this crossover pipe came out of an unknown buried catch basin not on the plans located on the west side of the road adjacent to the Saul Farm, approximately 45 feet south of Westhoven's 81 acre field. As the catch basin also contained a fair amount of debris and berm material, the decision was made to continue with filling the crossover pipe with LSM 50.

Seven months later in May of 2003, appellants and Westhoven agreed to and signed a one-year lease for appellants to rent the 81 acre field north of the Saul Farm that bordered County Road 3 on the west to plant tomatoes. Westhoven gave appellants assurances this field was tiled and had adequate drainage to plant tomatoes, which was factored into the lease price.

Appellants first observed water was not draining from this rented field in July, 2003. Appellants were aware the County Engineer had recently completed a project in the vicinity of the flooding and contacted the County Engineer. The County Engineer observed one to five acres with standing water.

After the 2003 harvest, the County Engineer worked with Westhoven to locate field tile in this 81 acre field. Westhoven was on site at the scene and was personally and

directly involved in these efforts. The County Engineer's efforts to locate any tile on Westhoven's field were all done at and with Westhoven's direction and approval, although Westhoven did not know where the tile existed in this field or which way the field drained. Efforts included trenching 40-50 feet into the Saul Farm/Westhoven fields along the boundary line, and digging in areas where Westhoven told the County Engineer to dig.

Although these efforts were not successful, the County Engineer at its own cost at this time installed a new catch basin with an open grate for surface water runoff near the southeast corner of Westhoven's 81 acre field and a crossover pipe from this catch basin under County Road 3 to the new drainage pipe system installed in the fall of 2002, to enable Westhoven to hook this field into the system if Westhoven so desired. At this time the County Engineer also fixed and reinforced the top of the catch basin located at the northeast corner of the 81 acre field appellants were renting that had been damaged by farm machinery running over it when entering and exiting the field, to enable this outlet to again handle surface water runoff from the northern section of this field.

Appellants verbally renewed the lease on this field with Westhoven in 2004, 2005 and 2006 at the same monetary amount as the initial lease.

In March of 2007, a joint excavation effort involving the parties discovered an eight-inch tile coming from the northwest from Westhoven's field. This was the County Engineer's first awareness and knowledge of such a tile. Murray and Walker denied a seed bag found at that time was intentionally placed into the field tile. They explained the seed bag was placed in the catch basin to be a funnel and barrier to minimize waste when the County crossover pipe was being filled with LSM 50 in October of 2002. The bag was simply left in the catch basin as it would not be going anywhere. If Westhoven or anyone else had reported the existence of this field tile or it had been found, the crossover pipe

and catch basin would not have been filled with LSM 50.

B. Statement of the Case.

Appellants' filed a ten count first amended complaint on June 22, 2006 that also added eight (8) County Engineer employees as defendants, individually and as employees of the County Engineer; sued the County Engineer Randolph Germann individually; and added the Henry County Commissioners as an entity. The third count comprised appellants' claim for writ of mandamus for an alleged taking under Article I, Section 19 of the Ohio Constitution.

On April 13, 2007, appellees filed two motions for summary judgment. One motion was that five county employees were entitled to summary judgment because they had no involvement with this project in 2002. The second summary judgment motion was filed on behalf of the County Engineer, the remaining named county employees and the Henry County Commissioners, involving issues of immunity, lack of taking/mandamus claim, etc.

On February 28, 2012, the trial court ruled on the two motions for summary judgment on the causes of action that were on record in July of 2007. The trial court granted summary judgment on all causes of action except for two claims the trial court allowed appellants to add after oral arguments; and denied summary judgment because a question of fact existed whether appellants were entitled to a writ of mandamus.

On August 8, 2012, the County Engineer and remaining defendants filed another motion for summary judgment. This motion addressed the two causes of action the trial court had later allowed and, with appellants acknowledging whether a writ of mandamus should be issued is a legal issue, lacked standing to assert such a claim.

On August 29, 2012, appellants filed their opposing memorandum for summary

judgment and motion for issuance of a writ of mandamus. The ensuing briefing covered the agreed three prerequisites a relator must show for the issuance of a writ of mandamus under Article I, Section 19 of the Ohio Constitution; a relator's burden of proof to be entitled to such a writ; and the other issues raised by the parties' motions.

On October 4, 2012, the trial court granted appellees' summary judgment motion in its entirety and denied appellants' motion for a writ of mandamus for lack of standing.

On appeal, the issue of mandamus was briefed, with appellants requesting the Third Appellate District to issue a writ of mandamus. On June 18, 2013, the Court of Appeals unanimously affirmed the trial courts' decisions on the issues appellants had appealed—immunity<sup>2</sup>, mandamus and a 42 U.S.C. §1983 claim. The Third Appellate District concluded the trial court “did not err in overruling the Rohrs' motion for a writ of mandamus” for all the reasons set forth in the opinion. See *Rohrs*, 2013-Ohio-2497, ¶¶ 52-58.

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<sup>2</sup>Appellants three times in their memorandum erroneously assert that the Court of Appeals concluded or found no evidence of negligence on the part of county employees. See Appellants' Memorandum in Support of Jurisdiction, pp. 2, 3, 4. The Third Appellate District did not address negligence at all when reviewing the actions and conduct of the county employees to determine if they had immunity under R. C. 2744.03 (A)(6). *Rohrs*, ¶¶ 37 & 39. Negligence is not and is never an issue under R.C. 2744.03 (A)(6) regarding a political subdivision employee's immunity. The issue is whether the employee's acts “were with malicious purpose, in bad faith, or in a wanton or reckless manner”. The Third Appellate District actually found was “There is no evidence in the record . . . that these employees acted with a malicious purpose or in a wanton or reckless manner in executing the County's project plans”. *Rohrs* ¶40. A substantial difference exists between what is negligent conduct and what would be reckless conduct. *Anderson v. City of Massillon*, 124 Ohio St. 3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶4 of the syllabus. Even more of a substantial difference presumably exists between negligent conduct and malicious purpose or wanton conduct.

Appellants also misconstrue the Third Appellate District's finding the county employees' actions were “unintentional and accidental”; although footnote 2 in their Memorandum quoting from the Rohrs opinion and footnote 3 highlight and document this misconception. The Court of Appeals found the “rendering the field tile inoperable was unintentional and accidental” by the county employees, not their conduct to fill the crossover pipe with LSM 50. See *Rohrs*, ¶55. The county employees did not intend or know that the consequences of their acts would be the field tile being plugged and a backup of water would occur in that area of the field. The county employees did not know, much less desire to cause such ensuing consequences nor believed such consequences were substantially certain to result to constitute intent, as appellants define “intent” in footnote 3 to their memorandum.

On July 29, 2013, appellants filed their notice of appeal with this Court.

III. ARGUMENT OPPOSING APPELLANTS' PROPOSITIONS OF LAW:

A. Appellants' Proposition of Law No. 1.

Leaseholds and growing crops are "private property" within the meaning of Article I, Sec. 19 of the Ohio Constitution.

A reading of the Third Appellate District's decision regarding appellants' mandamus claim/motion establishes this proposition of law is irrelevant and immaterial. The Court of Appeals did not affirm summary judgment and the denial of appellants' motion for a writ of mandamus because they lacked standing or that leaseholds and growing crops do not come within Article I, Section 19 of the Ohio Constitution. The Third Appellate District concluded the trial court did not err in overruling appellants' motion for a writ of mandamus based upon the many other reasons it cited. See *Rohrs*, 2013-Ohio-2497, ¶¶ 52-58.

App. R. 12 (A)(1) of the Rules of Appellate Procedure provides that a court of appeal's power and authority is to "(a) Review and affirm, modify, or reverse the judgment or final order appealed . . .". App. R. 12 (B) further provides: When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned . . . and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly." These rules establish that a lower court's reasons for ruling on an issue have nothing to do and is not relevant to the reviewing court's task. The reviewing court's duty is to determine if the judgment of the lower court is correct.

App. R. 12 of the Rules of Appellate Procedure incorporates long-standing and well-established decisions from this Court regarding a reviewing court's role when reviewing a lower court decision. A reviewing court is to only examine the lower court's judgment or ruling itself. A trial court's judgment must be affirmed if the reviewing court finds any valid

grounds to support it. A reviewing court is not authorized to reverse a correct judgment merely because the trial court might have given an erroneous reason for it. “By repeated decisions of this court it is definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof.” *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E. 2d 658, 663 (1944). “Reviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court’s reasons are erroneous.” *State ex rel. McGrath v Ohio Adult Parole Authority*, 100 Ohio St. 3d 72, 2003-Ohio-5062, 796 N.E. 2d 526, ¶18.

Appellants’ proposition of law also does not comport with the Third Appellate District’s ruling. It does not present an issue in the case. Appellants acknowledge the Court of Appeals did not address, much less affirm, the trial court’s denial of a writ of mandamus because appellants, as leaseholders growing tomatoes, lacked standing under Article I, Section 19 of the Ohio Constitution. See Appellants’ Memorandum in Support of Jurisdiction, p. 9. The Third Appellate District addressed appellants’ request for a writ of mandamus; applied the law directly on point regarding a relator seeking a writ of mandamus; and determined, for the numerous reasons given, the trial court did not err regarding its decision to overrule appellants’ motion for a writ of mandamus. None of the reasons the Third Appellate District lists in concluding appellants are not entitled to a writ of mandamus is cited in appellants’ proposition of law.

Appellants’ proposition of law should be rejected. It does not raise an issue of public or great general interest or involves a substantial constitutional question.

B. Appellants' Proposition of Law No. 2:

Where, in constructing a "road safety improvement project" upon a County road, a county without negligence or malice but solely as a result of the creation of such improvement causes floodwaters to encroach upon the land and property of another owner and deprives that owner of any of the use and enjoyment of his property, such encroachment is a taking *pro tanto* of the property so encroached upon, for which the county is liable, and the owner of such property is entitled to institute an action and have a jury impaneled to determine the compensation due him from the county for the appropriation *pro tanto* of his property.

This "slightly edited" proposition of law as appellants put it, mischaracterizes Ohio law. It violates Article I, Section 19 of the Ohio Constitution and over a century of State Supreme Court decisions on mandamus, including this Courts' two recent decisions in *Beasley* and *Doner*.

This proposition overlooks and ignores Article I, Section 19 of the Ohio Constitution and Ohio case law on "public use"; State Supreme Court pronouncements that one must bring a mandamus action in alleging a taking pursuant to Article I, Section 19 of the Ohio Constitution; the three elements of mandamus a relator must meet to be entitled to the issuance of a writ of mandamus; and the relator's burden of proof to show such entitlement by clear and convincing evidence. In addition to this proposition dismissing such basic, well-established and long-standing Ohio law, it circumvents and undermines the purpose and intent of R.C. Chapter 2744. Appellants' proposition is nothing more than an attempt to portray a tort claim as a taking claim--but without any "public use" condition or the application of Ohio law regarding mandamus actions--and, in the process, impose *carte blanche* absolute liability on a political subdivision carrying out governmental functions for any case brought alleging damage or destruction of property.

The wording and "source" for this proposition is also legally and fundamentally flawed. There is no tension, manufactured by appellants or otherwise, between this Court's decision in *Beasley* and *Lucas v. Carney*, 167 Ohio St. 416, 149 N.E. 3d 238 (1958). The

Court in *Lucas* was addressing demurrers and acknowledged that “We are simply deciding that the demurrers to the amended petitions should have been overruled.” *Id.* at p. 426, 149 N. E. 2d at 245. Before reaching its decision, *Lucas* noted the basic reliance and application of Article I, Section 19 of the Ohio Constitution to the case. *Lucas* acknowledges and cites *City of Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102, ¶1 of the syllabus which states: “Any direct encroachment upon land which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property for which he is guaranteed a right of compensation by section 19 of the Bill of Rights. *Lake Erie & Western R. Co. v. Commissioners of Hancock County*, 63 Ohio St. 23, 57 N.E. 1009, approved and followed.” (Emphasis added). *Lucas*, 167 Ohio St. at 421-422, 149 N. E. 2d at 242.

This Court in *Beasley* also cited ¶1 of the syllabus in *Sheen* as authority to state: “We have previously emphasized that a taking requires that the claimed encroachment subject the private property to a public use.” *Beasley*, 121 Ohio St. 3d at 305, 903 N.E. at 1200-1201, ¶18. The basic common thread between *Beasley* and *Lucas*--as with all the State Supreme Court decisions--is Article I, Section 19 of the Ohio Constitution. This is the constitutional provision that gives one the ability to bring an action against a governmental entity for property “taken for public use”.

This fundamental core legal principle that a taking must be an encroachment that subjects the land to a public use is notably absent in appellants’ proposition of law. Appellants delete this constitutional requirement of public use because the Third Appellate District found “the record establishes that the County appropriated no benefit” and that “the Rohrs have failed to demonstrate that any injury incurred to their private property was done so by the County Engineer for public use or to accomplish a public use so as to constitute

a taking under either the U.S. or Ohio Constitutions” in rejecting the issuance of a writ of mandamus. *Rohrs*, ¶¶ 54-55. This requirement of “taken for public use” however, is firmly embedded in the Ohio Constitution and in this Court’s numerous decisions interpreting Article I, Section 19 of the Ohio Constitution.

This Court has also consistently held the appropriate means for a property owner to show a taking has occurred per Article I, Section 19 of the Ohio Constitution is an action seeking issuance of a writ of mandamus. This Court in *Doner* unanimously reaffirmed and declared as a matter of law:

“Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings when an involuntary taking of private property is alleged. Any direct encroachment upon land that subjects it to a public use that excludes or restricts the dominion and control of the owner over it is a taking of property, for which the owner is guaranteed a right of compensation under Section 19, Article I of the Ohio Constitution. (*State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St. 3d 59, 63, 765 N.E. 2d 345; and *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102, approved and followed).” *Doner*, ¶4 of the syllabus.

This Court has declared this to be the law long before and repeated again in *Lucas*, *Beasley*, *Doner* and in its many other decisions where a taking is alleged under this constitutional provision.

This Court has likewise consistently held that for an extraordinary writ of mandamus to issue, a relator must demonstrate he has 1) a “clear legal right” to the relief prayed; 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 at law. See eg., *State ex rel. Westchester Estates, Inc. v. Bacon* 61 Ohio St. 2d 42, 399 N.E. 2d 81, (1980) ¶1 of the syllabus; *State ex rel. Harris v. Rhodes* 54 Ohio St. 2d 41, 374 N.E. 2d 641 (1978); *Shelly Materials, Inc. v. Clark Cty. Bd. Commrs.*, 115 Ohio St. 3d 337, 2007-Ohio-5022, 875 N.E. 2d 59, ¶15. Furthermore, as this Court again recently reaffirmed in *Doner* as a matter of law: “Relators

in mandamus cases must prove their entitlement to the writ by clear and convincing evidence. (*State ex rel. Pressley v. Industrial Comm.* (1967), 11 Ohio St. 2d 141, 40 O. O. 2d 141, 228 N. E. 2d 631; and *State ex rel. Henslee v. Newman*, (1972), 30 Ohio St. 2d 324, 59 O.O. 2d 386, 285 N. E. 2d 54, approved and followed).” *Doner*, ¶3 of the syllabus.

Appellants’ proposition of law further ignores what this Court recognized in *Doner* in adopting a two-part test to separate a taking from a tort claim. “[N]ot every ‘invasion’ of private property resulting from governmental activity amounts to an appropriation”. *Doner*, 130 Ohio St. 3d at 459, 958 N.E. 2d at 1248, ¶64. In addition to changing the Ohio Constitution and Ohio law on mandamus, appellants’ second proposition of law circumvents and abolishes R.C. Chapter 2744 regarding governmental functions to the extent any case involves an allegation of property damage or destruction. The Third Appellate District noted this Court’s concerns in *Beasley* about attempts to turn a tort claim into a taking claim. *Beasley* acknowledged Article I, Section 19 of the Ohio Constitution requires “a property owner to prove something more than damage to his property in order to demonstrate a compensable taking.” *Beasley* at ¶17, citing *Fejes v. Akron*, 5 Ohio St. 2d 47, 52, 213 N.E. 2d 353 (1966). *Beasley* expressed concerns about the crippling effects of treating tort claims as taking claims. *Beasley*, ¶25. See also *Doner*, ¶5 of the syllabus and ¶64 on the two part test promulgated to determine whether an “invasion” by a governmental activity is an appropriation or a tort claim. The Court of Appeals cited and applied this test and concluded no taking had occurred. *Rohrs*, ¶s 50, 54-55.

The Third Appellate District’s opinion exemplifies what an appellate court is to do-- follow and adhere to the law as pronounced by this Court regarding Article I, Section 19 of the Ohio Constitution and mandamus, and this Court’s more recent decisions such as *Beasley* and *Doner* that addressed flooding allegedly resulting from government activity.

No need exists for this Court to revisit and go over the same issues it has covered and addressed in *Beasley* and *Doner*. This proposition of law should also be rejected.

#### IV. CONCLUSION.

No valid, legal justification exists for this Court to accept jurisdiction on either of appellants' two proposition of law. Neither presents an issue of public or great general interest nor a substantial constitutional question.

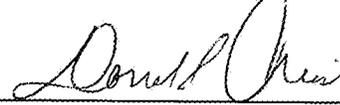
Appellants' first proposition of law has no bearing to the issues determined by the Court of Appeals. The Third Appellate District unanimously rejected appellants' request for a writ of mandamus on the merits. The Court of Appeals so concluded for a number of stated reasons, none of which has anything to do with appellants' first proposition of law.

This Court should also decline to exercise its jurisdictional discretion regarding appellants' second proposition of law. This Court would be reviewing the same issues this Court has addressed in *Beasley* and more recently and unanimously in *Doner*. Appellants' proposition of law is but an attempt to portray their tort claim as a taking claim--which would also exempt them from Article I, Section 19 of the Ohio Constitution to show a "taken for public use"; excuse them from having to prove the three elements to have a valid mandamus claim and the attendant burden of proof they must meet; and circumvent R. C. Chapter 2744.

Appellants' true complaint is that the Court of Appeals' application of well settled and established Ohio law and principles to the particular facts of this case resulted in an unanimous adverse judgment against them. Addressing such concerns are not grounds for this Court to exercise discretionary jurisdiction over this appeal. Nothing needs to be clarified, modified or changed in regards to existing law.

WHEREFORE, defendants-appellees respectfully ask this Court to decline jurisdiction over this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This will certify a copy of the foregoing Memorandum in Opposition to Motion for Jurisdiction was forwarded by ordinary U. S. Mail on this 26th day of August, 2013 to David S. Pennington, Attorney for Plaintiffs-Appellants, PENNINGTON LAW LLC, 3760 Leap Road, Hilliard, OH 43026; and to Chad A. Endsley and Leah F. Curtis, Attorneys for Amicus Curiae, 280 N. High Street, P. O. Box 182383, Columbus, OH, 43218.



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