[Cite as *State ex rel. Karr Revocable Trust v. Zehringer*, 2015-Ohio-1495.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO EX REL. JEAN A. KARR REVOCABLE TRUST, ET AL.,

RELATORS-APPELLEES, **CASE NO. 10-14-16**

v.

JAMES ZEHRINGER, DIRECTOR, OHIO DEPARTMENT OF NATURAL RESOURCES, ET AL., **O P I N I O N**

RESPONDENTS-APPELLANTS.

Appeal from Mercer County Common Pleas Court
Trial Court No. 13-CIV-084

Judgment Affirmed

Date of Decision: April 20, 2015

APPEARANCES:

Scott D. Phillips and Benjamin J. Yoder **for Appellants**

Joseph R. Miller and Thomas H. Fusonie **for Appellees**

PRESTON, J.

{¶1} Respondents-appellants, the Ohio Department of Natural Resources and its director, James Zehringer (collectively, "ODNR"), appeal the November 10, 2014 judgment of the Mercer County Court of Common Pleas ordering ODNR, under a writ of mandamus previously issued by the trial court and affirmed by this court, to make deposits in appropriation proceedings that ODNR filed against relators-appellees, Jean A. Karr Revocable Trust, Chad M. Knapke, Andrea M. Knapke, Mark L. Knapke Revocable Living Trust, Timothy A. Knapke, William J. Ransbottom, Gale A. Thomas, Nelda G. Thomas, Agnello Trust, and Powell Living Trust (collectively, "Relators"). For the reasons below, we affirm.

{¶2} This case was appealed to this court once before. *State ex rel. Karr Revocable Trust v. Zehringer*, 3d Dist. Mercer No. 10-13-18, 2014-Ohio-2241 ("*Karr I*"), *appeal not accepted*, 140 Ohio St.3d 1497, 2014-Ohio-4845. In our opinion in that appeal, we recited the following background:

> In *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, the Court determined that landowners located downstream from the western spillway of Grand Lake St. Marys—including the Relators—were entitled to compensation under Article I, Section 19 of the Ohio Constitution for property ODNR had taken as a result of

flooding caused by the spillway ODNR constructed and ODNR's lake-level-management practices. *Id.* at ¶ 59-83. (*See also* Complaint, Doc. No. 3, ¶ 2-3). The Court granted the landowners' writ compelling ODNR to "commence appropriation proceedings to determine the amount of their taking of the property." *Doner* at ¶ 86. The Court further stated that "[t]he determination of the extent of the taking will be made by the court presiding over the appropriation proceeding." *Id.*

Following *Doner*, in December 2012, ODNR initiated appropriation proceedings against the Relators in the Mercer County Court of Common Pleas. (Doc. No. 3, ¶ 10, 18-24). At the time ODNR filed the appropriation proceedings against the Relators, ODNR did not file with the clerk of court money deposits in the amounts of ODNR's appraisals of the properties. (*Id.*, ¶ 10).

On April 3, 2013, the Relators filed an original action in mandamus in the Mercer County Court of Common Pleas seeking to compel ODNR to file with the clerk of court "deposits in the amount of the State's appraisals in the appropriation proceedings." (Doc. No. 3). In their complaint for a writ of mandamus and memorandum in support, the Relators argued that Article I, Section 19 of the Ohio

Constitution and R.C. Chapter 163 require that ODNR file deposits at the time of filing its appropriation proceedings. (*Id.*, ¶ 12); (Doc. No. 6).

On April 30, 2013, ODNR filed a motion for an extension of time to respond, which the trial court granted. (Doc. Nos. 12-13).

On June 5, 2013, ODNR filed its answer to the Relators' complaint for a writ of mandamus. (Doc. No. 19). The next day, ODNR filed its memorandum in opposition to the Relators' complaint, arguing that mandamus is inappropriate because Ohio law does not impose a clear legal duty to file deposits in appropriation proceedings and because the Relators have an adequate remedy at law. (Doc. No. 20).

On August 16, 2013, the trial court heard oral argument concerning the Relators' complaint for a writ of mandamus. (Doc. No. 24). On October 2, 2013, the trial court issued a judgment entry and decision granting the writ and ordering ODNR to deposit with the clerk of court by October 31, 2013 "money equal to the value of the permanent and perpetual flowage easements of which it has taken possession in the matters it has initiated against the relators together with the damages, if any, to the residue of the individual

> relators' property as determined by ODNR * * *." (Doc. No. 29). The trial court also ordered a hearing on November 4, 2013 for the issue of attorney fees. (*Id.*).
>
> On October 22, 2013, the trial court filed an amended judgment entry finding no just cause for delay and certifying the October 2, 2013 decision as a final, appealable order under Civ.R. 54(A). (Doc. No. 31).

Karr I, 2014-Ohio-2241, at ¶ 2-8.

{¶3} ODNR appealed the trial court's October 22, 2013 judgment entry. (Doc. No. 34). We disposed of that appeal, *Karr I*, on May 27, 2014, holding that the trial court did not abuse its discretion in granting the writ of mandamus because "[t]he Relators proved by clear and convincing evidence their entitlement to a writ of mandamus." *Karr I* at ¶ 36. (*See also* Doc. No. 47).

{¶4} ODNR appealed our decision in *Karr I* to the Supreme Court of Ohio, but on November 5, 2014, the Court declined to accept jurisdiction. *State ex rel. Karr Revocable Trust v. Zehringer*, 140 Ohio St.3d 1497, 2014-Ohio-4845.

{¶5} Meanwhile, on November 12, 2013 and August 22, 2014, the trial court stayed "any proceedings to enforce the judgment entered in this action" pending ODNR's appeals to this court and to the Supreme Court of Ohio, respectively. (Doc. Nos. 42, 54).

{¶6} On November 5, 2014, the Relators notified the trial court of the Supreme Court of Ohio's decision to decline jurisdiction over ODNR's appeal from this court's decision in *Karr I*. (Doc. No. 56).

{¶7} On November 10, 2014, ODNR filed a "motion to correct value of mandated deposits." (Doc. No. 58). In that motion, ODNR requested "new or updated appraisals" because the "old appraisals * * * (i) were based upon an incorrect date of take * * *, (ii) did not take into account new information that materially impacts the before valuations of the properties, and (iii) require updating per R.C. 163.59(E) because the appraisals are over two years old." (*Id.* at 1, 5).

{¶8} Also on November 10, 2014, the trial court filed two judgment entries. In the first entry, titled "entry in accordance with Third District Court of Appeals' decision affirming mandamus writ," the trial court noted that its stay of the proceedings expired when the Supreme Court of Ohio declined to accept jurisdiction over ODNR's appeal. (Doc. No. 60). The trial court ordered "that, to the extent not already performed, [ODNR] shall forthwith make the mandated deposits" in the appropriation proceedings filed against the Relators. (*Id.*). The trial court stated that it would "assign this matter for further proceedings on the other relief requested by Relators, including the amount of attorney fees incurred * * *." (*Id.*). In the trial court's second November 10, 2014 judgment entry, it

denied ODNR's "motion to correct value of mandated deposits" and determined that "there is no just cause for delay" under Civ.R. 54(B). (Doc. No. 62).

{¶9} On November 13, 2014, ODNR filed a notice of appeal of the trial court's November 10, 2014 judgment entries. (Doc. No. 64). ODNR raises one assignment of error for our review.

Assignment of Error

The trial court erred by issuing judgment entries that failed to correct values for mandated deposits.

{¶10} In its assignment of error, ODNR argues that the trial court erred by not allowing ODNR "to correct the value of the mandated deposits" because, according to ODNR, "[t]he values of the mandated deposits were based on an improper date of take," "R.C. 163.59(E) requires that the appraisals at issue be replaced in light of new information that materially impacts valuation of the subject properties," and "R.C. 163.59(E) requires that the appraisals at issue be replaced because they are over two years old." (Appellants' Brief at 1, 4, 5, 8, 10). The Relators argue that ODNR's arguments are irrelevant to ODNR's duty to deposit money at the time it filed the appropriation proceedings. They also argue that this court did not hold "the date of the take to be 1997" in *Karr I* and that R.C. 163.59(E) does not allow ODNR to modify the deposit amounts it was required to make at the time it filed the appropriation proceedings. (Appellees' Brief at 8).

{¶11} A court on appeal reviews a decision to issue or deny a writ of mandamus under an abuse-of-discretion standard. *Karr I*, 2014-Ohio-2241, at ¶ 14, citing *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967), paragraph ten of the syllabus, and *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 64 (1995). In addition, "[a]ppellate courts review a trial court's decision to permit parties to amend defects in the proceedings for an abuse of discretion." *Ayersville Water & Sewer Dist. v. Geiger*, 3d Dist. Defiance Nos. 4-11-19 and 4-11-20, 2012-Ohio-2689, ¶ 71, citing *Wray v. Tattersall*, 6th Dist. Lucas No. L-98-1030, 1998 WL 636797, *5 (Sept. 18, 1998). "An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude on the lower court's part." *Karr I* at ¶ 14, citing *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 107 (1995).

{¶12} We observed in *Karr I* that the Takings Clause of the Ohio Constitution "requires the appropriating entity in all cases—other than 'in time of war or other public exigency' and to make or repair roads open to the public without charge—to either compensate a private-property owner or deposit money *before* taking the private property." (Emphasis sic.) *Karr I* at ¶ 21, quoting Ohio Constitution, Article I, Section 19. Based on the Supreme Court of Ohio's determination in *Doner* that ODNR "effected a taking of at least some of [the

Doner relators'] property," we concluded that, at least by the time it filed the appropriation proceedings against the Relators, ODNR had "a clear legal duty under the Takings Clause to deposit with the clerk of court money in amounts equal to the values of the permanent and perpetual flowage easements of which ODNR has taken possession and any damages to the residue of the properties." *Doner*, 130 Ohio St.3d 446, 2011-Ohio-6117, at ¶ 83; *Karr I* at ¶ 16, 26, citing *Doner* at ¶ 83, 86. None of ODNR's arguments in this appeal persuade us that ODNR is permitted or required to modify the amounts of the deposits it was required to make at the time it filed the appropriation proceedings.

{¶13} First, ODNR argues that its appraisals of the Relators' properties "were based on an incorrect date of take." (Appellants' Brief at 4). The "date of take," as ODNR is using the term, is one of the considerations for the trial court in an appropriation proceeding. *See Wray v. Stvartak*, 121 Ohio App.3d 462, 481 (6th Dist.1997). Indeed, the cases cited by ODNR involve date-of-take determinations made by trial courts in appropriation proceedings. *See Evans v. Hope*, 12 Ohio St.3d 119, 119-120 (1984) ("At a * * * hearing prior to the valuation trial, the date of take was established as July 1981 * * *."); *Director of Highways v. Olrich*, 5 Ohio St.2d 70, 71 (1966) ("The trial court * * * ruled that the date of take would be considered to be October 28, 1960 * * *."). In short, a trial court's ultimate date-of-take determination in an appropriation proceeding is

separate and distinct from, and cannot be relied on as a basis to "correct" or "modify," an appropriating agency's deposit. ODNR cites no constitutional, statutory, or case-law authority suggesting otherwise.[1]

{¶14} In support of its second and third reasons why it is allowed to replace its appraisals, ODNR relies on R.C. 163.59(E). ODNR first argues that R.C. 163.59(E) requires that ODNR be allowed to replace its appraisals "in light of new information that materially impacts valuation of the subject properties." (Appellants' Brief at 8). Second, ODNR argues that R.C. 163.59(E) "requires that the appraisals at issue be replaced because they are over two years old." (Appellant's Brief at 1, 10). R.C. 163.59 provides:

> In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, and to promote public confidence in public land acquisition practices, heads of

[1] ODNR suggests that, in *Karr I*, this court "found that ODNR took possession of [the Relators'] property prior to trial when it completed construction of the spillway modification in 1997, and believed the Supreme Court had likewise so determined." (Appellants' Brief at 6, citing *Karr I*, 2014-Ohio-2241, at ¶ 16, 26, 34). This is a mandamus action initiated by the Relators, requesting a writ of mandamus ordering ODNR to make deposits in the appropriation proceedings that ODNR filed against the Relators. The date of take in the Relators' appropriation proceedings was not at issue in *Karr I* and is not at issue now. We made no holding, or "finding," concerning the date of take. While our statement in *Karr I* that "it has now been 17 years since ODNR took the Relators' properties" was less than precise, we were simply explaining that the saga underlying this mandamus action has been ongoing for many years. *Karr I* at ¶ 34. We did not hold in *Karr I*, and we do not hold in this appeal, that the date of take in any appropriation proceeding was 1997, April 30, 1997, or any other date.

> acquiring agencies shall do or ensure the acquisition satisfies all of the following:
>
> * * *
>
> (E) If information presented by the owner or a material change in the character or condition of the real property indicates the need for new appraisal information, or if a period of more than two years has elapsed since the time of the appraisal of the property, the head of the acquiring agency concerned shall have the appraisal updated or obtain a new appraisal. If updated appraisal information or a new appraisal indicates that a change in the acquisition offer is warranted, the head of the acquiring agency shall promptly reestablish the amount of the just compensation for the property and offer that amount to the owner in writing.

R.C. 163.59(E).

{¶15} Once again, R.C. 163.59(E) is irrelevant to ODNR's legal duty to deposit money at the time it filed the appropriation proceedings. ODNR appears to argue that the obligation on the acquiring-agency head under R.C. 163.59(E) to update the appraisal or obtain a new appraisal under certain circumstances also amounts to an obligation to "correct" the amount of the deposit required to take possession of property. (Appellants' Brief at 8). R.C. 163.59(E) does not refer to

a "deposit" or "correcting" a deposit. ODNR is asking us to read a requirement into R.C. 163.59(E) that it not present in the clear and unambiguous language of the statute. We refuse to do so. *See Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, ¶ 14 ("'[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.'"), quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, ¶ 14.

{¶16} Even setting aside that ODNR asks us to rewrite R.C. 163.59(E), ODNR's reliance on that statute is problematic for other reasons. First, ODNR argues that, since its initial appraisals, it has "thoroughly researched historical and hydrological information that documents flooding that occurred on the [Relators'] properties long before the spillway modification in 1997" and has "retained new hydrological experts that produced hydrology reports specifically quantifying the increase in flooding from the 1997 spillway modification on the [Relators'] parcels in terms of frequency, area, and duration." (Appellants' Brief at 8, 9). ODNR does not contend that this is "information presented by the owner." R.C. 163.59(E). And while this information might be "new information" to ODNR, it is not based on "a material change in the character or condition of the real property indicat[ing] the need for new appraisal information." (Appellants' Brief at 8);

R.C. 163.59(E). Indeed, it appears this "new information" now in ODNR's possession was available to ODNR when it performed its initial appraisals. Second, were we to conclude that R.C. 163.59(E)'s two-year provision requires ODNR to update its appraisal and modify its deposit amounts, it would give incentive to an appropriating agency, such as ODNR, if it became displeased with its original appraisal, to prolong an appropriation proceeding for two years simply to reach that threshold. We refuse to construe the statute to reach that absurd result. *Campbell v. Smith*, 3d Dist. Allen No. 1-10-79, 2011-Ohio-3002, ¶ 18 ("'It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result.'"), quoting *Mishr v. Poland Bd. of Zoning Appeals*, 76 Ohio St.3d 238, 240 (1996).

{¶17} For the reasons above, we reject ODNR's arguments that "an improper date of take" or R.C. 163.59(E) allow or require ODNR to correct, modify, or replace the amounts of the deposits it was required to make at the time it filed the appropriation proceedings against the Relators. We hold that the trial court did not abuse its discretion by ordering ODNR, under a writ of mandamus that the trial court previously granted, to deposit money in the amounts that ODNR recited in its petitions for appropriation. (*See* Doc. No. 3, ¶ 19-24); (Doc. No. 60).

{¶18} ODNR's assignment of error is overruled.

{¶19} Having found no error prejudicial to the appellants herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW and WILLAMOWSKI, J.J., concur.

/jlr