[Cite as *Proctor v. Kardassilaris*, 2006-Ohio-2385.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

GORDON PROCTOR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION,	:	**O P I N I O N**
	:	
Plaintiff-Appellee,		**CASE NO. 2005-T-0026**
	:	
- vs -		
	:	
KATHY KARDASSILARIS, et al.,		
	:	
Defendants-Appellants.		

Civil Appeal from the Court of Common Pleas, Case No. 01 CV 1987.

Judgment: Affirmed.

Jim Petro, Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, OH 43215-3428, *L. Martin Cordero*, Assistant Attorney General, 150 East Gay Street, 17th Floor, Columbus, OH 43215-3130, and *Richard J. Makowski*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Plaintiff-Appellee).

Frank R. Bodor, 157 Porter Street, N.E., Warren, OH 44483 (For Defendants-Appellants).

DONALD R. FORD, P.J.

{¶1} Appellants, Kathy and Panagiotis Kardassilaris, appeal from the February 9, 2005 judgment entry of the Trumbull County Court of Common Pleas dismissing their counterclaim for writ of mandamus due to lack of subject matter jurisdiction.

{¶2} Appellee, Gordon Proctor, Director of the Ohio Department of Transportation, filed a petition to appropriate property owned by appellants, as well as two temporary

easements, and to fix compensation on October 4, 2001. In his petition, appellee alleged that it was necessary to appropriate property owned by appellants, specifically parcels 36-WD, 36-T, and 36-T1, for the purpose of highway improvement to State Route 5 ("SR 5"), on South High Street, in the city of Cortland. Appellants own a commercial grocery store and residence on South High Street. According to the petition, parcel 36-WD was for a right of way in fee simple, next to an existing permanent highway easement, for a total area of .167 acres (the existing easement was .163 acres, thus the total taking was .004 acres). Parcel 36-T and 36-T1 were for temporary easements necessary for the improvement project, which were an area of .028 and 0.20, for a total of .048 acres. Pursuant to R.C. 163.06, appellee deposited $1,425 with the clerk of courts, for the amount determined to be the fair market value of the property and any damages that may occur to the residue.

{¶3} Appellants filed their answer on October 26, 2001. On October 30, 2001, the trial court dispersed the original amount, $1,425, deposited by appellee, to appellants.

{¶4} According to appellee's notice of date of take, appellee or his agents physically entered appellants' property for purposes of construction of the highway improvement project on January 6, 2003.

{¶5} On August 20, 2004, appellants filed a motion for leave to file a claim for writ of mandamus to compel appellee to appropriate additional property seized during construction. The trial court granted the motion on August 26, 2004, and appellants filed a claim for writ of mandamus the same day. In their claim, appellants alleged that appellee broadened its occupation of appellants' property, outside and beyond the limits of the easements which appellee had specified in his plans. Specifically, they alleged an additional taking occurred during construction when appellee obstructed a storm sewer

that drained appellants' commercial parking lot, causing flooding; disconnected the electricity to their commercial sign, preventing illumination for approximately six weeks; disturbed water lines leading into the commercial building, causing flooding; expanded his temporary taking when his employees drove, operated, and parked equipment on appellants' property, as well as stored materials on their land; and removed survey pins on their property. Appellants requested that the value of the additional rights seized and any damages be determined by the jury in the pending appropriation case.

{¶6} On September 13, 2004, pursuant to Civ.R. 12(B)(1), appellee filed a motion to dismiss appellants' petition for a writ of mandamus due to lack of subject matter jurisdiction. Pursuant to Civ.R. 54(B), the trial court granted appellee's motion on February 9, 2005, and stayed the case pending appeal. It is from this judgment that appellants appeal, raising the following sole assignment of error:

{¶7} "The trial court abused its discretion and committed prejudicial error in dismissing appellants' counterclaim for a writ of mandamus to require [appellee] to appropriate additional property rights seized during the pendency of the appropriation case."

{¶8} Initially, we note that the correct standard of review when a trial court grants a Civ.R. 12(B)(1) motion to dismiss is "'whether the plaintiff has alleged any cause of action which the court has authority to decide.'" *Bd. of Trustees of Painesville Twp. v. Painesville* (June 26, 1998), 11th Dist. No. 97-L-090, 1998 Ohio App. LEXIS 2942, at 9-10, quoting *Manholt v. Maplewood Joint Vocational School Dist. Bd. of Edn.* (Aug. 21, 1992), 11th Dist. No. 91-P-2410, 1992 Ohio App. LEXIS 4282, at 4. "As for the standard to be applied in appellate review of Civ.R. 12(B)(1) dismissals, this court noted in *Manholt* that when the trial court dismisses the complaint, but does not make any determinations with

regard to disputed factual issues, our review is limited to a determination of whether the trial court's application of the law was correct." Id. at 10.

{¶9} In their assignment, appellants posit one issue for review: whether "the subject jurisdiction for an inverse condemnation counterclaim in mandamus for the seizure of additional property rights from a landowner during the pendency of the landowner's appropriation case is governed by Article IV, [Section] 5(B) of the Ohio Constitution and the Ohio Rules of Civil Procedure which abrogates and supercedes [sic] [R.C.] 5501.22."

{¶10} In addition, appellants argue two sub-issues. The first sub-issue is whether the seizure of additional property rights constitutes a taking that requires appropriation and additional compensation. Appellants' second sub-issue is whether Civ.R. 13(A) requires landowners to file their counterclaim for mandamus for additional seized property in the pending appropriation case in Trumbull County and not in Franklin County pursuant to R.C. 5501.22.

{¶11} With respect to appellants' first sub-issue, we note that the jurisdictional issue is dispositive of this case. Hence, we will not get to the merits of this sub-issue.

{¶12} We will address appellants' second sub-issue concomitantly with their main issue since the issues are essentially the same. Appellants argue that Civ.R. 13(A) requires landowners to file their counterclaim for mandamus for additional property seized in the pending appropriation case, not in Franklin County as mandated by R.C. 5501.22.

{¶13} R.C. 5501.22 provides that: "[t]he 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 ***."

{¶14} Appellants argue that R.C. 5501.22 is not controlling due to the passage of the Modern Courts Amendment. Section 5(B), Article IV, of the Ohio Constitution contains part of the Modern Courts Amendment of 1968, and provides in part that, "[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules *shall not abridge, enlarge, or modify any substantive right*. (***) All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Hartsock v. Chrysler Corp.* (1989), 44 Ohio St.3d 171, 173. (Emphasis added.)

{¶15} Regarding the Modern Courts Amendment, the Supreme Court of Ohio stated in *Morgan v. W. Elec. Co., Inc.* (1982), 69 Ohio St.2d 278, 281, that:

{¶16} "[t]his constitutional amendment recognizes that where conflicts arise between the Civil Rules or Appellate Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law. *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86; *State v. Hughes* (1975), 41 Ohio St.2d 208; *Morrison v. Steiner* (1972), 32 Ohio St.2d 86 (subject matter jurisdiction of a municipal court contrasted with venue); *Krause v. State* (1972), 31 Ohio St.2d 132, 145."

{¶17} "'Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits ***.'" *BCL Enterprises, Inc. v. Ohio Dept. of Liquor Control* (1997), 77 Ohio St.3d 467, 469, citing *Morrison*, supra, paragraph one of the syllabus. "[It] defines the competency of a court to render a valid judgment in a particular action." *Morrison* at 87. It is well established that subject matter jurisdiction is *substantive* law, not procedural. *Akron v. Gay* (1976), 47 Ohio St.2d 164, 165-166. (Emphasis added.)

{¶18} Appellants cite three cases in support of their argument that the Rules of Civil Procedure should prevail over R.C. 5501.22: *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, *Hiatt v. S. Health Facilities, Inc.* (1994), 68 Ohio App.3d 236, and *Graley v.*

Satazatham (1976), 74 O.O. 2d 316. However, even in their argument, appellants point out that all three cases denote that the Rules of Civil Procedure prevail over conflicting statutes *on matters regarding procedure*.

{¶19} Thus, we conclude that R.C. 5501.22, being substantive, controls over the Rules of Civil Procedure. Therefore, R.C. 5501.22 confers exclusive jurisdiction to courts in Franklin County over suits involving the director of the Ohio Department of Transportation, unless it falls within one of the limited exceptions.

{¶20} We must now determine if the mandamus action on appeal is one that falls within the exception under R.C. 5501.22, which would permit appellants to file their claim in Trumbull county; i.e., the county where the "the property is situated."

{¶21} As we stated in the foregoing analysis, R.C. 5501.22 prohibits any suit against the director of transportation 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 the case sub judice, the record on appeal makes it abundantly clear that at the time of appellants' filing of their mandamus action, the alleged "taking" had already occurred. The highway improvement project was complete. Any additional "seizure" that may have ensued during the construction of the project, could not now be prevented. As such, appellants' mandamus action does not fall within the limited exception of R.C. 5501.22.

{¶22} Appellants argue that three of the cases cited by appellee at trial in support of his position that R.C. 5501.22 gives the trial court jurisdiction to prevent a taking of property and not for a completed taking of property, preceded the Modern Courts

Amendment of 1968.[1] However, appellee correctly points out that "this court found *Wilson* and *Braman* controlling in the matter just six months ago in [*State ex rel. Turkovich v. Proctor*, 11th Dist. No. 2004-T-0081, 2004-Ohio-6699]." Indeed, in *Turkovich*, we agreed with the reasoning in *Wilson and Braman*, and stated that, "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." Id. at ¶20.

{¶23} Based on the foregoing analysis, we conclude that the Trumbull County Court of Common Pleas does not have subject matter jurisdiction to adjudicate appellants' mandamus action. As such, appellants' assignment of error is without merit and the judgment of the Trumbull County Court of Common Pleas is affirmed.

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDELL, J.,

concur.

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1. The three cases cited by appellee at trial were: *State ex rel. Jaster v. Ct. of Common Pleas of Jefferson Cty.* (1936), 132 Ohio St. 93; *Wilson v. Cincinnati* (1961), 172 Ohio St. 303; and *State ex rel. Braman v. Masheter* (1966), 5 Ohio St.2d 197.