

ORIGINAL

IN THE SUPREME COURT OF OHIO

DARLA J. HOLTkamp  
FRANK M. NAGY

No. 14-0665

Appellants

On Appeal from the  
Richland County Court of Appeals  
Fifth Appellate District  
Court of Appeals  
Case No. 13-CA-117

v.

JOINT BOARD OF COUNTY  
COMMISSIONERS, KNOX AND  
RICHLAND COUNTY, OHIO

Appellees

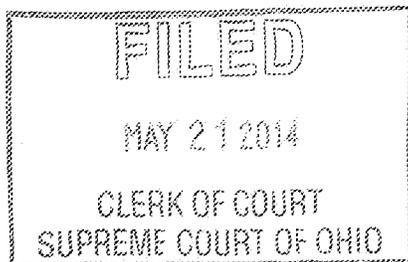
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MEMORANDUM OF APPELLEES IN RESPONSE TO MEMORANDUM IN  
SUPPORT OF JURISDICTION OF APPELLANTS DARLA J. HOLTkamp  
AND FRANK M. NAGY

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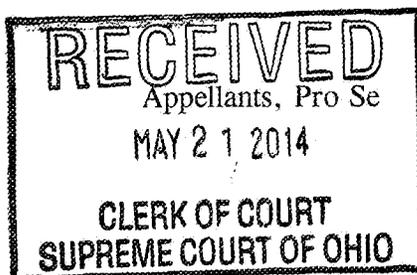
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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

A. Contrary to Appellants' claim, this case does not involve a matter of public or great general interest, but arises from a very narrow issue, namely their attempted appeal to an appellate court before the trial court has rendered a final, appealable order. In this instance, Appellants are requesting the Court to accept jurisdiction of this case following a decision by the Fifth District Court of Appeals, which granted Appellees' Motion to Dismiss Appellants' appeal for the lack of a final, appealable order. In so ruling, the Court of Appeals noted (1) that the Order of the Court of Common Pleas, General Division (the "General Division"), being appealed to it was an Order denying Appellants' "Motion for Vacation of Void Judgment"; (2) that said Order did not contain Civ.R. 54(B) language; and (3) that the cause remains pending before the General Division. While the issue here is extremely narrow, Appellants' Memorandum contains virtually all of the substantive arguments repeatedly raised and argued by them in the Court of Common Pleas of Richland County (both the Probate and General Divisions) and the Fifth District Court of Appeals.

This township road vacation appeal has a turbulent history due to the litigious nature of these pro se Appellants. After the Joint Board of the Knox and Richland County Commissioners granted the Petition to formally vacate a 679.24 foot strip of land, Appellants filed an appeal to the Richland County Probate Court. As the Probate Court proceeded to hear preliminary questions and motions under R.C. 5563.04, Appellants at various times filed the following pleadings: Motion for Final Judgment in Their Favor and Statement of Irregularities in the Proceedings before the Joint Boards of County

Commissioners; a Second Memorandum in Support of their Motion; a Post-Hearing Memorandum regarding the Applicability and Constitutionality of R.C. 5553.045 and 5553.11; Motion for a Misjoinder of Parties; Motion for Immediate Clarification of Material Fact and Terminology Used and the Necessity for Citation from the Ohio Revised Code to be Complete and Accurate; and Motion for Summary Judgment. All of their Motions were overruled by the Probate Court. After ruling on all preliminary questions and motions, the Probate Court transferred this case to the General Division for further proceedings, i.e., a jury trial. Appellants then filed their Motion for Vacation of Void Judgment, raising many of the same arguments that had already been ruled upon by the Probate Division. The General Division Judge refused to disturb those Probate Court rulings, and Appellants appealed the denial of their Motion to the Fifth District Court of Appeals. As mentioned above, that Court dismissed their appeal for lack of a final, appealable order from the trial court. A trial has still not been held in this case.

In their Memorandum, Appellants fail to address the narrow issue upon which the Fifth District ruled, but are again arguing, in both the Explanation and Argument portions of their Memorandum, the same issues that have been denied by the various courts below. Appellees will summarize their position on those broader issues below in their Responses to Appellants' Propositions of Law, although Appellees believe that such arguments are premature because the case is still pending without a trial having been conducted.

B. Contrary to Appellants' assertion, there is no substantial constitutional issue involved in this appeal relating to the lack of a final, appealable order from the trial court. As described above, Appellants have alleged multiple times throughout these proceedings and in different courts their belief that R.C. 5553.11, as amended by H.B. 318 (effective

April 1, 2009) is unconstitutional and may result in a taking of their property. All of Appellants' motions on this issue have been denied, and such argument is clearly not ripe for appeal. In any event, Appellees will summarize their position on this issue in their Response to Proposition of Law #3 below.

### **ARGUMENTS AGAINST PROPOSITIONS OF LAW**

#### **Response to Proposition of Law #1: The Order of the Probate Court denying Appellant Nagy standing in this case is valid and is supported by Ohio Law.**

The Joint Board of County Commissioners of Knox and Richland Counties on August 5, 2010 adopted a Resolution to Vacate 679.34 feet of Leedy's Lane east of State Route 95. Darla J. Holtkamp and Frank M. Nagy appealed this Resolution to the Court of Common Pleas of Richland County, Probate Division (the "Probate Court") under R.C. Chapter 5563. Appellant Holtkamp owns real property abutting this vacated roadway, but Appellant Nagy owns no property abutting or in the vicinity of this former roadway.

On August 27, 2010, Appellees filed a Motion to Dismiss Appeals and/or Appellants in the Probate Court, requesting that Frank M. Nagy be dismissed as a party to this case for lack of standing. Appellees also filed a Supplemental Memorandum on this Standing issue on April 6, 2012. The basis for Appellees' Motion and Memorandum was *Board of Commissioners of Crawford County v. Gibson*, 110 Ohio St. 290, 144 N.E. 117 (1924). In *Gibson*, this Court examined G.C. 6890 and 6891 (now R.C. 5563.01 and 5563.02), wherein an appeal of a township road vacation may be taken by "any person interested," and the Court considered this wording in light of G.C. 6892 (now R.C. 5553.04). This latter section authorizes a township road vacation petition to be signed by at least twelve "freeholders of the county residing in the vicinity of the proposed

improvement.” R.C. 5553.04. By definition, an “improvement” includes the vacation of a road. R.C. 5553.01. Further, a “freeholder” is the owner of any interest in land. *Board of Lucas County Commissioners v. Waterville Township Board of Trustees*, 171 Ohio App.3d 354, 2007-Ohio-2141, 870 N.E.2d 791, ¶ 25 (6th Dist.). This Court ruled that the words “any person interested” includes “any freeholder of the county residing in the vicinity of” the road sought to be vacated. *Gibson* at paragraph 2 of the syllabus. The evidence submitted to the Probate Court by Appellees established that Appellant Nagy had no ownership interest in any real property in this vicinity. Appellant Nagy failed to submit any evidence that he had any such ownership interest.

By Journal Entry and Order issued by the Probate Court on September 10, 2012, that Court granted Appellee’s Motion to Dismiss Appellant Nagy as a party to this action by finding that he had no ownership or leasehold interest in the property abutting Leedy’s Lane and that under applicable law, he lacks standing in this matter. (Journal Entry and Order Sept. 10, 2012, at 2.) In violation of that Order, Mr. Nagy has continued to participate in this case by signing and submitting pleadings filed in the General Division, the Fifth District Court of Appeals, and this Court. In Appellants’ Merit Brief to the Fifth District Court of Appeals, Appellants did not raise as an assignment of error the Probate Court’s finding that Mr. Nagy lacked standing. Appellants’ failure to raise this issue in the Court of Appeals acts as a waiver and precludes them from raising this standing issue for the first time in their Memorandum to this Court. *Portage Cty. Bd. Of Commrs v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 86.

Because Mr. Nagy is not a licensed attorney and lacks standing in this matter, Appellant Nagy is prohibited from representing or attempting to represent any party in

this litigation, specifically Appellant Holtkamp. R.C. 4705.01. The practice of law is not restricted to appearances in court, but also encompasses giving legal advice and the preparation of pleadings and other papers incident to actions and other special proceedings. *Columbus Bar Assn. v. Smith*, 96 Ohio St.3d 156, 2002-Ohio-3607, 772 N.E.2d 637, ¶ 5. See also Gov. Bar R. Section 2(A). Such conduct constitutes the unauthorized practice of law, a misdemeanor of the first degree. R.C. 4705.07 and R.C. 4705.99.

**Response to Proposition of Law #2: Township Trustees have authority to petition for the vacation of a portion of a township road and County Commissioners have authority to grant such petition even if that portion of the roadway previously, but no longer, is occupied by a county bridge.**

Appellants first argue that the Township Trustees overstepped their authority by attempting to vacate a county bridge. Previously, they have argued that the Township Trustees overstepped their authority by petitioning the Joint Board to vacate Leedy's Lane because the makeshift structure that crosses the Kokosing River (the "Kokosing") is a "county bridge," is part of the "county system" of bridges, and is not "a township bridge or culvert." Clearly, the Revised Code gives township trustees authority to petition the board of county commissioners to vacate not only any township road, but also any portion of a township road. R.C. 5553.045. Thus, the township trustees did not overstep their authority.

Further, the makeshift structure that crosses the Kokosing is neither a "county bridge" nor part of the "county system" of bridges. Under the Revised Code, the county engineer is responsible for the "construction, maintenance, and repair of all bridges \* \* \* constructed under the authority of any board within and for the county." R.C. 315.08. The bridge that the Boards of County Commissioners jointly constructed in 1911 on

Leedy's Lane across the Kokosing was a county bridge, as it was constructed "under the authority of [a] board within and for the county." *Id.* This bridge, however, no longer exists, having been privately replaced by a flat bed trailer long before Appellant Holtkamp acquired any interest in the abutting land and more recently having been replaced by privately installed cement culverts. This makeshift structure is not a "county bridge" because it was not "constructed under the authority of [a] board within and for the county." *Id.*

Next, Appellants erroneously claim that Appellees have argued that there has been no final, appealable order from the Board of County Commissioners. This is a total misrepresentation. Appellees have consistently asserted that the Resolution of the Joint Board of Commissioners of Knox and Richland Counties was a final, appealable order and is not void, and the courts below have agreed. However, Appellees have argued that the decision of the General Division denying Appellants' Motion to Vacate Void Judgment was not a final, appealable order from that court, and the Fifth District Court of Appeals agreed by dismissing Appellants' appeal.

Appellants have repeatedly argued below that the Probate Court never had jurisdiction over this case because the Joint Board failed to hold a hearing on compensation and damages, which rendered its decision to vacate not a final appealable order under R.C. 2505.02. Appellants relied below on *Southworth v. Pike County Board of Commissioners*, 4th Dist. Pike No. 08CA783, 2009-Ohio-566, and *Jeffers v. Board of Athens County Commissioners*, 4th Dist. Athens No. 06CA39, 2007-Ohio-2458. The Fourth District Court of Appeals held in *Southworth* that the order of a board of county commissioners to vacate a road does not become a final appealable order until the board

either holds a hearing on damages to an abutting landowner or compensates the landowner for any damages the vacation causes. *Southworth* at ¶ 12. The Fourth District held in *Jeffers* that when a board of county commissioners vacates a road, it “must conduct a compensation and damages hearing when the owner’s property abuts the potential vacated road and the parties cannot agree on compensation.” *Jeffers* at ¶ 1.

Appellants’ argument is unavailing for two reasons. First, R.C. 2505.02 does not apply to an order of a board of county commissioners to vacate a road. That section does apply to *most* final orders of boards of county commissioners and other political subdivisions of the state. *See* R.C. 2506.01(A). However, Chapter 5563 of the Revised Code is “exclusively applicable” to appeals of orders of boards of county commissioners to vacate roads. *State ex rel. Lindenschmidt v. Bd. of Commrs of Butler Cty.*, 72 Ohio St.3d 464, 468, 650 N.E.2d 1343 (1995); *see also Acme Eng’g Co. v. Jones*, 150 Ohio St. 423, 83 N.E.2d 202 (1948), paragraph one of the syllabus (“A special statutory provision which applies to a specific subject matter constitutes an exception to a general statutory provision covering other subjects as well as the specific subject matter which might otherwise be included under the general provision.”)

Second, even if this Court were to credit Appellants’ citations to two Fourth District cases, *Jeffers* and *Southworth* are no longer good law even in the Fourth District. In holding that a board of county commissioners is required to hold a hearing on compensation and damages before vacating a road, both *Jeffers* and *Southworth* relied on R.C. 5553.10. *See Southworth*, 4th Dist. Pike No. 08CA783, 2009-Ohio-566, ¶ 8; *Jeffers*, 4th Dist. Athens No. 06CA39, 2007-Ohio-2458, ¶¶ 9-10. R.C. 5553.10 provides, in pertinent part, that “[n]o road shall be opened or property taken until all compensation

and damages allowed are paid, or the amount thereof, as allowed in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.” Sections 163.01 to 163.22 of the Revised Code set forth procedures for the taking of private property for public use.

Prior to the Joint Board vacating Leedy’s Lane on August 5, 2010, the General Assembly amended R.C. 5553.11 in H.B. 318, effective April 9, 2009, to specifically exempt road vacation hearings from what the Fourth District in *Jeffers* and *Southworth* construed in R.C. 5553.10 as a requirement that a board of county commissioners consider compensation and damages at the board’s final hearing. *See* R.C. 5553.11 (Emphasis added.) (“If the proceeding is for an improvement *other than the vacation of a road* and the board of county commissioners, at its final hearing on the proposed improvement, orders the improvement established, it shall proceed in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.”). The Fourth District has since recognized that R.C. 5553.11 “specifically except[s] vacations of roads from ‘sections 163.01 to 163.22 of the Revised Code.’” *State ex rel. Jeffers v. Athens Cty. Comms*, 4th Dist. Athens Nos. 10CA3, 10CA15, 2011-Ohio-675, ¶ 30, citing R.C. 5553.11.

Thus, for the foregoing reasons, the Township Trustees had authority to petition for the vacation of Leedy’s Lane, and the Joint Board’s Resolution vacating Leedy’s Lane was a final, appealable order.

**Response to Proposition of Law #3: The 2009 amendment to R.C. 5553.11 is not unconstitutional.**

Appellants essentially argue that the Joint Board’s order to vacate Leedy’s Lane constituted a taking and that because the 2009 amendment to R.C. 5553.11 eliminated the requirement that boards of county commissioners conduct eminent domain proceedings

before adopting a resolution to vacate a road, that statute as amended is unconstitutional. Under Ohio law, when “statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts.” (Citation omitted.) *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 38. Appellants’ argument is unavailing because under the facts of this case, as presented by Appellants, the Joint Board’s order to vacate Leedy’s Lane does not constitute a taking.

Appellants have incorrectly argued that any time a board of county commissioners vacates a road, the vacation results in a taking of the property of landowners whose property abuts the vacated road. The vacation here did not restrict Appellants’ dominion or control over Leedy’s Lane because Leedy’s Lane was not closed up and because the vacation did nothing to restrict Appellants’ use of Leedy’s Lane or impair Appellant Holtkamp’s access to her property in any way. For these reasons, the road vacation here does not constitute a taking.

Appellants previously cited to *Kinnear Manufacturing Company v. Beatty*, in which the Ohio Supreme Court held that “an abutting lot owner has such an interest in the portion of the street on which he abuts, that the closing of it up, or the impairment of its use as a means of access, or the addition of a new burden, is a taking of private property for a public use, and cannot be done without compensation.” (Citations omitted.) *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 282, 62 N.E. 341 (1901). The Court in *Kinnear* went on to explain that when the vacated portion “furnishe[s the owner] the only

means of access to his property \* \* \* he is regarded as having an easement in the road or street.” *Id.*, citing *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N.E. 595 (1897).

Although the Court in *Kinnear* does not explain the meaning of the phrase “closing up,” the Court in *McQuigg* clarifies that “closing up” a road is not the same thing as vacating a road. In *McQuigg*, the Court held that a landowner was entitled to an injunction when township trustees who had already vacated a road then also “threaten[ed] to obstruct or close up such road,” where “such threatened action w[ould] destroy the easement of an owner of adjacent land in such road, and no other road reasonably suitable to meet the necessities of such owner ha[d] been provided.” *McQuigg* at paragraph two of the syllabus. The Court in *McQuigg*, however, did not find the vacation itself to be unlawful; rather, it was the *additional* act of closing up or obstructing the road without compensating the landowner that was unlawful and entitled the landowner to an injunction: “The effect of the judgment of the trustees ordering the road vacated, is to relieve the public from any duty to keep it in repair, but it does not authorize the trustees, or anybody else, to close the road up, or obstruct it, and thus deprive [the landowner] of the right to travel it.” *Id.* at 654-655.

Unlike in *McQuigg*, the Joint Board here did nothing to close up a road, impair Appellant Holtkamp’s access to her property, or add a new burden. Even though Appellant Holtkamp has access to her property through and along a substantial portion of her property which abuts on State Route 95, she still has an easement, pursuant to *McQuigg* and *Kinnear*, in Leedy’s Lane following its vacation. The Joint Board did nothing to destroy that easement. When Ms. Holtkamp and her husband purchased the property years ago, the county bridge that Appellants argue still exists had long since

failed and had been replaced by a flat-bed trailer. While Appellants argue, in an effort to force the Joint Board to pay for a new bridge, that the road vacation was a taking, Appellants fail to demonstrate that by vacating Leedy's Lane, the Joint Board did anything to close up Leedy's Lane or impair Appellants' ability to use Leedy's Lane as a means to access Ms. Holtkamp's property.

Because the Joint Board's vacation of Leedy's Lane did not restrict Appellant Holtkamp's use of Leedy's Lane for access purposes, the vacation was not a taking. And because the vacation was not a taking, Appellants fail to present clear and convincing evidence of a presently existing set of facts that makes R.C. 5553.11 unconstitutional as applied here.

**Response to Proposition of Law #4: Appellants' rights were not violated when the Court failed to fix a jury trial date within the twenty days per R.C. 5563.05, as the statute's provision is directory, not mandatory.**

The Probate Court's September 14, 2012 Judgment Entry states that the proceedings before that court had been regular and that Appellants' appeal of the Joint Board's decision to vacate had been perfected according to law. R.C. 5563.05 states that, upon such findings, "the judge shall fix a day, not more than twenty days after the finding, for the trial of the case by jury." If Appellants' argument is that the Probate Court erred and therefore lacked jurisdiction by failing to fix a trial date within twenty days of its September 14, 2012 order, their claim has no merit. This Ohio Supreme Court holds held that deadlines such as the one in R.C. 5563.05 are directory, not mandatory:

[E]ven with "shall" as the operative verb, a statutory time provision may be directory. As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure. This is so unless the nature of the act to be performed or the phraseology of the statute or of

other statutes relating to the same subject-matter is such that the designation of time must be considered a limitation upon the power of the officer.

(Citations omitted.) *In re Davis*, 84 Ohio St.3d 520, 522, 705 N.E.2d 1219 (1999) This Court held in *Davis* that “the seven-day time limit set forth in R.C. 2151.35(B)(3) is directory, not mandatory, and failure to comply with it will not deprive a [juvenile] court of jurisdiction to decide the issue.” *Id.* at 523.

The phraseology of R.C. 5563.05 in no way suggests that this twenty-day time limit is to be considered a limitation on a court’s jurisdiction; Appellants fail to identify any other statutes relating to the same subject matter that include time constraints that limit a court’s jurisdiction; and R.C. 5563.05 does not mandate any particular result if a court fails to fix a trial date within twenty days of a petitioner’s perfection of his appeal to that court. For these reasons, the twenty-day time limit in R.C. 5563.05 is directory, and Appellants’ argument lacks any merit. Thus the General Division still has jurisdiction to proceed with this case despite a failure to fix a jury trial date within twenty days after the Order that all preliminary questions and motions had been decided.

While Appellants mention Civ.R. 59(A)(9) in their Proposition of Law #4, they make not mention of this rule in their argument. In any event reliance on that Rule is misplaced because it relates to a request for a new trial after the conclusion of an initial trial. Here, there has not yet been any trial.

### **CONCLUSION**

For all the reasons set forth in the foregoing analysis, Appellees request that this Court deny Appellants’ discretionary appeal and decline jurisdiction over this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing documents was served upon appellants Darla J. Holtkamp and Frank M. Nagy at 21750 Ankneytown Road, Butler, Ohio 44822, by regular U.S. mail, postage prepaid, on May 19<sup>th</sup>, 2014.

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