[Cite as *Lawrence Twp. Bd. of Trustees*, 2011-Ohio-200.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
LAWRENCE TOWNSHIP, STARK COUNTY, OHIO, BOARD OF TOWNSHIP TRUSTEES, etc.	:	Julie A. Edwards, P.J. W. Scott Gwin, J. John W. Wise, J.
Plaintiff-Appellant	:	Case No. 2010 CA 00063
-vs-	:	
	:	O P I N I O N
THE CITY OF CANAL FULTON, OHIO, et al.,		
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2007 CV 04010
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
JAMES F. MATHEWS Baker, Dublikar, Beck, Wiley & Mathews 400 South Main Street North Canton, Ohio 44720	ERIC J. WILLIAMS Pelini, Campbell, Williams & Traub 8040 Cleveland Avenue, N.W. Suite 400 North Canton, Ohio 44720

Edwards, P.J.

{¶1} Plaintiff-appellant, Lawrence Township, Stark County, Ohio, Board of Township Trustees, appeals from the February 25, 2010, Judgment Entry of the Stark County Court of Common Pleas denying the Motion for Summary Judgment filed by plaintiff-appellant while granting the Motions for Summary Judgment filed by defendants-appellees Tammy Marthey and the City of Canal Fulton, Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} The facts, as set forth in our previous Opinion in *Lawrence Township, Stark County, Ohio, Board of Township Trustees v. City of Canal Fulton*, Stark App. No.2008CA00021, 2009-Ohio-759, are as follows. On June 22, 2007, Canal Fulton Farms, LLC ("CFF") filed a type-2 petition for annexation pursuant to R.C. 709.021 and 709.023. The petition requested annexation to the City of Canal Fulton of 32.767 acres of land located within Lawrence Township. The only signatory on the petition was CFF as owner of 24.937 acres.

{¶3} The agent for CFF, Eric Williams, stated in the annexation petition that R.J. Corman Railroad Company ("Corman") and Stark County Park District ("Park") were not statutorily defined owners required to sign the petition. The petition identifies Parcel # 95011737 as "land now or formerly owned by" Corman in the legal description of the area to be annexed. A copy of the annexation plat is also included in the petition. The plat notes "tracks and occupation used to establish right of way" in reference to Corman's parcel.

{¶4} On July 9, 2007, appellant Lawrence Township passed Resolution 2007-210 which set forth objections to the petition.[1] The objections were subsequently filed with the Commissioners pursuant to R.C. 709.023(D). After consideration of the objections, the Commissioners passed a resolution on or about August 2, 2007, granting the petition pursuant to R.C. 709.023.

{¶5} On October 2, 2007, appellant Lawrence Township filed a complaint in the Stark County Court of Common Pleas seeking a declaratory judgment, injunctive relief and a writ of mandamus requesting that the annexation be invalidated and set aside. Appellant Lawrence Township submitted that the petition was defective since it did not contain the signatures of all of the owners of the property as required by 709.21(A) and 709.023(E)(2).

{¶6} In the complaint, appellant Lawrence Township alleged that Corman was identified in the petition as the fee simple owner of property within the territory to be annexed. Appellant Lawrence Township further alleged that fee owners of property used for "railroad purposes" are required to sign the annexation petition under R.C. 709.02(E).

{¶7} The record reflects that service of the complaint was not perfected upon Corman. Consequently, Corman did not defend or otherwise appear in this action.

[1] We note that while Lawrence Township filed an objection stating the petition "fails to meet any of the requirements provided [in] Section 709.021 of the Revised Code," it did not set forth a specific objection that the petition lacked the required number of owner signatures.

{¶8} On October 12, 2007, appellant Lawrence Township filed a motion for summary judgment which was supported with a copy of the annexation petition (Exhibit A) and the Township's objections to the annexation petition (Exhibit B).

{¶9} In the motion, appellant Lawrence Township reiterated its belief that on the face of the petition, Corman was a private title owner to a portion of the land included in the annexation and, therefore, that Corman was required to sign the petition. Appellees filed cross-motions for summary judgment arguing that Corman only held fee title to a railroad right-of-way, and that therefore, Corman should not be counted as an "owner" under R.C. 709.02(E).

{¶10} Pursuant to a Judgment Entry filed on December 31, 2007, the trial court granted summary judgment in favor of appellees, finding "[i]n the present action the material facts are undisputed in that Corman held fee title to the property for a railroad right-of-way and did not sign the Petition. There has been no affidavit or deed indicating Corman held something other than fee title to the property for a railroad right-of-way. Further, Corman has not objected to the annexation". The trial court concluded that the word "owner" within R.C. 709.021 and 709.023 did not include Corman or the Park, and that, therefore CFF's petition was valid as it contained the signatures required by law. The trial court found that appellant Lawrence Township, therefore, was not entitled to mandamus relief. Finally, the trial court found that appellant Lawrence Township lacked standing to seek a declaratory judgment, injunctive relief or summary judgment on the issue of who is an owner according to Ohio's annexation statutes.

{¶11} Appellant Lawrence Township filed an appeal. Pursuant to an Opinion filed in *Lawrence Township, Stark County, Ohio, Board of Township Trustees v. City of*

Canal Fulton, Stark App. No.2008CA00021, 2009-Ohio-759, this Court held, in part, that the trial court had erred in granting summary judgment to appellees because there was a factual issue as to Corman's interest. This Court specifically found that there was an issue of fact as to whether or not Corman owned the land under its tracks in fee simple or merely owned a fee interest in a right-of-way over the land. In our Opinion, we also stated, in relevant part, as follows: "Although it is easier to conceptualize Appellant's challenge as being one seeking prohibition as opposed to mandamus given the board of commissioners' resolution approving annexation, it is conceivable to frame Appellant's mandamus complaint as one to compel the board of commissioners to reject the annexation petition because of the lack of signatures of the owners of the property to be annexed. Therefore, mandamus may lie. The crux of the issue becomes whether board of commissioners had a clear legal duty to approve [or reject] the petition." Id at paragraph 36. Finally, this Court held that, with respect to the claims for declaratory and injunctive relief, "the proper disposition of these claims in the trial court [was] dismissal of lack or jurisdiction, not lack of standing." Id. at paragraph 41.

{¶12} Upon remand, the parties filed briefs with the trial court. As memorialized in a Decision filed on February 25, 2010, the trial court overruled appellant's Motion for Summary Judgment while granting the Motions for Summary Judgment filed by appellees. The trial court, in its Judgment Entry, found that appellant did not have standing to bring a writ of mandamus "as it relates to the Canal Fulton Farms, LLC type-2 petition since it is not a 'party' within the meaning of R.C. [Section] 709.23." The trial court also found that while it was undisputed that Corman was a fee simple owner of the land upon which its tracks sat and that it possesses a railroad right of way in fee upon

the land, "this fact is not a necessary determinant of the outcome of the pending litigation due to the fact that …the plaintiff does not have standing to bring a writ of mandamus,…" The trial court further found that it lacked jurisdiction to hear any claim on behalf of appellant for declaratory judgment or injunctive relief.

{¶13} Appellant now raises the following assignments of error on appeal:

{¶14} "I. THE TRIAL COURT ERRED IN GRANTING THE APPELLEES' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND IN DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT, AS A MATTER OF LAW, TO APPELLANT'S PREJUDICE.

{¶15} "II. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT THE APPELLANT LACKED STANDING IN MANDAMUS, FAILING TO FOLLOW THE LAW OF THE CASE, AS A MATTER OF LAW, TO APPELLANT'S PREJUDICE."

I, II

{¶16} Appellant, in its two assignments of error, argues that the trial court erred in granting appellees' Motions for Summary Judgment while denying that filed by appellant. We disagree.

{¶17} The critical issue for determination is whether or not appellant had standing to bring a mandamus action.[2] As is stated above, the trial court found that appellant did not have standing to bring a writ of mandamus "as it relates to the Canal Fulton Farms, LLC type-2 petition since it is not a 'party' within the meaning of R.C. [Section] 709.23." Appellant now maintains, in part, that the issue of appellant's

[2] Appellant does not assign as error the trial court's decision that it lacked jurisdiction over any claims for declaratory judgment or injunctive relief.

standing in mandamus was previously addressed by this Court in the earlier appeal and that the law of the case doctrine prevented the trial court from revisiting such issue.

{¶18} In *Hopkins v. Dyer,* 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, the Ohio Supreme Court discussed the law-of-the-case doctrine and stated as follows: "The law of the case is a longstanding doctrine in Ohio jurisprudence. '[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.' *Nolan v. Nolan,* 11 Ohio St.3d at 3, 11 OBR 1, 462 N.E.2d 410. The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343. It is considered a rule of practice, not a binding rule of substantive law. *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781." *Hopkins* at ¶ 15.

{¶19} The Court also explained, in *Hopkins,* that it has previously recognized an exception to the doctrine of the law of the case in *Jones v. Harmon* (1930), 122 Ohio St. 420, 172 N.E. 151, wherein it held that an inferior court must take notice of an intervening decision, by a superior court, that is inconsistent with the law of the case. *Id.* at ¶ 16-17.

{¶20} On January 28, 2010, the Ohio Supreme Court issued a decision in *State ex rel. Butler Township Bd. of Trustees v. Montgomery County Bd. Of Commissioners*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945. In such case, Waterwheel Farms, Inc. filed a petition with the Montgomery County Board of County Commissioners

seeking to annex property it owned in Butler Township to the city of Union, pursuant to R.C. 709.023. After the Board of Commissioners, over the township's objection, adopted a resolution approving the annexation petition, the township filed a complaint against Waterwheel, the city of Union, and the Montgomery County Board of Commissioners seeking, in part, a writ of mandamus to compel the board of commissioners to rescind the annexation. The township sought the writ to compel the Board of Commissioners to make findings on each of the conditions set forth in R.C. 709.023(E). The trial court granted the city's motion to dismiss the complaint, finding that the township lacked standing to file a claim in mandamus because it did not fit the definition of a "party" as such term is used in R.C. 709.023.

{¶21} On appeal, the Second District Court of Appeals affirmed. The township then appealed to the Ohio Supreme Court. In affirming the decision of the appellate court and holding that the township was not a party to the special annexation proceeding entitled to challenge the annexation, the Ohio Supreme Court stated, in relevant part, as follows: "'Standing' is defined as a 'party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Ohio Pyro, Inc. v. Ohio Dept. of Commerce,* 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting Black's Law Dictionary (8th Ed.2004) 1442. Thus, whether Butler Township has standing to seek a writ of mandamus in this case depends upon whether the township is a party to an R.C. 709.023 special annexation proceeding.

{¶22} "In construing statutes, reviewing courts must ascertain the intent of the legislature in enacting the statute. See *Rosette v. Countrywide Home Loans, Inc.,* 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 12. To determine intent, a court

looks to the language of the statute. *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217. Here, the General Assembly expressed its intent regarding whether the township is a party for purposes of R.C. 709.023 by enacting R.C. 709.021(D), wherein it defined the term "party" as "the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners." However, subsection (D) expressly provides that this definition applies to R.C. 709.022 and 709.024, but R.C. 709.023 is not mentioned.

{¶23} "'The canon expressio unius est exclusio alterius tells us that the express inclusion of one thing implies the exclusion of the other.' " *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.,* 121 Ohio St.3d 560, 2009-Ohio-1355, 906 N.E.2d 409, ¶ 42, quoting *Myers v. Toledo,* 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶ 24. It is well recognized that a court cannot read words into a statute but must give effect to the words used in the statute. See generally *State ex rel. McDulin v. Indus. Comm*. (2000), 89 Ohio St.3d 390, 392, 732 N.E.2d 367; *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus, citing *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 254 N.E.2d 8.

{¶24} "The General Assembly could have applied the R.C. 709.021(D) definition of "party" to R.C. 709.023 if it had intended to do so. It chose otherwise. Our duty is to construe the statutes as written. In doing so, we conclude that the General Assembly did not intend the definition of "party" in R.C. 709.021(D) to apply to R.C. 709.023;

hence R.C. 709.021 does not confer party status on a township in an R.C. 709.023 special annexation proceeding." Id at paragraphs 19-22. (Emphasis added).

{¶25} We find that the Ohio Supreme Court's January 28, 2010, decision in *State ex rel. Butler Township Bd. of Trustees v. Montgomery County Bd. Of Commissioners* is inconsistent with the February 17, 2009, decision of this Court in the previous appeal. While, in the previous appeal, this Court implicitly found that appellant had standing in mandamus,[3] the Ohio Supreme Court, in the above case, clearly held that a township is not a "party" as such term is used in R.C. 709.023(G) and therefore lacks standing to seek a writ of mandamus as provided in such section. We find, therefore, that an exception to the law of the case doctrine applies and that, pursuant to *State ex rel. Butler Township Bd. of Trustees v. Montgomery County Bd. Of Commissioners*, appellant lacked standing to seek a writ of mandamus as it relates to the subject annexation petition because it was not a party to the action.

{¶26} Based on the foregoing, we find that the trial court did not err in granting appellees' Motions for Summary Judgment while denying that filed by appellant.

[3] While this Court, in our Opinion, never expressly stated that appellant had standing, by reversing and remanding the matter for a determination of Corman's interest, we implicitly found that appellant had standing in mandamus.

{¶27} Appellant's two assignments of error are, therefore, overruled.

{¶28} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Gwin, J. concurs and

Wise, J. concurs separately

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JUDGES

JAE/d0908

Wise, J., concurring

{¶29} I concur with the majority decision to affirm based on the Ohio Supreme Court's holding in *Butler*. While we have herein resolved this appeal on the basis of lack of township standing, I am compelled to write separately to reiterate my concerns – now moot in this matter – as expressed in my concurrence in *Lawrence Twp. Bd. of Trustees v. Canal Fulton*, 185 Ohio App.3d 267, 923 N.E.2d 1180, 2009-Ohio-6822. That is to say, I remain disquieted by the tendency to utilize mandamus relief under R.C. 709.023(G) for purposes of seeking an order from a common pleas court to effectively rescind a commissioners' annexation resolution.

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JUDGE JOHN W. WISE

[Cite as *Lawrence Twp. Bd. of Trustees*, 2011-Ohio-200.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

LAWRENCE TOWNSHIP, STARK COUNTY, OHIO, BOARD OF TOWNSHIP TRUSTEES, etc.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
THE CITY OF CANAL FULTON, OHIO, et al.,	:	
Defendants-Appellees	:	CASE NO. 2010 CA 00063

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES