[Cite as *Gabel v. Miami E. School Bd.*, 2007-Ohio-6590.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

THOMAS E. GABEL, et al.	:	
	:	Appellate Case No. 07-CA-16
Plaintiff-Appellants	:	
	:	Trial Court Case No. 05-361
v.	:	
	:	(Civil Appeal from
MIAMI EAST SCHOOL BOARD	:	Common Pleas Court)
	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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VALEN, J.

{¶ 1} Plaintiffs-appellants Thomas and Christine Gabel appeal from a summary judgment rendered in favor of Defendant-Appellee Miami East School Board (Board). The Gabels contend that the trial court erred in finding that they lacked standing to bring an appropriation action against the Board. The Gabels further contend that the trial court abused its discretion by allowing the Board to amend its answer and assert an

affirmative defense two years after the action was filed and after the case had been appealed once and remanded to the trial court.

{¶ 2} We conclude that the trial court erred in granting summary judgment against the Gabels on the issue of standing. Although the Gabels took possession of the property after the Board's wastewater treatment facility began operation, no evidence was presented to indicate that the Gabels knew of any improper discharge before they received title to the property. In addition, the Board failed to present evidence to indicate that a substantial burden or interference with a property right occurred before title was transferred. Finally, even if the Board had presented evidence indicating that the Gabels were not the real parties in interest, the trial court should not have dismissed the action without allowing reasonable time for the real parties in interest to be joined.

{¶ 3} Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I

{¶ 4} This case is before us on appeal for a second time. In the first appeal, we affirmed in part and reversed in part a summary judgment that had been rendered on the Board's behalf. We agreed with the trial court that the Board was immune from liability for nuisance and trespass claims. However, we also concluded that the trial court erred in granting summary judgment in the Board's favor on a mandamus claim that alleged a taking of property without just compensation. *Gabel v. Miami East School Board*, 169 Ohio App.3d 609, 613, 2006-Ohio-5963, 864 N.E.2d 102, at ¶ 6-7 (*Gabel I*).

{¶ 5} The background facts are set out in detail in *Gabel I*. Our opinion noted

that the Gabels had purchased the property in question in August, 2004. A prior owner of the property granted Miami East School District (District) an easement in 1958 to install and operate a sewer line across the property. For more than forty years, the District operated a 10,000 gallon wastewater treatment facility and discharged treated effluent through the sewer line directly into Little Lost Creek. In 1998, subsequent owners of the property, Jeffrey and Pamela Bair, granted the District another easement to install and operate a stormwater outfall sewer in, under, or around the property. This sewer was not designed to drain directly into Little Lost Creek; rather, the sewer was designed to drain into a low-lying portion of the property that was located a short distance from the creek. 2006-Ohio-5963, at ¶ 8-9.

{¶ 6} After the 1998 easement was granted, the District embarked on several projects, including installation of a stormwater drainage system around the high school track; construction of a new elementary school and a new stormwater drainage system around the school, which required placement of a 36 inch cement drain on the Bair property under the 1998 easement; and construction of a new 25,000 gallon wastewater treatment facility to replace the existing plant. The treated effluent from the new wastewater treatment facility was supposed to flow onto the Bair property through the stormwater outfall sewer and the 1958 sewer line easement was to be used only as a secondary stormwater outlet. Id. at ¶ 10-11.

{¶ 7} In May, 2004, the District began operation of the new wastewater treatment facility. In our prior opinion, we noted that:

{¶ 8} "The Gabels purchased the Bair property on August 18, 2004. They did not immediately notice that the school district was using the 1998 easement to drain

stormwater and treated wastewater onto their property. A few weeks after buying the property, however, the Gabels discovered 'a large amount of murky water' flowing from a drain pipe on their land. The water was located near Little Lost Creek in an area 'covered by a large amount of underbrush' that Thomas Gabel had to 'hack away' to find. The affected area allegedly includes several acres of the Gabels' property, which remains 'continual[ly] saturated' due to treated wastewater being discharged there." Id. at ¶ 12.

{¶ 9} After unsuccessfully attempting to resolve the matter with the Board, the Gabels filed suit in June, 2005, alleging trespass, nuisance, and a taking of their property without just compensation. The Gabels also included a request for a writ of mandamus. After we reversed the summary judgment in part, we remanded the case to the trial court in November, 2006. On remand, the trial court issued an order setting discovery and motion deadlines, and a trial date of July 24, 2007.

{¶ 10} On May 7, 2007, the Board filed a motion for leave to file a second amended answer raising the issue of whether the Gabels had standing to assert a takings claim. In support of the motion, the Board claimed that the issue of when the taking occurred had become "clarified" as a result of the prior summary judgment proceedings and an admission by the Gabels in their appellate brief as to a more definite time frame for when the taking began, i.e., when the new treatment plant went into operation in May, 2004.[1]

[1]The Board had previously filed a motion in August, 2005, asking for permission to amend its answer to assert the defense of "implied easement." In the motion, the Board stated that "During informal discovery in this case, it became known that the school had been operating the wastewater treatment plant and using the easement on

{¶ 11} Before the court granted leave to file an amended complaint, the Board filed a motion for summary judgment on the standing issue. The Board did not attach new evidence, but relied on an affidavit that had been submitted nearly two years earlier in support of the Board's original summary judgment motion. The Board's new basis for summary judgment was that the date of "taking" was the date on which the Board began using the new wastewater treatment facility in May, 2004. Consequently, the Board claimed that the Gabels lacked standing to bring the appropriation action because the taking occurred before they owned the property.

{¶ 12} The Gabels opposed the motion to amend, contending among other things, that the information in question had been available for some time, but was not raised in the Board's prior motion for summary judgment. The Gabels also filed a response to the summary judgment motion, claiming that no known burden on the property occurred until after title was transferred. In this regard, the Gabels relied on the affidavit of the Board Treasurer, Michael Summer, who testified that no one had contacted the District to complain about drainage until December, 2004.

{¶ 13} The Gabels also attached the affidavit of their own expert, David Winemiller, who stated that the initial use of the waste treatment facility did not create a

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the plaintiff's property in an open and obvious manner prior to their purchase of that property from the former owners. The former owners of the property had been the grantors of the easement to install the stormwater outfall on the property now owned by the plaintiffs. Therefore, the Board of Education has reasonable grounds to assert the affirmative defense. Accordingly, the Board seeks leave of court to amend its answer to add only this affirmative defense." Doc. #20, p. 2. The Board attached a proposed answer to the motion, and the trial court subsequently granted the motion and deemed the amended answer filed as of August 29, 2005. Therefore, the Board would have known in August, 2005, that the Gabels purchased the property after the wastewater treatment facility became operational.

burden on the land because the dry season began and the land could absorb the waste water without any negative impact. According to Winemiller, the burden on the property did not begin until August or early September, 2004, because it took some time for the land to be negatively affected from the wastewater treatment facility. Winemiller's conclusion was based on the fact that the discharge was a small, steady stream that did not come out in one instant rush, and did not have an immediate impact. However, over time, the constant flow created a substantial burden on the property.

{¶ 14} In June, 2007, the trial court granted summary judgment in favor of the Board on the standing issue. The trial court rejected the Gabels' contentions and concluded that under applicable law, the date of taking is the date that an unauthorized physical invasion of the property occurs. According to the court, the unauthorized invasion occurred in May, 2004, when the treatment plant began operation. The Gabels timely appealed, and raise two assignments of error.

II

{¶ 15} The Gabels' First Assignment of Error is as follows:

{¶ 16} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT AND HOLDING IN ITS DECISION THAT APPELLANTS DID NOT HAVE STANDING TO BRING THIS ACTION."

{¶ 17} Under this assignment of error, the Gabels contend that the trial court erred because there were genuine issues of material fact, at a minimum, regarding when the easement and their property became overburdened by the wastewater treatment facility. According to the Gabels, the burden did not begin until late August or

early September, 2004, when the property began to be substantially burdened by the discharge.

{¶ 18} Whether established facts confer standing to assert a claim is a matter of law. We review questions of law *de novo*. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 124, 2006-Ohio-954, 846 N.E.2d 478, at ¶ 90, citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4. The *de novo* standard of review also applies to summary judgment decisions.

{¶ 19} "A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760, 732 N.E.2d 422. We review decisions granting summary judgment *de novo*, which means that we apply the same standards as the trial court. *Broadnax v. Greene Credit Service* (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167, and *Long v. Tokai Bank of California* (1996), 114 Ohio App.3d 116, 119, 682 N.E.2d 1052.

{¶ 20} "Standing is a threshold question for the court to decide in order for it to proceed to adjudicate the action." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275, 701 N.E.2d 1002. However, the issue of lack of standing "challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." Id. To decide whether the requirement has been satisfied that an action be brought by the real party in interest, "courts must look to the substantive law creating the right being

sued upon to see if the action has been instituted by the party possessing the substantive right to relief." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25, 485 N.E.2d 701.

{¶ 21} In the context of appropriation proceedings, Ohio has followed the substantive rule that:

{¶ 22} "the right to damages for injury to real property by its temporary appropriation to a public use is in the one who owns such property when the appropriation and injury occur, and such right does not ordinarily pass to a subsequent grantee who acquires the property after such appropriation has ceased." *Steinle v. City of Cincinnati* (1944), 142 Ohio St. 550, 551, 53 N.E.2d 800, paragraph three of the syllabus.

{¶ 23} Relying on this principle, the Board contends that the appropriation and injury occurred in May, 2004, and that the right to recover did not pass to the Gabels, who were subsequent grantees. The Board also relies on *Hatfield v. Wray* (2000),140 Ohio App.3d 623, 628, 748 N.E.2d 612, which held that "[i]f the injury is permanent at the time of the completion of the structure, the owner at that time has a cause of action which is not assignable and does not pass to the grantee." The Board contends that the "injury" to the land was permanent when the wastewater treatment facility became operational in May, 2004, and that the cause of action, therefore, did not pass to the Gabels, who were subsequent grantees.

{¶ 24} We disagree with the Board. As a preliminary point, we note that there are fundamental differences between the present case and the situations outlined in *Steinle* and *Hatfield*. In *Steinle*, the City of Cincinnati obtained a right of way in 1913 to

construct a sewer. In 1930, the City was notified that the sewer was out of repair. Because water was being improperly discharged from the sewer, the land beneath a residence began to settle beginning in 1933, and caused the garage and house to crack. The City repaired the sewer in 1934, and by the middle of 1935, the house, garage, and surface of the land ceased to sink. After purchasing the property in 1937, the plaintiff brought suit against the City. See 142 Ohio St. at 551-52.

{¶ 25} In finding that the plaintiff was not the real party in interest, the Ohio Supreme Court noted that "any taking or appropriation by the city was temporary and had ended before plaintiff bought the property." Id. at 555. The Supreme Court, therefore, concluded that "[s]uch right of action as there might have been under the appropriation theory would have belonged to the one who owned the property when the appropriation and injury occurred." Id.

{¶ 26} In *Hatfield*, the injury occurred as the result of a permanent construction that was complete long before the plaintiff took title to the property. More significantly, however, the plaintiff's parents discovered the problem many years before they transferred title to the plaintiff.

{¶ 27} In *Hatfield*, the Ohio Department of Transportation (ODOT) constructed a highway adjacent to a property owned by the plaintiff's parents. In 1975, the family began experiencing problems of settling and moisture with a house and restaurant located on the property. 140 Ohio App.3d at 625. In fact, the parents met with ODOT's head engineer in 1975, and informed him that the highway reconstruction project in the early 1970's had caused flooding to the property. Id. at 627. In 1992, the property was conveyed to the plaintiff and his sisters, and the plaintiff then brought a mandamus

action to compel ODOT to institute appropriation proceedings. In finding a lack of standing on the plaintiff's part, the Tenth District Court of Appeals noted that:

{¶ 28} "appellant became a grantee of the property in 1992, long after the highway project had been completed, and the record is undisputed that the water problems alleged to have been caused by the project were manifest to the original owner as early as 1975. The trial court held that appellant lacked standing to bring this action because 'the injury to the property *both occurred and was discoverable* before relator took title to the property.' Although the trial court relied upon authority * * * that did not involve a governmental taking claim, we conclude, based upon case law applicable to actions alleging a governmental taking or appropriation of private property, that the trial court properly concluded that appellant lacked standing to bring this action." Id. at 630 (emphasis added).

{¶ 29} In contrast to the above cases, the record below contains no evidence indicating that the water problem was discoverable or had been discovered by anyone prior to the transfer of the property to the Gabels. In fact, the only evidence submitted on summary judgment was that the pool of murky water was not discovered until after title was transferred.

{¶ 30} In *Frazier v. Village of Westerville* (1941), 34 Ohio Law Abs., 36 N.E.2d 812, the Franklin County Court of Appeals considered a situation similar to the one at hand. Specifically, the Village of Westerville had constructed a dam, dikes, and other improvements that were complete in April, 1935. The plaintiffs purchased adjoining parcels of land in July, 1935, and in March, 1936. See 36 N.E.2d at 816. The plaintiffs subsequently brought suit, claiming that the construction had caused constant flooding

of two acres of their property and had obstructed the natural flow of water in another area so as to cause overflowing on thirty other acres in times of unusual rainfall or flood. Id. at 815. A jury found in favor of the plaintiffs, and the Village then appealed.

{¶ 31} As in the present case, the Village claimed that the plaintiffs could not recover because the damage had accrued as of the date the construction was completed, and "the right to exercise this claim for damages inured to the owner of the premises and did not and could not pass to the plaintiffs as of the date that they took title." Id. at 816-17.

{¶ 32} The Franklin County Court of Appeals disagreed, stating that:

{¶ 33} "Plaintiffs meet this contention with the assertion that their cause of action did not arise until the injury resulting in their damages was apparent and that it did not occur and, therefore, could not have been known prior to 1937. We are inclined to support this latter view of the law.

{¶ 34} " * * *

{¶ 35} "But a few months elapsed after the completion of the dam and the acquisition of the seven-acre tract and less than a year elapsed between its completion and the acquisition of the fifty-six acres by the plaintiffs. It is well within the probabilities that no unusual flowage of water over the lands of plaintiffs occurred at any time prior to their purchase of both tracts of lands. From their evidence in this case it is conclusive that this is the fact. They claim no damage before the spring and summer of 1937 and no testimony is forthcoming in their presentation of the case of any damaging deposits of water on the lands prior to 1937." Id. at 817.

{¶ 36} As we stressed, the Gabels presented evidence that the damage to their

property was not apparent until after they received title. The record also fails to demonstrate that a water problem occurred before the property was transferred. Although the wastewater treatment facility presumably began discharging wastewater when it became operational in May, 2004, the Board failed to submit any evidence indicating what quantity of wastewater was being discharged. As support for summary judgment, the Board simply submitted an affidavit that had previously been used to support the Board's first summary judgment motion. This affidavit, from the Board Treasurer, stated only that operation of the new wastewater treatment facility began at some unspecified date in May, 2004. However, this statement is conclusory and proves nothing.[2]

{¶ 37} In contrast, the Gabels presented evidence from their expert that any discharge would not have created a substantial burden on the property until after the Gabels took possession.

{¶ 38} The Board also contends that the Ohio Supreme Court established a "clear rule" for determining the date of taking in *Evans v. Hope* (1984), 12 Ohio St.3d 119, 465 N.E.2d 869. Again, we disagree with the Board's interpretation.

{¶ 39} In *Evans*, the Ohio Supreme Court stated that "[g]enerally, the 'date of take' on which the value of property appropriated for public use is determined is the

[2]In fact, a June 10, 2004 letter from the Ohio EPA indicates that a final inspection of the wastewater facility did not take place until May 26, 2004, leading one to question how much the facility was actually used before the end of the 2003-2004 school year. The EPA letter also noted that certain issues still needed to be addressed. The record fails to reveal whether the facility was used during the summer of 2004, or to what extent, nor does the record indicate what amount of wastewater was being discharged at any point before the Gabels took possession of their property.

earlier of either the date of trial or the date of actual physical appropriation." 12 Ohio St.3d at 120 (citations omitted). The Board interprets this to mean that the date of the "take" for purposes of standing must be the date that the government physically invades private property, no matter how minimal the invasion. However, *Evans* did not discuss the degree of physical invasion that is required.

{¶ 40} The court's comment in *Evans* is also qualified by the word "generally," which means that exceptions will exist. In the typical situation, the date on which a government agency physically occupies or takes over a property would be the date of taking. For example, in *Evans*, the county commissioners appropriated land in July, 1981, and opened a new road that included the appropriated land in November, 1981. The landowners in *Evans* argued that the trial court should have used a valuation date in the mid-1970's because events between that time and July, 1981, had caused the land value to decline. The Ohio Supreme Court rejected this argument.

{¶ 41} The Ohio Supreme Court first noted that the rule for *valuation* purposes is generally the earlier of the date of trial or the date of the actual physical appropriation. Id. at 120. The court then observed that an exception exists where activity of an appropriating agency causes the property's value to depreciate. However, the court refused to apply this exception because there was no causal link between the commissioners' actions and the depreciation in value. The court chose instead to value the land as of July, 1981, which was the date the commissioners had physically taken over the property. Id.

{¶ 42} The discussion in *Evans* relates to the date selected for purposes of valuing the compensation to be given for an appropriation, not to the issue of standing.

In *Evans*, the court did not consider how to evaluate the point at which an actual physical taking occurs, because that was not at issue. However, other cases have indicated that in order "[t]o establish a taking, a landowner must show a substantial or unreasonable interference with a property right." *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati,* 167 Ohio App.3d 798, 804, 2006-Ohio-3348, 857 N.E.2d 612, at ¶ 24. This consideration is pertinent to the standing issue.

{¶ 43} Under the Board's theory, any physical invasion of a property, no matter how slight, would constitute a taking and would prevent a future grantee from bringing an action for appropriation. In other words, if the Board's wastewater treatment facility had deposited a gallon or even a cup of wastewater into the stormwater outflow sewer on its first day of operation, that act would have constituted a physical taking and would have barred a grantee who purchased the property the following day from pursuing an action for appropriation. We cannot agree with such an approach, since the law requires a substantial or unreasonable interference. Thus, the date of taking in this case would be the date on which the Board substantially or unreasonably interfered with the property rights of the owner. As we noted, the evidence presented to the trial court was that this occurred after the Gabels took possession of the property.[3] Accordingly, the trial court erred in granting summary judgment against the Gabels on the issue of whether the Gabels were the real parties in interest.

{¶ 44} We also note that even if the trial court had been correct in concluding that

[3]At most, there is a factual issue on this point. However, an issue of fact is raised only if one credits the statement that the wastewater treatment facility began operation in May, 2004. As we indicated, that statement is entitled to little weight because it is so conclusory.

the Gabels were not the real parties in interest, the court would have erred in dismissing the action. In this regard, Civ. R. 17(A) states that:

{¶ 45} "Every action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Accord, *Shealy*, 20 Ohio St.3d 23, 26.

{¶ 46} Based on the preceding discussion, the first assignment of error is sustained.

III

{¶ 47} The Gabels' Second Assignment of Error is as follows:

{¶ 48} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY PERMITTING APPELLEE TO AMEND ITS ANSWER FOR A SECOND TIME ALMOST TWO YEARS AFTER THE ORIGINAL COMPLAINT WAS FILED AND AFTER THE ACTION HAD BEEN THROUGH THE SECOND DISTRICT COURT OF APPEALS AND THE AMENDED DEFENSE COULD/SHOULD HAVE BEEN PRESENTED AT THE TIME OF THE ORIGINAL COMPLAINT BEING FILED. APPELLANTS WERE PREJUDICED THEREIN AND THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION."

{¶ 49} Under this assignment of error, the Gabels contend that the trial court abused its discretion by allowing the Board to amend its answer to raise the standing

issue. In view of our disposition of the first assignment of error, this assignment of error is moot.

IV

{¶ 50} The Gabels' First Assignment of Error having been sustained and the Second Assignment of Error having been declared moot, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion. . . . . .

DONOVAN, J., concurs.

GRADY, J., concurring:

{¶ 51} I am fully in accord with Judge Valen's opinion. I write separately only to point out that, although proof of a physical invasion of the Gabels' real property by the Miami East School Board is a necessary predicate to the Gabels' particular claim for just compensation, for purposes of the Fifth Amendment, the "taking" of private property is not the physical invasion itself. Rather, it is the appropriation of the Gabels' right to acquire, use and dispose of their property, which are essential attributes of the ownership of private property that the Due Process Clause of the Fourteenth Amendment protects. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 18 L.Ed.2d 255. An uncompensated appropriation of the owner's rights in any of those respects is the "taking" for which just compensation is required by the Fifth Amendment and by Article I, Section 19. Of the Ohio Constitution.

{¶ 52} The distinction between the property and the owner's rights in it is

significant in relation to the discovery rule we impose. The Gabels acquired their rights of ownership when they took title to the property. The rights the Gabels acquired are subject to any easements of record in favor of Miami East School Board that would permit the Board to discharge waste onto the property. For purposes of their standing to assert their "takings" claim, the rights of ownership that the Gabels acquired are also subject to the particular physical invasion of the property for which they now claim a right to just compensation. Unless the Gabels discovered or reasonably should have discovered the invasion in its actual or prospective extent before they took title, they lack notice of the Board's alleged appropriation of the rights of ownership the Gabels acquired when they took title to the property, and do not lack standing to prosecute their claim for just compensation. Those matters involve genuine issues of material fact that must be resolved at trial.

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(Hon. Anthony Valen, retired from the Twelfth Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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