

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO ex rel. JASON DEBOLT,	:	PER CURIAM OPINION
	:	
Relator,	:	CASE NO. 2009-P-0081
	:	
- vs -	:	
	:	
HERMAN FREDERICK INDERLIED JR., JUDGE (RET.),	:	
	:	
Respondent,	:	
	:	
KMV V, INC.,	:	
	:	
Intervening Respondent.	:	

Original Action for Writs of Prohibition and Mandamus.

Judgment: Petition dismissed.

George W. Cochran, Smith, Greenberg & Leightty, P.L.L.C., 2321 Lime Kiln Lane, Ste. C, Louisville, KY, 40222 (Relator).

Victor V. Viglucci, Portage County Prosecutor, and *Denise L. Smith*, Chief Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Respondent).

John T. Murphy, *Colleen R. DelBalso*, *Richard C.O. Rezie* and *George H. Carr*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Intervening Respondent).

PER CURIAM.

{¶1} This action in prohibition and mandamus is presently before this court for final disposition of the dual motions to dismiss of respondents, KMV V, Inc., and Retired Judge Herman F. Inderlied, Jr. As the primary grounds for both motions, respondents

argue that the amended petition of relator, Jason DeBolt, fails to state a viable claim for either writ because his own allegations demonstrate that Judge Inderlied has not acted beyond the scope of his jurisdiction in the underlying lawsuit. For the following reasons, we conclude that the dismissal of both pending claims is justified under Civ.R. 12(B)(6).

{¶2} Our review of relator's amended petition readily indicates that the majority of his factual assertions are predicated upon various events in a civil proceeding which remained pending before the Portage County Court of Common Pleas for nearly nine years. The subject matter of the litigation concerned the repeated flooding of a mobile or manufactured home park located in Garrettsville, Ohio. The plaintiffs were composed of certain residents of the park, including relator, whose mobile homes had been subject to some form of damage as a result of the flooding. The defendants consisted of the operators of the park, including KMV V, Inc.

{¶3} In their amended complaint in the underlying case, the plaintiffs alleged that the repeated flooding of the park had directly resulted from the defendants' decision to build a culvert bridge over a small creek which bisected the park. Specifically, it was asserted that, due to its inadequate design, the bridge obstructed the nature flow of the creek, thereby causing the floods. The plaintiffs further alleged that, based upon their various acts in regard to the bridge, the defendants had committed six violations of their legal duties as mobile or manufactured home park operators, under R.C. 3733.10(A). For their ultimate relief under their various claims, the plaintiffs sought preliminary and permanent injunctions, a declaratory judgment, compensatory damages, and punitive damages.

{¶4} After the underlying case had been pending for approximately one month, the plaintiffs moved the original trial judge to certify the matter as a class action under

Civ.R. 23. In addition to requesting the original judge to recognize a general class of all persons who had resided in the subject park since January 1992, the plaintiffs further moved that the class be divided into three subclasses. In turn, the subclasses would be based upon the exact relief sought by the individual members: injunctive relief, loss-of-use/loss-of-enjoyment damages, and compensatory damages covering specific harm to property.

{¶5} The motion to certify was first heard by a court magistrate, who essentially recommended that the motion be granted in part. That is, although the magistrate held that the case should proceed as a class action, she also concluded that only two of the proposed subclasses, for injunctive relief and loss-of-use/loss-of-enjoyment damages, be recognized. After the defendants had filed objections to the magistrate's decision, the original trial judge issued a separate judgment in which he agreed that certification of a class for "injunctive relief" purposes was warranted. However, as to the proposed group for loss-of-use/loss-of-enjoyment damages, the trial judge held that the plaintiffs had not satisfied the requirements for certification under Civ.R. 23.

{¶6} Both the plaintiffs and the defendants filed appeals from the judgment on the motion to certify. In *Arndt v. P & M Ltd.*, 163 Ohio App.3d 179, 2005-Ohio-4481, this court first expressly rejected the defendants' contention that the original trial judge had erred in allowing class certification as to those park residents seeking injunctive relief. Second, we accepted the plaintiffs' argument that they had met all requirements for certification of a class or subclass for loss-of-use/loss-of-enjoyment damages. As a result, we affirmed the trial judge's judgment in part, reversed in part, and remanded the case for further proceedings consistent with our decision.

{¶7} The foregoing appellate decision was rendered in August 2005. Nearly

sixteen months later, the parties to the underlying case submitted separate motions for summary judgment as to certain claims and/or issues. In April 2007, the original trial judge issued a second final judgment in which the plaintiffs' motion for partial summary judgment was denied, but the defendants' motion regarding specific claims for relief was granted. Once again, though, this court concluded on appeal that the analysis of the trial judge had been improper as to the majority of the arguments raised by the various defendants. Accordingly, in *Arndt v. P & M Ltd.*, 11th Dist. Nos. 2007-P-0038 & 2007-P-0039, 2008-Ohio-2316, we again affirmed the appealed judgment in part, reversed in part, and remanded the case for additional proceedings.

{¶8} At some juncture during the ensuing proceedings, Judge Inderlied, respondent, was appointed by the Supreme Court of Ohio to replace the original trial judge. After the matter had been pending upon remand for over one year, Judge Inderlied set a trial date for the fall of 2009. In response, the plaintiffs, including relator, filed a series of motions which primarily pertained to their submission of evidence concerning the subclass claim for loss-of-use/loss-of-enjoyment damages. Beginning in October 2009, the plaintiffs moved Judge Inderlied: (1) for an advanced ruling allowing them to prove such damages through an aggregation method; (2) for the appointment of a special master to determine such damages for individual members of the subclass; and (3) for approval to either retain an expert witness on aggregate damage or amend the class "notice" to solicit the testimony of all individual members at trial.

{¶9} In a series of separate judgments, Judge Inderlied overruled each of the foregoing three motions. The plaintiffs then moved for approval to voluntarily dismiss their class claims, but this request was likewise denied. Consequently, the plaintiffs informed Judge Inderlied that they intended to bring a new appeal in relation to his last

two judgments on the “loss-of-use/loss-of-enjoyment” question. In response, Judge Inderlied indicated that he still intended to proceed with the scheduled trial.

{¶10} On the same date that the plaintiffs in the underlying proceeding filed their third appeal before this court, relator instituted the instant action in both prohibition and mandamus on his own behalf. In both his original and amended petition, relator named Judge Inderlied as the sole respondent in the case. However, after the action had been pending for three months, this court granted the motion of KMV V, Inc., to intervene as the second respondent.

{¶11} Even though relator attempted to state two causes of action, the crux of his petition was set forth under his prohibition claim. In that aspect of his petition, relator sought the issuance of a writ to enjoin Judge Inderlied from going forward with any additional proceedings in the underlying case. In contending that Judge Inderlied lacks the requisite jurisdiction to proceed, relator presented two basic arguments. First, he maintained that the filing of the plaintiffs’ third appeal deprived Judge Inderlied of his authority over the matter. Second, relator argued that, by denying the plaintiffs’ three preliminary motions regarding the “loss-of-use/loss-of-enjoyment” issue, Judge Inderlied lost jurisdiction under the “law-of-the-case” doctrine because his rulings conflicted with the prior decision of this court.

{¶12} As to the first basis for relator’s prohibition claim, this court would begin our analysis by noting that Civ.R. 44.1(A)(1) gives a trial court in a civil action the ability to take judicial notice of any “decisional” law that has previously been released in this state. *State ex rel. Smith v. Vettel*, 11th Dist. No. 2010-A-0020, 2010-Ohio-3809, at ¶9. Furthermore, in considering this rule in the context of an original action, we have stated that an appellate court can take judicial notice of its own prior opinions as part of a

Civ.R. 12(B)(6) analysis. Id.

{¶13} Consistent with the foregoing precedent, this court takes judicial notice that we have already issued a final decision in relation to the third appeal that was filed by the plaintiffs in the underlying case. In *Arndt v. P & M Ltd.*, 11th Dist. No. 2009-P-0080, 2010-Ohio-113, we expressly dismissed the appeal on the basis that the disputed rulings of Judge Inderlied did not constitute final appealable orders. As part of our legal discussion, this court further indicated that the rulings would be appealable when a final judgment has been rendered for the entire underlying case.¹

{¶14} In reviewing prior prohibition actions in which it was alleged that the filing of an appeal had deprived the trial judge of the authority to proceed, the Supreme Court of Ohio has indicated that the pendency of an appeal from a non-final judgment, i.e., an interlocutory order, has no effect upon the jurisdiction of the trial court. See, e.g., *State ex rel. Eberling v. Nugent* (1988), 40 Ohio St.3d 129. Therefore, since the third appeal in the present situation did not stem from a proper final order, the first basis for relator's prohibition claim does not establish that Judge Inderlied acted beyond the scope of his jurisdiction.

{¶15} Regarding the second basis for the prohibition claim, this court would again note that, in submitting their three pre-trial motions on the "loss-of-use/loss-of-enjoyment" issue, the underlying plaintiffs were allegedly attempting to establish the means by which they would present their case as to the amount of damages sustained by the individual members of the subclass. Initially, they requested that they be allowed

1. As an aside, we would also note that relator brought a separate appeal from a judgment issued by Judge Inderlied in a proceeding which was a companion case to the class action. In *KMV V, Ltd. v. DeBolt*, 11th Dist. No. 2009-P-0079, 2010-Ohio-827, we dismissed this separate appeal for the reason that it had not been filed in a timely manner.

to use an “aggregation” method, under which: (1) representative plaintiffs would testify as to the amount of their particular damages; and (2) the jury would then be permitted to extrapolate from this testimony and determine the total amount of damages for those members of the class who did not testify at trial. According to relator, when Judge Inderlied rejected this method, the plaintiffs then moved for the appointment of a special master who would hear evidence from each individual member of the subclass after the main trial had concluded. Finally, when the “special master” motion was overruled, the plaintiffs sought to amend the notice to the class to provide that each individual member could appear at trial and present testimony as to their respective damages.

{¶16} Based upon the foregoing, relator has argued that the denial of all three motions had the effect of leaving the plaintiffs with no means of proving all damages that had been sustained by all subclass members for loss-of-use/loss-of-enjoyment. In turn, he has further argued that the inability to demonstrate damages had the technical effect of de-certifying that particular class. Building on this, he has ultimately asserted that, in issuing the three disputed rulings, Judge Inderlied has violated the law-of-the-case doctrine by failing to follow the court’s “certification” decision in the original *Arndt* appeal.

{¶17} In describing the doctrine of the law-of-the-case, this court has often cited the following quote of the Supreme Court:

{¶18} “[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *** Thus, where at a rehearing following a remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the

appellate court's determination of the applicable law. *** Moreover, the trial court is without authority to extend or vary the mandate given.' (Internal citations omitted.)" *Parker v. Hegler*, 11th Dist. No. 2008-L-009, 2008-Ohio-3739, at ¶12, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-4.

{¶19} As to the inherent purpose of the doctrine, this court has previously stated that it is intended to: (1) protect the general constitutional relationship between superior and inferior state courts; (2) guarantee consistent results in a given case; and (3) avoid endless litigation by allowing for the permanent resolution of issues. *State v. Sanders*, 11th Dist. No. 2009-P-0053, 2010-Ohio-2525, at ¶33.

{¶20} In relation to the actual application of the law-of-the-case doctrine, it has been held that the question of whether the principle should be followed in a particular instance involves a question of law that is reviewed under a de novo standard. *Skolinck v. Cincinnati Ins. Cos.*, 11th Dist. No. 2007-T-0088, 2008-Ohio-2319, at ¶26. Moreover, it has been emphasized that the doctrine is only applicable to issues which were the subject of a legal conclusion by the appellate court in its prior decision. *Id.* at ¶27.

{¶21} In the instant case, it is relator's position that Judge Inderlied's rulings on the three evidentiary motions conflicted with our previous holding in the plaintiffs' first appeal. *Arndt*, 163 Ohio App.3d 179. However, as was noted above, the sole issue in that opinion as to the "loss-of-use/loss-of-enjoyment" point pertained to whether the trial court had erred in failing to certify it as part of the class action. At that stage of the both the trial and appellate proceedings, no issue had been raised concerning the means by which the plaintiffs should be permitted to present evidence about the extent of the damages suffered by the subclass members; instead, the only issue was whether the subclass should even be recognized. Thus, our prior opinion did not contain any legal

conclusions as to the nature of the plaintiffs' evidentiary submission.

{¶22} Given the limited parameters of our prior holding, it follows that the law-of-the-case doctrine has no application in this instance. That is, since Judge Inderlied's denial of the three evidentiary motions did not conflict with any previous legal conclusion of this court, he did not exceed the scope of his jurisdiction in rendering the rulings.

{¶23} In rejecting relator's "law-of-the-case" contention, this court would further emphasize that the actual merits of Judge Inderlied's evidentiary rulings are irrelevant to our disposition of this point. It is certainly possible that, in the context of a properly-filed appeal in which the issues have been adequately preserved for review, relator and the other plaintiffs may be able to establish that the net effect of the rulings was to deprive them of any logical means of proving the damages suffered by all members of the "loss-of-use/loss-of-enjoyment" subclass. Nevertheless, even if it is assumed, for the sake of this analysis, that the disputed rulings were legally incorrect, such subsequent errors would be procedural in nature, and would only constitute a viable reason for reversing the rulings on appeal. Consequently, the second basis for relator's prohibition claim also fails to demonstrate any jurisdictional error of the part of Judge Inderlied.

{¶24} Before a writ of prohibition can issue, the relator must be able to prove, inter alia, that the judicial officer's intended use of power was not authorized under the law. *State ex rel. Feathers v. Hayes*, 11th Dist. No. 2006-P-0092, 2007-Ohio-3852, at ¶9. Consistent with the foregoing discussion, this court holds that, even when relator's factual assertions are construed most favorably in his favor, he will not be able to establish a set of facts under which this element would be met. That is, his own allegations support the conclusion that Judge Inderlied did not act beyond the scope of his jurisdiction in rendering the three pre-trial evidentiary rulings or in going forward

despite the fact that a new appeal had been filed.

{¶25} As to the separate mandamus claim, our review of the petition indicates that relator sought this writ to compel Judge Inderlied to vacate the three interlocutory rulings which, according to him, violated the law-of-the-case doctrine. In light of our determination that no violation has occurred, Judge Inderlied would not have any legal duty to perform such an act. Moreover, relator has an adequate remedy to challenge the propriety of those rulings through the plaintiffs' direct appeal. Therefore, since relator cannot fulfill any of the elements for this particular writ, the dismissal of this claim is also warranted under Civ.R. 12(B)(6).

{¶26} Pursuant to the foregoing discussion, the motion to dismiss of Judge Inderlied, respondent, is granted. For the same reasons, the motion to dismiss of KMV V, Inc., intervening respondent, is also granted. Accordingly, it is the order of this court that relator's claims in prohibition and mandamus are hereby dismissed in their entirety.

MARY JANE TRAPP, P.J., DIANE V. GRENDALL, J., TIMOTHY P. CANNON, J.,
concur.