[Cite as *State ex rel. N. Canton v. Stark Cty. Bd. of Commrs.*, 2009-Ohio-6942.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE EX REL. CITY OF NORTH CANTON, ET AL	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
	:	Hon. John W. Wise, J.
Plaintiffs-Relators/Appellant	:	
	:	
-vs-	:	Case No. 2009-CA-00132
	:	
BOARD OF COUNTY COMMISSIONERS OF STARK COUNTY	:	O P I N I O N

Defendants-Respondents/Appellees

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Case No. 2009CV00753

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 28, 2009

APPEARANCES:

For - Appellee – City of Canton

KEVIN R. L'HOMMEDIEU
JASON P. REESE
Canton City Law Department
218 Cleveland Avenue S.W.
Canton, OH 44701-4218

For – Appellee Board of Trustees of Jackson Township
MICHAEL THOMPSON
4571 Stephen Circle N.W., Ste. 130
Canton, OH 44718

For –Appellant – City of North Canton

KIMBERLY J. BROWN
JENNIFER A. FLINT
100 South Third Street
Columbus, OH 43215-4291

For – Appellant – Dan J. Fosnaught
CHRISTOPHER J. GOLDTHORPE
849 West Maple
Hartville, OH 44632

For – Appellee – Metro Regional Transit
STEPHEN W. FUNK
222 South Main St., Ste. 400
Akron, OH 44308

Gwin, J.

{¶1} Plaintiffs-Relators/ appellants the City of North Canton, Ohio, and Dan J. Fosnaught appeal a judgment of the Court of Common Pleas of Stark County, Ohio, which granted the motion to dismiss filed by defendants-respondents/ appellees, Metro Regional Transit Authority, the City of Canton and the Boards of Trustees of Jackson and Plain Townships. The court also granted summary judgment in favor of appellees and overruled appellants' motion for summary judgment. Appellants assign four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT TO PLAINTIFFS-RELATORS ON THEIR MANDAMUS CLAIM RELATING TO THE FOSNAUGHT PETITION.

{¶3} "II. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS TO DISMISS AND IN CONCLUDING THAT PLAINTIFFS-RELATORS WERE NOT PARTIES TO THE RM INVESTMENTS PETITION PROCEEDINGS AND HAD NO STANDING TO BRING A MANDAMUS ACTION AGAINST THAT PETITION PURSUANT TO R.C. 709.023 (G).

{¶4} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-RESPONDENTS AND IN FAILING TO ISSUE A WRIT OF MANDAMUS ORDERING THE BOARD OF COUNTY COMMISSIONERS TO VACATE THE GRANTING OF THE RM INVESTMENTS PETITION, AS THE RM INVESTMENTS PETITION WAS INVALID AT ITS INCEPTION.

{¶5} "IV. IN THE ALTERNATIVE, THE TRIAL COURT ERRED IN GRANTING THE MOTIONS TO DISMISS AND IN CONCLUDING THAT DECLARATORY AND

INJUNCTIVE RELIEF IS NOT AVAILABLE TO PLAINTIFFS-RELATORS TO CHALLENGE THE RM INVESTMENTS PETITION."

{¶6} In its judgment entry of May 20, 2009, the court set out the background facts of the within case. On January 23, 2009, Fosnaught filed with the Stark County Commissioners a petition for an expedited Type II Annexation, seeking to annex approximately 25.933 acres of land into the City of North Canton. The property is located partially in Plain Township and partially in Jackson Township. On February 10, and 11, 2009, both Plain and Jackson Townships filed objections to Fosnaught's petition.

{¶7} On February 9, 2009, RM Investments filed a petition for an expedited Type II Annexation with the Commissioners, seeking to annex approximately 23.377 acres of land into the City of Canton. The land included a 60 foot wide strip of land owned by Metro Regional Transit Authority. Some of the property the City of Canton sought to annex was also included in the Fosnaught petition. Plain and Jackson Townships approved the RM petition.

{¶8} Because Plain and Jackson Township objected to the Fosnaught petition, the Commissioners delayed their review. Because Plain and Jackson Township approved the RM petition, the Commissioners were required by law to review the petition at their next meeting. The Commissioners reviewed and approved the RM petition on February 18, 2009. On March 4, 2009, the Commissioners reviewed and denied the Fosnaught petition. The Commissioners denied the Fosnaught petition because it included a portion of the Metro land the City of Canton had already annexed in the RM Investments petition.

{¶9} On February 23, 2009, North Canton and Fosnaught filed a petition in mandamus and a complaint for declaratory and injunctive relief against the Board of Commissioners, the City of Canton, the Board of Trustees for Jackson Township, the Board of Trustees for Plain Township, RM Investments, LLC, and the Metro Regional Transit Authority. North Canton and Fosnaught sought a writ directing the Board to deny RM Investment's petition and to consider the Fosnaught petition. North Canton and Fosnaught also sought declarations that the Fosnaught petition must be considered prior to the RM Investments petition, and also that the RM Investments petition failed to comply with various section of the Revised Code. North Canton and Fosnaught sought to enjoin the Board from certifying the RM Investment petition to the City of Canton and to enjoin Canton from taking action on the RM Investment's petition. North Canton and Fosnaught later amended their petition to seek a writ of mandamus ordering the Board to withdraw its approval of the RM Investment's petition and to grant the Fosnaught petition. They also challenged the constitutionality of R.C. 709.023 to the extent Fosnaught was denied the right to annex his property in North Canton without due process of law.

I

{¶10} In their first assignment of error, appellants argue the Common Pleas Court erred in not granting summary judgment in their favor on their mandamus claim relating to the Fosnaught petition.

{¶11} Civ. R. 56 states in pertinent part:

{¶12} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶13} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶14} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶15} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶16} The trial court cited *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St. 3d, 28, 451 N.E. 2d 255, for the proposition a relator must establish three requirements in order to secure a writ of mandamus. The relator must show: first that he or she has a clear legal right to the relief prayed for; second, that the respondents have a clear legal duty to perform the act; and third, that the relator has no plain and adequate remedy in the ordinary course of the law. Id. at 28.

{¶17} R.C. 709.023 states in pertinent part:

{¶18} "(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation when, subject to division (H) of this section, the land also is not to be excluded from the township under section 503.07 of the Revised Code. The owners who sign this petition by their signature expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section, waive any rights they may have to sue on any issue relating to a municipal

corporation requiring a buffer as provided in this section, and waive any rights to seek a variance that would relieve or exempt them from that buffer requirement.

{¶19} "The petition circulated to collect signatures for the special procedure in this section shall contain in boldface capital letters immediately above the heading of the place for signatures on each part of the petition the following: 'WHOEVER SIGNS THIS PETITION EXPRESSLY WAIVES THEIR RIGHT TO APPEAL IN LAW OR EQUITY FROM THE BOARD OF COUNTY COMMISSIONERS' ENTRY OF ANY RESOLUTION PERTAINING TO THIS SPECIAL ANNEXATION PROCEDURE, ALTHOUGH A WRIT OF MANDAMUS MAY BE SOUGHT TO COMPEL THE BOARD TO PERFORM ITS DUTIES REQUIRED BY LAW FOR THIS SPECIAL ANNEXATION PROCEDURE.' (Emphasis sic).

{¶20} ***

{¶21} "(C) Within twenty days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed shall adopt an ordinance or resolution stating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation. ***

{¶22} "The clerk of the legislative authority of the municipal corporation to which annexation is proposed shall file the ordinances or resolutions adopted under this division with the board of county commissioners within twenty days following the date that the petition is filed. The board shall make these ordinances or resolutions available for public inspection.

{¶23} "(D) Within twenty-five days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed and each township any portion of which is included within the territory proposed for annexation may adopt and file with the board of county commissioners an ordinance or resolution consenting or objecting to the proposed annexation. An objection to the proposed annexation shall be based solely upon the petition's failure to meet the conditions specified in division (E) of this section.

{¶24} "If the municipal corporation and each of those townships timely files (sic) an ordinance or resolution consenting to the proposed annexation, the board at its next regular session shall enter upon its journal a resolution granting the proposed annexation. If, instead, the municipal corporation or any of those townships files an ordinance or resolution that objects to the proposed annexation, the board of county commissioners shall proceed as provided in division (E) of this section. Failure of the municipal corporation or any of those townships to timely file an ordinance or resolution consenting or objecting to the proposed annexation shall be deemed to constitute consent by that municipal corporation or township to the proposed annexation.

{¶25} "(E) Unless the petition is granted under division (D) of this section, not less than thirty or more than forty-five days after the date that the petition is filed, the board of county commissioners shall review it ***

{¶26} "(G) If a petition is granted under division (D) or (F) of this section, the clerk of the board of county commissioners shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code, except that no recording or hearing exhibits would be involved. There is no appeal in law or equity from the board's entry of any

resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section."

{¶27} Appellants argue both North Canton and Fosnaught are parties to the Fosnaught petition and have standing under R.C. 709.023(G) to seek a writ of mandamus to compel the Board to grant the Fosnaught petition. The trial court found appellants did not have standing to the petition for a writ of mandamus to challenge the RM Investments petition, see II, infra. However, the trial court did not find appellants lack standing to pursue their mandamus claim as it relates to the Fosnaught petition.

{¶28} Appellants argue no valid objections were filed against the petition and therefore the Board had a clear legal duty to review and grant the petition at the Board's February 18, 2009 meeting. In the alternative, appellants argue the Board of Commissioners had a clear legal duty to grant the Fosnaught petition at its March 4, 2009 meeting because it met all the conditions set out in R.C. 709.23(E), while the RM Investments petition was not final.

{¶29} The Common Pleas Court found that although the Fosnaught petition was filed first, R.C. 709.023 required the Commissioners to review the RM Investments petition at their next regular session, while pursuant to the statute, the objections filed against the Fosnaught petition delayed the Commissioners' review by not less than 30 days, and no more than 45 days.

{¶30} The court found there was no legal authority to support appellants' argument the Commissioners were required to consider the petitions in the order they were filed. We agree. Appellants set forth no statutory or case law authority, and this court discovered none.

{¶31} Next, appellants argue there were no valid objections to the Fosnaught petition, and the Commissioners should have rejected the objections and proceeded to review the petition at its next scheduled meeting. Appellants argue the objections set out by Plain and Jackson Townships were not based upon any of the conditions cited in R.C. 709.023(E). Plain Township argued a petition for incorporation had been filed in Plain Township, which invalidated any annexation petition. Jackson Township objected on the basis there was a judgment entry which prohibited Fosnaught's property from being transferred, sold, or impaired in whole or substantial part without consent of the court. The trial court found there was no evidence the objections were not filed in good faith, but appellants argue the statute contains no requirement of good faith.

{¶32} The City of Canton responds that the clear language of the statute requires the Commissioners to review the petition not less than 30 days after the date the petition is filed if there is an objection to the proposed annexation. There is no provision or exception in the statute for a preliminary review to determine the validity of the objections.

{¶33} Appellants argue the RM Investments petition was not final until 30 days after Canton accepted the petition. The time limits set out in the statute are incompatible with appellants' argument.

{¶34} Finally, appellants argue North Canton had extended its municipal water lines outside its municipal boundaries, and this extends the jurisdiction of North Canton's mayor and police department to cover the maintenance, repair and protection of its lines. North Canton alleges its lines run within and across the Metro Regional Transit Authority land proposed to be annexed to the City of Canton. The City of

Canton responds no evidence was presented at the hearing before the trial court, and as such, the record does not contain any evidence regarding this issue. We agree.

{¶35} In conclusion, we find the trial court did not err in finding appellants were not entitled to a writ of mandamus regarding the Fosnaught petition, because they did not establish a clear legal right to the relief requested and did not establish the Commissioners had a clear legal duty to approve the Fosnaught petition.

{¶36} The first assignment of error is overruled.

II

{¶37} In their second assignment of error, appellants argue the trial court erred in granting the motions to dismiss their complaint for mandamus regarding the RM Investments annexation petition for lack of standing.

{¶38} The trial court cited *North Canton v. Canton* (2007), 114 Ohio St. 3d 253, 2007-Ohio-4005, wherein the Ohio Supreme Court held the City of North Canton had no standing to challenge R.C. 709.02 (E) on behalf of a third party. In that case, the City of North Canton had a contract with Metro Regional Transit Authority, which provided for the annexation of a portion of Metro's property in North Canton in exchange for North Canton's agreement to partially fund the reconstruction of certain bridges on the property. However, the City of Canton filed a petition for annexation of some of the same Metro property that was the subject of the contract. The Supreme Court found the contract between North Canton and Metro did not give North Canton standing to challenge the constitutionality of R.C. 709.02 (E) because it was not a party to the Canton annexation petition and did not belong to the class of persons against whom the statute was allegedly unconstitutionally applied.

{¶39} The Common Pleas Court also reviewed R.C. 709.021 in pari materia with R.C. 709.023, which gives "parties" the right to seek a writ of mandamus. R.C. 709.021 defines the term "party" and provides that townships and municipal corporations are parties in Expedited Type I and Type III annexation proceedings. The Common Pleas Court correctly found the omission of Type II annexation proceedings from the statutory definition indicates townships and municipal corporations are not parties.

{¶40} We agree with the trial court appellants did not have standing to seek a writ of mandamus as it relates to the RM Investments' petition because it is not a party to the action.

{¶41} The second assignment of error is overruled.

III

{¶42} In its third assignment of error, appellants argue the trial court erred in granting summary judgment in favor of appellees on the RM Investments' petition because the RM Investments' petition was invalid from its inception. Because we find North Canton had no standing to bring the mandamus action, see II, supra, we find the trial court was correct in determining it did not have jurisdiction over the complaint for a writ as it pertained to RM Investments' petition.

{¶43} The third assignment of error is overruled.

IV

{¶44} In their fourth assignment of error, appellants argue the trial court erred in granting the motion to dismiss and finding declaratory and injunctive relief is not available to appellants to challenge the RM Investments' petition. Pursuant to R.C. 2721.03, any person whose rights, status, or other legal relations are affected by a

statute or municipal ordinance may seek a declaratory judgment regarding the construction or validity of the statute or the ordinance and may obtain a declaration of rights, status, or other legal relations. Appellants argue they have standing under the declaratory judgment action to challenge the petition, regardless of their standing to bring the mandamus action. Appellants argue even though they are not owners of any property proposed to be annexed, they nevertheless have rights directly affected by this competing annexation petition.

{¶45} The trial court cited *City of North Canton v. The City of Canton*, supra, finding R.C. 709.07 abolished the right to appeal certain types of annexations, limited which parties may institute an appeal, and provided appeals could only be made through an administrative appeal in accord with R.C. Chapter 2506. The trial court found R.C. 709.023 (A) provides that the property owners expressly waived their right to appeal in law or equity from the Board of County Commissioners' entry of their resolution.

{¶46} We agree with the trial court R.C. 709.023 (A) bars appellants from appealing the petitions, or bringing a declaratory judgment action, which is essentially a collateral attack on the Commissioners decision.

{¶47} Finally, appellants argue the statute is unconstitutional as applied to Fosnaught because it impairs his ability to challenge a competing and invalid annexation petition. Appellants urge while the *City of North Canton v. the City of Canton*, supra, arguably bars North Canton from bringing this claim, the case does not apply to Fosnaught as the owner of the affected property.

{¶48} A statute is entitled to a strong presumption of constitutionality. *State v. Hochhausler,* 76 Ohio St. 3d 455, 1996-Ohio-374, 668 N.E. 2d 457. Thus, a statute may be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt. *Board of Education v. Walter* (1979), 58 Ohio St. 2d 368, 390 N.E. 2d 813.

{¶49} The Due Process Clause requires an individual be afforded proper notice and the opportunity to be heard before the state may impinge on a protected liberty or property interest. Fosnaught has not demonstrated he has any constitutionally protected property interest which is impinged by the statute.

{¶50} The fourth assignment of error is overruled.

{¶51} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, J., and

Farmer, P.J.,

Wise, J., concurs

separately

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____

HON. JOHN W. WISE

WSG:clw 1201

Wise, J., concurring

{¶52} I concur with the opinion and decision of my colleagues in regard to the First and Fourth Assignments of Error. I agree with the result reached in the Second and Third Assignments of Error that Appellant North Canton, on standing and jurisdictional grounds, is prevented from challenging the RM Investments/Canton annexation via a writ of mandamus in the common pleas court, under the circumstances of this case. However, the majority opinion at ¶39 appears to reach a dictum conclusion that townships and municipal corporations are never to be recognized as "parties" for purposes of seeking mandamus relief in any Type II annexation. I am not prepared to invoke such a reading of the expedited annexation statutes in deciding the present appeal.

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JUDGE JOHN W. WISE

[Cite as *State ex rel. N. Canton v. Stark Cty. Bd. of Commrs.*, 2009-Ohio-6942.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE EX REL. CITY OF NORTH CANTON, ET AL	:	
Plaintiffs-Relators/Appellant	:	
-vs-	:	JUDGMENT ENTRY
BOARD OF COUNTY COMMISSIONERS OF STARK COUNTY	:	
Defendants-Respondents/Appellees	:	CASE NO. 2009-CA-00132

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellants.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE