

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO EX REL. HAMILTON TOWNSHIP BOARD OF TRUSTEES,	:	
Relator-Appellant,	:	CASE NO. CA2009-07-100
- vs -	:	<u>OPINION</u> 3/1/2010
WARREN COUNTY BOARD OF COMMISSIONERS, et al.,	:	
Respondents-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09 CV 73431

Keating Ritchie, Warren J. Ritchie, 5300 Socialville-Foster Road, Suite 140, Mason, Ohio 45040, for relator-appellant

Rachel A. Hutzler, Warren County Prosecuting Attorney, Bruce A. McGary, 500 Justice Drive, Lebanon, Ohio 45036, for respondent-appellee, Warren County Board of Commissioners

Cohen, Todd, Kite & Stanford LLC, Kevin C. McDonough, 250 East Fifth Street, Suite 1200, Cincinnati, Ohio 45202, for respondent-appellee, the village of Maineville

Aronoff, Rosen & Hunt, Kevin L. Swick, Richard A. Paolo, 2200 U.S. Bank Bldg., 425 Walnut Street, Cincinnati, Ohio 45202-3954, for intervening-respondents/appellees, The Sandy Cove Corp., Salt Run Development, LLC., Hildebrandt Family Partnership, Ltd., and American Homes, LLC

BRESSLER, P.J.

{¶1} Relator-appellant, Hamilton Township Board of Trustees, appeals a decision of the Warren County Court of Common Pleas dismissing the township's

complaint for a writ of mandamus against respondent-appellee, Warren County Board of Commissioners, at the request of intervening-respondents/appellees, Salt Run, LLC, Hildebrandt Family Partnership, American Homes, LLC, and The Sandy Cove Corp.

{¶12} In December 2008, Salt Run, Hildebrandt, American Homes, and Sandy Cove filed a petition with the Warren County Board of Commissioners to annex 458.2347 acres of property the companies owned in Hamilton Township to the village of Maineville. Maineville later filed a statement of services to be provided to the property owners and their properties if the petition was approved.

{¶13} On December 10, 2008, the Hamilton Township Board of Trustees adopted a resolution objecting to the annexation on the ground that the petition failed to comply with one or more of the requirements in R.C. 709.023(E), and filed the resolution with the board of county commissioners. In January 2009, the board of county commissioners voted to approve the annexation.

{¶14} In February 2009, the township filed a second amended verified complaint in mandamus in the Warren County Court of Common Pleas requesting that the board of county commissioners be directed to reconsider their approval of the annexation. The property owners who brought the annexation petition intervened in the action and moved to dismiss the township's complaint on the ground that the township lacked standing to challenge the board of county commissioners' approval of the annexation. The trial court agreed with the property owners and dismissed the township's complaint.

{¶15} The township now appeals, assigning the following as error:

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S WRIT OF MANDAMUS ON THE ISSUE OF STANDING."

{¶18} The township argues the trial court erred by denying the township's

complaint seeking a writ of mandamus on the ground that the township lacked standing to seek such a writ. The township contends it has standing under R.C. 709.023(G) to seek a writ of mandamus to compel the board of county commissioners to perform its duty to consider whether the conditions specified in R.C. 709.023(E) have been met. We disagree with this argument.

{¶9} The issues presented by this assignment of error have been recently decided by the Ohio Supreme Court in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, Slip Opinion No. 2010-Ohio-169, syllabus, wherein the court held that "[a] township that files a resolution objecting to an annexation petition pursuant to R.C. 709.023(D) is not a 'party' as that term is used in R.C. 709.023(G) and therefore lacks standing to seek a writ of mandamus to compel the board of county commissioners to make findings on each of the conditions set forth in R.C. 709.023(E)."

{¶10} In this case, the property owners filed their annexation petition pursuant to R.C. 709.023. The township objected to the petition pursuant to R.C. 709.023(D). R.C. 709.021(D) defines "party" to include townships for purposes of special annexation proceedings brought under R.C. 709.022 and 709.024, but *not* 709.023. As a result, the township was not a "party" as that term is defined in R.C. 709.021(D), nor is the township a "party" as that term is used in R.C. 709.023; therefore, the township lacked standing to seek a writ of mandamus to compel the board of county commissioners to make findings on each of the conditions set forth in R.C. 709.023(E). *State ex rel. Butler Twp. Bd. of Trustees*, 2010-Ohio-169, at ¶ syllabus. Consequently, the trial court did not err in dismissing the township's complaint seeking a writ of mandamus. *Id.*

{¶11} Accordingly, the township's first assignment of error is overruled.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S WRIT OF

MANDAMUS ON THE ISSUE OF REVIEW/APPEAL."

{¶14} The township argues the trial court erred by determining that "standing aside, the Board of County Commissioners' Decision is not subject to any form of review or appeal." However, the trial court made this determination only as an alternative justification for its decision to dismiss the township's complaint for a writ of mandamus in the event that the township was found to have standing to challenge the board of county commissioners' decision. The Ohio Supreme Court's recent decision in *State ex rel. Butler Twp. Bd. of Trustees*, Slip Opinion No. 2010-Ohio-169, now makes it clear that the township did *not* have standing to bring their complaint for a writ of mandamus, and therefore this issue is moot.

{¶15} The township also argues that R.C. 709.023 should not be construed as defining "any party" to exclude townships, since doing so could lead to unreasonable or absurd results, such as preventing a township from challenging a board of county commissioners' decision approving a property owner's petition that sought the annexation of 700 acres rather than the maximum allowable amount of 500 acres. See R.C. 709.023(E)(3).

{¶16} However, in *State ex rel. Butler Twp. Bd. of Trustees*, 2010-Ohio-169 at ¶21 and 22, the Ohio Supreme Court found that it was obligated to construe the statute as written, without reading words into the statute, and giving effect to the words used therein. The court also noted that 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[,]" but "chose otherwise." *Id.* at ¶22. This court is obligated to follow the decisions of the Ohio Supreme Court. See *Marshall v. ACE USA*, Warren App. No. CA2001-09-083, 2002-Ohio-2419, ¶28.

{¶17} Therefore, the township's second assignment of error is overruled.

{¶18} Assignment of Error No. 3:

{¶19} "THE TRIAL COURT ERRED WHEN IT DISPOSED OF A MANDAMUS ACTION ON A 12(B)(6) MOTION."

{¶20} The township argues the trial court erred by dismissing the township's complaint seeking a writ of mandamus pursuant to Civ.R. 12(B)(6), because such a motion may be sustained only when it appears beyond doubt that a plaintiff can prove no set of facts entitling him to relief, and the property owners failed to meet that burden. We disagree with this argument.

{¶21} A party may use a Civ.R. 12(B)(6) motion to dismiss to raise the defense of lack of standing. *Brown v. Columbus City Schools Bd. of Edn.*, Franklin App. No. 08AP-1067, 2009-Ohio-3230, ¶4. See, also, *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267; and *A-1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.* (1994), 97 Ohio App.3d 623, 626-627.

{¶22} In this case, the township clearly lacked standing to seek a writ of mandamus to compel the board of county commissioners to make findings on each of the conditions set forth in R.C. 709.023(E). *State ex rel. Butler Twp. Bd. of Trustees*, 2010-Ohio-169, at syllabus. Moreover, there was no need for the trial court to resort to any material outside the pleadings to rule on the Civ.R. 12(B)(6) motion to dismiss. Cf., *Washington Mut. Bank v. Beatley*, Franklin App. No. 06 AP-1189, 2008-Ohio-1679, ¶12-17.

{¶23} Accordingly, the township's third assignment of error is overruled.

{¶24} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.