[Cite as *State ex rel. Turkovich v. Proctor* , 2004-Ohio-6699.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO ex rel. JOHN E. TURKOVICH,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2004-T-0081**
- vs -	:	
GORDON PROCTOR, DIRECTOR, STATE OF OHIO, DEPARTMENT OF TRANSPORTATION,	:	
Respondent.	:	

Original Action for a Writ of Mandamus.

Judgment: Petition dismissed.

Gilbert L. Rieger and *David D. Daugherty*, 410 Mahoning Avenue, N.W., P.O. Box 1429, Warren, OH 44482-1429 (For Relator).

Jim Petro, Attorney General, and *Janice Y. Schwartz*, Assistant Attorney General, 615 West Superior Avenue, 11th Floor, Cleveland, OH 44113-1899 (For Respondent).

PER CURIAM

{¶1} This action in mandamus is presently before this court for consideration of the motion to dismiss of respondent, Gordon Proctor, Director of the Ohio Department of Transportation. As the sole basis for his motion, respondent contends that this action cannot go forward before this court because we lack the authority to grant the specific relief sought by relator, John E. Turkovich, in his petition. For the following reasons, we

conclude that the motion to dismiss has merit.

{¶2} The basic subject matter of this action concerns whether relator is entitled to receive compensation for an alleged taking of certain land by the Ohio Department of Transportation for the benefit of a state highway. In his mandamus petition, relator has alleged that he is the present owner of real property located on Aurora-Warren Road in Braceville Township, Ohio. Relator has further alleged that, at some point in the past, the Department of Transportation came upon that property and constructed a four-foot drainage ditch. According to relator, the completion of the drainage ditch resulted in the destruction of approximately thirty trees on his property. Finally, he has asserted that the Department of Transportation performed the work without his knowledge or consent, and that he has not received any compensation for the damage to his land.

{¶3} As the legal foundation for his claim, relator has contended in his petition that the various acts of the Department of Transportation upon his property constitutes a governmental taking for which he deserves compensation. Based upon this, relator has requested for his ultimate relief the issuance of an order under which respondent, as the Director of the Department of Transportation, would be required to file an appropriation action in regard to his property.

{¶4} In now moving to dismiss relator's entire claim for relief, respondent does not contest the fact that a writ of mandamus generally will lie to compel a state entity to commence an appropriation proceeding for the purpose of compensating a landowner for a governmental taking. Instead, respondent maintains that this court does not have the jurisdiction to consider the merits of this particular mandamus claim. Specifically, he submits that, because relator has asserted that the taking of the land has already been

completed, a mandamus action can be filed against him, as the Department's Director, only in a court in Franklin County, Ohio.

{¶5} In support of the foregoing basic argument, respondent relies primarily on R.C. 5501.22, which expressly governs the filing of actions against the state's director of transportation. This statute provides, in pertinent part:

{¶6} "The director of transportation shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside Franklin county except in actions brought *** by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated, ***."

{¶7} As is readily apparent from the foregoing quote, R.C. 5501.22 first states a general rule that the director of transportation can be sued only in an appropriate court of Franklin County. The statute then delineates certain exceptions to this general rule, including the exception that any case filed to prevent a taking of private property without due process can be maintained in the separate county in which the land is located.

{¶8} In contending that the general rule of R.C. 5501.22 is not applicable to the facts of the instant case, relator relies solely on the "prevent" exception in the statute. In attempting to interpret the wording of this exception, relator submits that the inclusion of the phrase "without due process of law" readily indicates that the legislature intended for the exception to be invoked whenever a landowner has not received compensation for a taking. That is, he argues that the exception is not meant to apply only to situations in which a possible taking can be stopped before it actually takes place, but is intended to also cover any situation in which the "compensation" issue is not settled before any step

to take the disputed land has been made. Based on this, relator asserts that the instant case can be heard outside Franklin County because he has never been compensated for the alleged placement of the drainage ditch on his property.

{¶9} On the other hand, respondent states that, under relator's interpretation of the statutory language, the "prevent" exception could be invoked in a situation in which the taking of the property has already been completed. Respondent further states that such an interpretation conflicts with the plain language of R.C. 5501.22; i.e., according to respondent, the wording of the exception supports the conclusion that it is intended to apply only when the alleged taking is ongoing. Thus, respondent contends that, since relator's own allegations in his petition indicate that the alleged taking of relator's land has already taken place, the general rule of R.C. 5501.22 must be followed in this instance.

{¶10} Upon reviewing the relevant case law on this jurisdictional issue, this court concludes that respondent's interpretation of the "prevent" exception to the general rule of R.C. 5501.22 is legally correct. At the outset of our analysis, we would note that our reading of the relevant case law readily indicates that, even though the basic provisions of R.C. 5501.22 have previously been set forth in different sections of the Ohio Revised Code, those provisions have been a part of the statutory scheme pertaining to the state department of transportation for over fifty years. For example, at the time the Supreme Court of Ohio rendered its decision in *Wilson v. City of Cincinnati* (1961), 172 Ohio St. 303, the statute which governed the filing of any legal proceeding against the director of transportation was R.C. 5501.18. In addition to stating the general rule that the director could not be sued outside Franklin County unless an exception was applicable, the prior

statute also provided for a "prevent" exception which was worded in the same manner as the modern version of the statute. That is, the prior statute stated that a legal action against the director could be brought outside Franklin County if it was instituted "*** by a property owner to prevent the taking of property without due process of law, ***."

{¶11} In *Wilson*, the landowner initiated an action in Hamilton County against the transportation director and the City of Cincinnati. In his complaint, the landowner stated that he was entitled to compensation because both defendants had taken possession of his land and used it for a public purpose. Prior to trial, the director moved to dismiss the action as to him on the basis that only a court in Franklin County could have jurisdiction to hear this type of case against him. The Hamilton County trial court denied the motion to dismiss, and a jury ultimately rendered a verdict against both the director and the City for damages based upon the alleged taking.

{¶12} In subsequently appealing the matter to the Supreme Court, the director in *Wilson* essentially argued that the Hamilton County trial court had not properly applied the "prevent" exception to the general rule concerning the county where actions against him must be filed. In concluding that this type of action against a transportation director had to brought in Franklin County, the Supreme Court first indicated that R.C. 5501.18, the statutory predecessor to the present R.C. 5501.22, sets forth an express limit on the subject matter jurisdiction of all trial courts outside Franklin County, and that the failure to properly apply the provisions of the statute renders any resulting judgment void. The *Wilson* court then addressed the question of the application of the "prevent" exception to the facts of that case:

{¶13} "Is this an action to prevent the taking of property? Obviously, it is not.

The petition shows on its face that the property involved in the present action has already been taken and devoted to a public use, and that the present action is not one to prevent a taking but rather an action to recover compensation for a taking that is an accomplished fact. Therefore, the venue of such an action as to the director is clearly confined by Section 5501.18, Revised Code, to the Court of Common Pleas of Franklin County, and the Court of Common Pleas of Hamilton County committed prejudicial error when it failed to sustain the director's motion for dismissal for lack of jurisdiction." Id., at 306.

{¶14} In the foregoing analysis, the *Wilson* court did not focus upon whether the landowner had alleged that he had not received compensation prior to the taking of the property. Instead, the focus was solely upon the landowner's allegations concerning the status of the taking. In subsequent cases in which the Supreme Court has considered the application of the "prevent" exception, the focus of the analysis has been the same; i.e., the Supreme Court has predicated its decision upon whether the allegations show that the actual taking of the property interest is still ongoing and the purpose of the case is to stop the taking. See *Sarkies v. State of Ohio* (1979), 58 Ohio St.2d 166; *State ex rel. Braman v. Masheter* (1966), 5 Ohio St.2d 197. In *Sarkies*, the court reiterated that, in applying the "prevent" exception, "the issue becomes whether the present action was initiated to prevent a taking of property or to recover compensation for a taking which was an accomplished fact." *Sarkies* at 169.

{¶15} In regard to the *Sarkies* and *Braman* precedent, relator submits that those two cases can be distinguished on the basis that they involve a governmental taking of an "inchoate" property interest, as compared to an actual physical taking of land. As to

this point, this court would first note that the wording of the "prevent" exception in R.C. 5501.22 simply does not support the conclusion that the application of the exception in a given case depends on the nature of the property interest involved. Furthermore, our review of the *Sarkies*, *Braman*, and *Wilson* cases does not reveal any language in those opinions which would support such a distinction. Finally, although *Sarkies* and *Braman* did not involve an actual taking of land, the *Wilson* case did involve such a taking, and the holdings in *Sarkies* and *Braman* were based upon the earlier precedent in *Wilson*.

{¶16} Besides his attempt to distinguish the Supreme Court precedent regarding this point, relator's proposed interpretation of the "prevent" exception is primarily based on the decision of the Second Appellate District in *Brown v. Preston* (1963), 119 Ohio App. 207. In that particular case, the landowner instituted an original action before the appellate court, seeking a writ of mandamus to compel the state transportation director to file an appropriation proceeding. In his petition, the landowner expressly stated that the director had already completed the taking of the property in question for purposes of constructing a public highway. Notwithstanding this undisputed fact, the *Brown* court still concluded that it had jurisdiction to hear the action in Montgomery County because the "prevent" exception was applicable in that instance.

{¶17} In analyzing the exception, the *Brown* court emphasized that the language of the statute had to be considered as a whole so that each of its phrases would have meaning. The court then stated that if the exception was interpreted not to apply when the taking has already occurred, the phrase "without due process" in the statute would be rendered meaningless. Stated differently, the *Brown* court held that the exception could be invoked not only when a landowner seeks to stop an ongoing taking, but also

when he seeks to prevent any taking which occurs without due process:

{¶18} "Counsel for the [director] appears to argue that in order to have venue in Montgomery County the action must be one 'to prevent the taking of property,' ignoring altogether the last clause of the exception, 'without due process of law'; and that inasmuch as the director has physically taken the property, although without any legal process and without compensation, there can no longer be an action 'by a property owner to prevent the taking of property without due process of law.' The inevitable corollary of that argument is that, however arbitrarily the director might seize property, every owner would be compelled to resort to the onerous and expensive procedure of bringing his action for readdress in Franklin County, with the result that the statutory provisions for appropriation would be nullified." *Brown* at 209-210.

{¶19} After reviewing the foregoing quote in light of the existing Supreme Court precedent on the same point, this court concludes that the *Brown* analysis concerning the proper interpretation of the "prevent" exception is unpersuasive. As was previously noted, the crux of the *Brown* holding is that, unless the exception is construed to apply to a taking by the transportation director which has been fully completed, the "without due process" phrase would have no meaning in the general context of the entire statute pertaining to the viability of lawsuits against the director. Obviously, this holding must be based upon the underlying proposition that a "taking without due process" can only take place when the director has achieved full control of the disputed property. However, this court fails to see why the process of taking the property must be finished before a violation of due process can occur. That is, logic dictates that a landowner's due process rights are violated whenever the director and his department proceed with

any initial step to take property without first bringing an appropriation action. To this extent, we cannot agree that a narrow interpretation of the "prevent" exception of R.C. 5501.22 is in any respect logically inconsistent with the plain language of the statute.

{¶20} In regard to this point, this court would further note that, as it is generally used, the word "prevent" means to stop or limit the effect of something in advance of its occurrence. If the *Brown* analysis is followed, the use of the word "prevent" becomes somewhat illogical; i.e., once the taking of the property has been completed without the filing of an appropriation action, the violation of due process has also technically been completed. Under such circumstances, the filing of an action by the landowner would not be for the purpose of "preventing" a taking without due process, but instead would only serve the goal of correcting the due process violation. On the other hand, if a due process violation is deemed to have occurred whenever the director begins the "taking" process prior to bringing an appropriation action, the use of the word "prevent" makes complete sense.

{¶21} In addition to the foregoing, this court would emphasize that the holding in *Brown* conflicts with the basic tenor of R.C. 5501 22. Again, it must be stated that the statute first sets forth a general rule concerning where the state transportation director can be sued, and then lists certain exceptions to that rule. Accordingly, it is apparent that the Ohio General Assembly intended for the director to be sued in Franklin County unless special circumstances exist. When the director is involved in the governmental taking of private property, such special circumstances only truly exist while the taking is ongoing. By its very nature, an action to enjoin a taking of property would have to be litigated quickly in order to ensure that the taking is not completed before the trial court

can hear the merits of the matter. Under this scenario, it is logical that the landowner should have the ability to file the case in the county where the land is located because the case could be initiated quicker there than in Franklin County. However, when the taking has already been completed, time is no longer of the essence regardless of the nature of the relief the landowner seeks; therefore, it follows that the general rule of the statute should apply, even if the landowner will be inconvenienced.

{¶22} As a final basis for rejecting the *Brown* holding, this court would reiterate that the underlying analysis for that holding is inconsistent with the logic adopted by the Supreme Court in *Wilson*, *Sarkies*, and *Braman*. In *Brown*, the court tried to distinguish the *Wilson* decision on the grounds that, while the landowner in *Wilson* had only sought compensation for the taking, the landowner in *Brown* had sought to contest the validity of the taking. As to this point, we would again note that our review of *Wilson* and the ensuing Supreme Court precedent fails to reveal any language which would indicate that the nature of the requested relief in the underlying case would alter the analysis in *Wilson*. Similarly, there is no language in the "prevent" exception itself which would support a distinction in the application of the exception based upon the type of relief sought.

{¶23} It is evident from the wording of R.C. 5501.22 that the General Assembly desired to limit the scope of the "prevent" exception to situations involving incomplete takings. To the extent that the *Brown* decision expands the scope of the exception beyond its plain language, its analysis is not logical. This would explain why the *Brown* analysis has not been cited favorable by any other appellate court since the release of the decision in 1963.

{¶24} In the instant case, relator has expressly alleged in his mandamus petition that the Department of Transportation has already entered upon his property, cut down a number of trees, and constructed a drainage ditch. Hence, relator's own allegations tend to show that the purported taking has already been completed. In light of these specific facts, the aforementioned Supreme Court precedent dictates that the "prevent" exception of R.C. 5501.22 is not applicable in this instance. In turn, it follows that, since the general rule of that statute would be controlling, relator can maintain his mandamus claim against respondent only in Franklin County.

{¶25} As this court does not have jurisdiction to render a final judgment on the merits of relator's mandamus claim, respondent's motion to dismiss the instant action is well taken. It is the order of this court that relator's entire mandamus petition is hereby dismissed.

DONALD R. FORD, P.J., DIANE V. GRENDELL, J., CYNTHIA WESTCOTT RICE, J., CONCUR.