

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

|                         |   |                             |
|-------------------------|---|-----------------------------|
| TODD GAVRILOFF, et al., | : | <b>OPINION</b>              |
| Plaintiffs-Appellants,  | : |                             |
| - vs -                  | : | <b>CASE NO. 2006-P-0085</b> |
| CITY OF KENT, et al.,   | : |                             |
| Defendant-Appellee.     | : |                             |

Civil Appeal from the Court of Common Pleas, Case No. 2004 CV 1270.

Judgment: Affirmed.

*Stephen C. Lawson*, 250 South Chestnut Street, Suite 17, Ravenna, OH 44266 (For Plaintiffs-Appellants).

*William D. Lentz*, Sandvoss & Lentz, 228 West Main Street, P.O. Box 248, Ravenna, OH 44266-0248 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Todd and Carrie Gavriloff (“the Gavriloffs”), appeal the judgment entered by the Portage County Court of Common Pleas. The trial court entered summary judgment in favor of appellee, the city of Kent (“Kent”).

{¶2} The Gavriloffs own property in Kent, Ohio. The property is approximately 15 acres in size, and the southern end of the property has frontage on West Main Street. Fish Creek flows through the northern section of the property. The property has been in Todd Gavriloff’s family for many years, with the property most recently having

been owned by Todd Gavriloff's parents. Portions of the property have been used, at various times, for agricultural purposes.

{¶3} Sometime in the past, probably the 1940s, Fish Creek was dredged and channelized, presumably to assist with agricultural drainage. In the 1950s or 1960s, Todd Gavriloff's father and uncle installed drain tile on the property to help drainage so the property could be used for agricultural purposes.

{¶4} In 1987, Kent sought to install a sanitary sewer line across the Gavriloffs' property. Todd Gavriloff's father, Pete Gavriloff, was opposed to the project. Kent initiated an eminent domain action against Pete Gavriloff for the purpose of installing the sanitary sewer line. In 1989, Kent and Pete Gavriloff entered into a settlement agreement, wherein Kent obtained an easement for this project and paid \$12,406.67 to Pete Gavriloff. The agreement required the topography to be returned to its original level within 36 months of the completion of the project. In addition, Kent was responsible for repairing any drain tiles that were destroyed during the project.

{¶5} The sanitary sewer line was installed between 1994 and 1996. Shortly after the project was completed, Todd Gavriloff noticed standing water over the easement portion of the property.

{¶6} In the 1990s, Kent constructed a storm sewer in connection with improvements made to Fairchild Road. This storm sewer emptied into Fish Creek just upstream from the Gavriloffs' property. By 1998, Todd Gavriloff noticed that Fish Creek would overflow its banks following any significant rainfall.

{¶7} In 1997, appellants purchased the property and have lived in the residence on the property since that time.

{¶8} At various times, a beaver dam existed across Fish Creek. The beaver dam was located just downstream from the Gavrilloffs' property. The beaver dam was on Kent's property. Kent did remove the beaver dam; however, the beavers rebuilt the dam.

{¶9} In 2001, the Gavrilloffs filed a complaint against Kent. This case was assigned case No. 2001 CV 0575.<sup>1</sup> While this initial matter was pending, the Gavrilloffs voluntarily dismissed it pursuant to Civ.R. 41(A).

{¶10} In 2004, the Gavrilloffs refiled the lawsuit against Kent. This new complaint was assigned case No. 2004 CV 01270. Shortly after refiling the complaint, the Gavrilloffs filed an amended complaint. The amended complaint alleged that Kent negligently operated its storm water drainage conduit; that Kent has created a nuisance by permitting its storm sewer to drain into Fish Creek and, as a result, cause flooding on the Gavrilloffs' property; and that Kent has committed a trespass by permitting water from its storm water conduit to enter Fish Creek and, then, flood the Gavrilloffs' property. The complaint sought damages in excess of \$25,000 and abatement of the nuisance and trespass. Kent filed an answer to the amended complaint, wherein it denied the substantive allegations.

{¶11} In September 2005, Kent filed a motion for summary judgment. Kent attached several documents to its motion, including: a copy of the settlement agreement between Kent and Pete Gavrilloff; an affidavit from Gregory Bachman, Kent's City Engineer; and an affidavit and wetland delineation report of the Gavrilloffs' property from

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1. In its appellate brief, Kent contends the Gavrilloffs advanced the following causes of action in the case: negligence, appropriation, and nuisance. However, a copy of the complaint in case No. 2001 CV 0575 is not included in the record before this court.

Dr. Samuel Mazzer. The Gavrilloffs filed a brief in opposition to Kent's motion for summary judgment. The Gavrilloffs attached several items to their brief, including: a wetlands evaluation and historical investigation report regarding Gavrilloffs' property from Robert Curtis; a report about the property from Engineer Joseph Mosyjowski; various correspondences between the parties; and Todd Gavrilloff's affidavit.

{¶12} On January 9, 2006, the trial court issued a judgment entry regarding Kent's motion for summary judgment. The trial court found, pursuant to R.C. 2744, that Kent had immunity for the planning, design, and construction of the sanitary sewer system, as these activities related to a governmental function. The trial court held that the Gavrilloffs' claims regarding the damaged field drain tiles are covered by the 1989 settlement agreement between Kent and Pete Gavrilloff, and the Gavrilloffs are bound by that agreement as successors in interest. Further, the court held that the Gavrilloffs' negligence action regarding the damaged drain tiles was barred by the two-year statute of limitations. The court found that Kent had immunity from the trespass claim. The trial court granted Kent's motion for summary judgment in relation to the claim for "negligent planning, design, construction, or reconstruction" of the sanitary and storm sewer systems and the trespass claim. The trial court denied Kent's motion for summary judgment in relation to the Gavrilloffs' "claims for negligence in the maintenance, operation or upkeep of the easement and creek and abatement of nuisance flowing therefore."

{¶13} Kent was granted leave to file a second motion for summary judgment. In its second motion for summary judgment, Kent claimed the applicable statutes of limitations precluded the Gavrilloffs' remaining claims. The Gavrilloffs filed a brief in

opposition to Kent's second motion for summary judgment. Kent filed a reply to the Gavrilloffs' brief in opposition.

{¶14} On August 4, 2006, the trial court issued a judgment entry on Kent's second motion for summary judgment. In this judgment entry, the trial court held:

{¶15} “[T]his Court misapprehended one aspect of the Fairchild storm sewer project. This Court had concluded that Fish Creek, the creek bordering Plaintiffs’ property, was part of the storm sewer system, rather than what it is – a natural watercourse located in the natural drainage system into which the Fairchild storm sewer discharges. That erroneous characterization lead to the conclusion that Fish Creek was part of the City’s storm sewer system. With that incorrect conclusion the City became obligated to the ‘maintenance’ and ‘upkeep’ of Fish Creek, and thereby subject to monetary damages for the negligent discharge of those obligations.

{¶16} “Upon further review, it becomes apparent that Fish Creek is not part of the Fairchild storm sewer improvement. The issue then becomes one involving the effect on Plaintiffs’ property from discharge of surface waters from the Fairchild storm sewer improvement, the City’s reasonable use of Fish Creek. This issue does not involve maintenance and upkeep of the storm sewer system.”

{¶17} The trial court went on to hold that Kent had immunity from the Gavrilloffs’ claims regarding the negligent planning, design, construction, or reconstruction of the storm sewer system. The court held that the Gavrilloffs presented no evidence regarding the negligent maintenance or upkeep of the storm sewer system. The court also held that Kent has no duty to maintain or dredge Fish Creek, as it is a natural watercourse. The trial court noted that the decision to dredge a natural watercourse is

discretionary and a flood control measure. Thus, Kent has immunity for its decision not to dredge the creek. The trial court noted that the Gavriloffs are not without recourse. The court held that the Gavriloffs “have a remedy for damages to their property through an appropriation action, not an action in tort.”

{¶18} In regard to the Gavriloffs’ claim seeking an injunction of the storm sewer project, the trial court held that, since the Gavriloffs produced no evidence on the elements necessary for an injunction of the storm sewer, their claim failed. In regard to the Gavriloffs’ claims that there was ponding of water over the sanitary sewer line, the trial court held that the Gavriloffs were bound by the 1989 settlement agreement. The court noted the settlement agreement provided Pete Gavriloff, and his successors in title, three years to achieve a complete restoration of the topography. The trial court held that the failure of Pete Gavriloff and his successors in title to begin this restoration project was binding on appellants and, therefore, appellants had no claim against Kent in regard to this issue. The trial court did hold that the Gavriloffs may be able to recover compensation from Kent for water that encroaches onto their property from Kent’s property by means of an appropriation action.

{¶19} In regard to the Gavriloffs’ claims concerning the beaver dam, the trial court held that the Gavriloffs have no valid claim against Kent in tort, because there is no evidence that Kent encouraged the beavers to build the dam. The trial court held that the Gavriloffs may have a successful claim for injunctive relief regarding the beaver dam. The trial court held that the matter would proceed to a bench trial on this issue.

{¶20} The trial court entered summary judgment in favor of Kent on all the Gavriloffs’ remaining claims, except for their claim for injunctive relief regarding the

beaver dam. The trial court's judgment entry did not contain language pursuant to Civ.R. 54(B) that there was no just reason for delay.

{¶21} The Gavrilloffs filed a notice of appeal of the trial court's August 4, 2006 judgment entry to this court. Since the trial court's August judgment entry did not dispose of all claims and did not contain Civ.R. 54(B) language, it did not appear to be a final, appealable order. Thus, this court issued a judgment entry ordering the Gavrilloffs to show cause as to why the appeal should not be dismissed for lack of a final, appealable order. On October 31, 2006, the Gavrilloffs voluntarily dismissed their claim for injunctive relief. Thereafter, this court issued a judgment entry indicating that, in light of the voluntary dismissal, there appears to be a final, appealable order and that the Gavrilloffs' notice of appeal would be considered a premature appeal as of October 31, 2006.

{¶22} The Gavrilloffs raise two assignments of error. Their first assignment of error is:

{¶23} "It was error for the trial court to not rule on the issue presented in the second motion for summary judgment."

{¶24} The Gavrilloffs argue the trial court erred by reversing its prior judgment entry.

{¶25} "The Ohio Rules of Civil Procedure do not provide for motions for reconsideration after a final judgment is entered. [*Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus.] For this reason, a motion for reconsideration made after a final judgment in a court of original jurisdiction is considered a nullity, and any judgment or final order entered on the motion is a nullity.

Id.” *Shirley v. Republic-Franklin Ins. Co.*, 5th Dist. No. 2002CA00257, 2003-Ohio-4120, at ¶19.

{¶26} However, in this matter, the trial court’s January 9, 2006 judgment entry was not a final, appealable order, because the entry contemplated further action and did not resolve all of the issues between the parties. *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, at ¶4. (Citations omitted.) “Where no final judgment has been entered, a trial court has continuing jurisdiction to revise its order at any time and can entertain a motion for reconsideration.” *Phillips v. Mufleh* (1994), 95 Ohio App.3d 289, 293. Since the trial court’s January 9, 2006 judgment entry was not a final, appealable order, the trial court was permitted to reconsider and “reverse” its prior ruling in its August 23, 2006 judgment entry. *Id.*

{¶27} Next, the Gavrilloffs contend the trial court erred by not addressing the statute of limitations issue raised by Kent in its second motion for summary judgment. We disagree. If a defendant is entitled to judgment on one issue as a matter of law, and that issue is dispositive of the action, the trial court need not address other issues. See, e.g., Civ.R. 56(C).

{¶28} The Gavrilloffs’ first assignment of error is without merit.

{¶29} The Gavrilloffs’ second assignment of error is:

{¶30} “The trial court erred as a matter of law when it reversed itself from its decision in the first motion for summary judgment.”

{¶31} Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. In addition, it must



appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. Civ.R. 56(C). The standard of review for the granting of a motion for summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶32} In *Dresher v. Burt*, the Supreme Court of Ohio set forth a burden-shifting exercise to occur in a summary judgment determination. Initially, the moving party must point to evidentiary materials to show that there are no genuine issues of material fact and they are entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d at 293. If the moving party meets this burden, a reciprocal burden is placed on the nonmoving party to show that there is a genuine issue of fact for trial. *Id.*

{¶33} The issues regarding the beaver dam and the sanitary sewer line are not at issue on this appeal. The Gavrilloffs only object to the trial court's conclusions regarding the storm sewer project.

{¶34} One of the reasons water accumulated on the Gavrilloffs' property was the accumulation of silt in Fish Creek. Dr. Mazzer opined that Fish Creek was reverting to its natural state as a wetland following the channelization of the creek in the 1940s. The question that arises is whether Kent had a duty to dredge or otherwise channel the creek to alleviate flooding.

{¶35} Kent presented evidence that Fish Creek is a natural waterway. Gregory Bachman stated in his affidavit that Fish Creek formed naturally.

{¶36} The Gavrilloffs cite the Eighth Appellate District's decision in *Accurate Die Casting Co. v. Cleveland* (1981), 2 Ohio App.3d 386, in support of its argument that Kent had a duty to maintain Fish Creek. The Eighth District's opinion is readily

distinguishable from the instant matter. In *Accurate Die Casting Co. v. Cleveland*, “the city enclosed the entire watercourse within storm sewer pipes so that no portion thereof continued to flow in its natural state.” *Id.* at 390. The court noted that the city’s storm sewer system did not merely “conjoin” with the natural waterway but, rather, the storm sewer system was “superimposed” on the natural waterway. *Id.* In the instant matter, Kent’s storm sewer conduit merely emptied into Fish Creek.

{¶37} The Gavriloffs have not cited any other authority in support of its position that Kent is required to maintain Fish Creek through dredging and other flood control measures. We agree with the trial court’s conclusion that such dredging is a “flood control measure,” which is a governmental function for which Kent has immunity. R.C. 2744.01(C)(2)(r) and 2744.02. Further, we agree that Kent has immunity because such dredging is discretionary. See R.C. 2744.03(A)(5).

{¶38} Finally, we agree that the appropriate remedy for the Gavriloffs to pursue against Kent for the alleged flooding of their property is an appropriation action.

{¶39} Pursuant to the Ohio and United States Constitutions, private property is not permitted to be taken for public use unless the property owner is provided just compensation. *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 529, 533, citing Fifth and Fourteenth Amendments to the United States Constitution and Section 19, Article I, Ohio Constitution.

{¶40} The Supreme Court of Ohio has held:

{¶41} “The construction and operation of a municipal storm sewer system so as to cause material damage to a downstream landowner, as a result of flooding from rains or other causes which are reasonably foreseeable, is a direct encroachment upon the

land which subjects it to a public use that excludes or restricts the landowner's dominion and control over his land, and *such owner has a right to compensation for the property taken under Section 19, Article I of the Ohio Constitution.*" (Emphasis added.) *Masley v. Lorain* (1976), 48 Ohio St.2d 334, syllabus.

{¶42} Generally, when a governmental entity seeks to acquire private property for a public use, the governmental entity initiates appropriation proceedings against the property owner. R.C. 163.01, et seq. This was the avenue taken by Kent in the 1980s to acquire an easement for the sanitary sewer line. However, if a private property owner believes his or her property has been unlawfully taken, he or she may seek just compensation from the public entity. See, e.g., *Trumbull Cty. Bd. of Comms. v. Snyder* (1996), 74 Ohio St.3d 357, 360. The Supreme Court of Ohio has "held that mandamus is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged." *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 108. (Citations omitted.)

{¶43} In this matter, the Gavriloffs did not file a mandamus action seeking to compel appropriation proceedings. Further, they do not object to the trial court's conclusion that the appropriation issue is not raised in the present matter.

{¶44} The trial court did not err by entering summary judgment in favor of Kent.

{¶45} The Gavriloffs' second assignment of error is without merit.

{¶46} The judgment of the trial court is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

MARY JANE TRAPP, J., concur.