[Cite as *State ex rel. Wasserman v. Fremont*, 2013-Ohio-762.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio, ex rel. Stanley J. Wasserman and State of Ohio, ex rel. Kathryn A. Wasserman

Relators

v.

City of Fremont and Terry Overmyer

Respondents

Court of Appeals No. S-10-031

DECISION AND JUDGMENT

Decided: February 20, 2013

* * * * *

Corey J. Speweik, Nathan T. Oswald, and J. Douglas Ruck, for relators.

James F. Melle, Law Director, City of Fremont, for respondents.

* * * * *

OSOWIK, J.

{¶ 1} On June 25, 2010, relators, Stanley and Kathryn Wasserman, filed a petition for a writ of mandamus against respondents, the city of Fremont, Ohio, and Fremont's Mayor, Terry Overmeyer. In the petition, relators asked this court to order respondents to

commence an eminent domain action to compensate relators for the partial taking of an easement that provided drainage of excess water from relators' property, across property owned by the city of Fremont, and into nearby Minnow Creek.[1]

{¶ 2} On July 20, 2010, we issued an alternative writ, in which we asked respondents to either commence eminent domain proceedings or show cause as to why they have not done so. Respondents filed a motion to dismiss on August 6, 2010, which we denied on January 18, 2011. Thereafter, briefs were filed by both parties.

{¶ 3} On March 14, 2011, we issued a decision in which we held that: (1) relators' mandamus action was properly before this court, and (2) relators had alleged a taking which, if proved, would be compensable through an eminent domain action. *State ex rel. Wasserman v. Fremont*, 6th Dist. No. S-10-031, 2011-Ohio-1269, ¶ 7 (Jan. 18, 2011), citing *State ex rel. Wasserman v. City of Fremont*, 6th Dist. No. S-10-031, *overruled on other grounds by State ex rel. Wasserman v. Fremont*, 131 Ohio St.3d 52, 960 N.E.2d 449, 2012-Ohio-27. (Additional citations omitted.) Accordingly, we granted relators' request for mandamus and ordered respondents to "commence eminent domain proceedings to determine if a taking has occurred and what, if any, compensation is due to relators." *Id.* at ¶ 9.

{¶ 4} On January 10, 2012, the Ohio Supreme Court held that this court erred by granting a writ of mandamus without first determining that a taking had occurred.

[1] The facts in this mandamus action are more fully set forth in our decision issued on January 18, 2011, which is attached hereto as Appendix A.

Consequently, the court reversed our decision and remanded the case for further proceedings. *State ex rel. Wasserman,* at ¶ 4. After the case was remanded, both parties filed merit briefs and supporting evidence.

{¶ 5} On remand, relators argue that, due to respondents' actions, they suffered a taking of both their drainage chattels and their easement appurtenant across respondents' real estate. Attached to relators' brief are photographs of the farmland, taken after respondents removed the two 8-inch perforated drainage tiles from relators' easement and replaced them with one 12-inch non-perforated tile. Those photographs depict flooding in relators' fields and at the catch-basin and exit point of the 12-inch drainage tile. Also shown in a photograph are the 8-inch lines after respondents removed them from the ground.

{¶ 6} Relators' other exhibits include affidavits by Stanley Wasserman, Gary Pfeiffer and Joseph Picciuto. In his affidavit, Wasserman authenticates the photographs attached to relators' merit brief and further states that, in August 2005, relators paid a portion of the cost, $7,538.76, to install the 8-inch drainage tile. Pfeiffer states in his affidavit that he is a certified appraiser and that, in his opinion, productivity is a key factor in valuing farmland, and that "drainage systems almost always result in greater agricultural productivity."

{¶ 7} Picciuto stated in his affidavit that he oversaw installation of the two 8-inch tile lines in 2005. Picciuto further stated that he inspected respondents' property on February 20, 2012, and found that those lines were no longer in existence, and that he

observed "debris" from the 8-inch lines on the bank of the reservoir being constructed on the property. Picciuto further stated that respondents had installed a 12-inch tile line with a catch basin at its beginning and also at its outlet into Minnow Creek, which was approximately "one hundred to five hundred feet north of where the two 8-inch tile lines had existed." Picciuto stated that, in his opinion, the 12-inch line does not drain relators' farmland as effectively as the two 8-inch lines and, as a result, the ability of relators' land to drain excess water into Minnow Creek has been "significantly diminished."

{¶ 8} In their merit brief, respondents argue that relators cannot show by clear and convincing evidence that a physical taking occurred. In support, respondents assert that relators' land was prone to flooding before the 8-inch drainage lines were removed, and that respondents have made every effort to preserve and protect relators' easement. Respondents also assert that the 12-inch drainage pipe has "12%" more capacity to hold runoff than the two 8-inch tiles, and that the new line has "exactly the same ingress and egress points with the same elevation" as the prior lines. Respondents also assert that the photos attached to relators' merit brief do not prove that a taking occurred because they are not time-stamped, and they were taken immediately after three inches of rain fell on relators' field. Attached to respondents' merit brief are copies of respondents' deed to the property on which the reservoir was constructed, the document executed by George Guth and Roberta Kenney in 1915 which established relators' easement over the property, and invoices for the installation of the two 8-inch drainage tiles in 2005 and the

12-inch replacement line in 2009. Also attached are affidavits of Christopher Grover, Jerry O'Kenka, Harry Mylander, John Kuzma, and Rick Galford.

{¶ 9} Grover stated in his affidavit that he is a retired engineer who was employed by the city of Fremont until October 2010. Grover stated that he was an "engineering technician" during "all relevant times involved in this matter." Grover further stated that, in 1915, an easement was established that allowed relators to drain water from their farmland, using a system of field tiles that connected to a 12-inch drainage tile that eventually drained into Minnow Creek, after running through adjacent property that was purchased by the city of Fremont in 2002. Grover stated that relators constructed a lift station sometime between 2002 and 2005 and that, in 2005, the city and relators jointly paid to replace the 12-inch line with two perforated 8-inch lines. However, even after the lift station was installed and the lines were replaced, storm water continued to accumulate on relators' property after a heavy rain. Grover stated that the two 8-inch tiles were removed and replaced with a non-perforated 12-inch line in June 2009. He stated that the replacement pipe was "rerouted * * * to remove it from [an] area intended to construct the reservoir embankment and basin." He further stated that the line was not perforated because the city no longer needed to drain its own parcel, which is now dominated by the newly constructed reservoir.

{¶ 10} Jerry O'Kenka stated in his affidavit that, as an employee of Unilliance from 1976 until March 1, 2010, he helped to construct the reservoir, and that Stanley Wasserman was not present when the 8-inch drainage lines were replaced with a 12-inch

line. O'Kenka further stated that, "[i]n order to construct the reservoir as designed, it was necessary to reroute the two 8" drainage tiles." He stated that the new 12-inch drain was connected to the same origination point as the two 8-inch lines, and that a catch-basin was installed at that location "to allow the flow of water from the Wasserman property to be monitored." However, the new 12-inch pipe ended at a few feet away from where the two 8-inch lines had discharged water into Minnow Creek. O'Kenka stated that, all along the new drainage route, the elevation of the 12-inch pipe was the same as that of the two 8-inch pipes. He further stated that the capacity of the 12-inch, smooth-walled tile exceeds the carrying capacity of the two 8-inch lines. O'Kenka stated that, as of March 1, 2010, he became a city employee, and was made manager of the reservoir project. He further stated that the "No Trespassing" signs on the city's property were posted to protect recently seeded ground and to "help eliminate any further damage" to the property.

{¶ 11} Harry Mylander stated in his affidavit that he is the owner of Unilliance, Inc., the contractor hired to construct the reservoir. Mylander stated that, on June 1, 2009, he observed as his crew exposed the two 8-inch drainage pipes, which appeared to functioning normally. He further stated that Unilliance workers removed the two tiles and replaced them with one 12-inch pipe, which they connected to the same ingress and egress points as the 8-inch tiles.

{¶ 12} John Kuzma stated in his affidavit that he was employed by the city of Fremont as an engineer from April 15, 1985, until December 13, 2011. Kuzma stated

that the two 8-inch pipes were replaced because they "ran through the intended reservoir site, whereas the 12" drainage pipe was constructed along the perimeter of the city property outside of the reservoir construction." Kuzma further stated that "Stanley Wasserman was present on several occasions to inspect the repair of the two 8" plastic tiles and the installation of the 12" HDPE (High Density Polyethylene) drainage pipe in mid-May and early June, 2009."

{¶ 13} Rich Galford stated in his affidavit that he was project manager for Unilliance in 2009. Galford stated that he was present when the two 8-inch lines were replaced with one 12-inch line, and that the "same ditch was used for the egress for both the two 8" tiles and the 12" HDPE pipe."

{¶ 14} In a reply brief, relators argue that respondents wrongly attempted to convince this court that relators are seeking compensation for flood damage to their property. Instead, relators state that the alleged taking in this case was due to the physical removal of their drainage chattels and the relocation of the drainage lines due to the obliteration of the original easement by the newly constructed reservoir. In support, relators refer to Kuzma's affidavit, in which he stated that the 12-inch line had to be routed around the edge of respondents' property because relators' 8-inch lines ran through the site of the new reservoir. Relators also referred to O'Kenka's affidavit, in which he stated that the two perforated 8-inch lines were removed and replaced with one smooth 12-inch line.

{¶ 15} Relators also attached Stanley Wasserman's affidavit to their reply, in which he stated that the two 8-inch drainage lines were destroyed, and the pathway for the new 12-inch line was relocated, without relators' knowledge or consent. Stanley Wasserman also stated that he took the photographs that were attached to relators' merit brief. Each photograph was then described in detail. Specifically, Stanley Wasserman states that the photographs labeled exhibits B, C, and E all demonstrate that the two 8-inch drainage tiles were impaired on or before June 1, 2009, as a result of respondents' construction of the reservoir. Stanley Wasserman also states that exhibits F, G and H show heavy construction equipment used to construct the reservoir sitting on relators' property, which he states could reasonably have caused the two 8-inch lines, as well as the 13 laterally placed clay lines that drained into them, to collapse. Stanley Wasserman also identifies photographic exhibit J as depicting broken pieces of the two 8-inch tiles on June 15, 2009, after they were removed by respondents' contractor. Stanley Wasserman further identifies photographic exhibits K and L, which show the non-perforated 12-inch pipe engulfed by water that was draining into Minnow Creek, and additional photographic exhibits depicting both flooding in relators' field allegedly caused by blocked or broken drainage tile, and the "No Trespassing" sign on respondents' property. The affidavit also contains Stanley Wasserman's conclusions that the 12-inch tile is not capable of carrying an increased load, contrary to opinions expressed by Kuzma, because it is improperly designed and does not disperse the run-off from relators' field in a manner similar to the previous 8-inch lines that respondents removed.

{¶ 16} In a surrebuttal brief, respondents argue that they did not "take" relators' easement because the original easement "was not based on a metes and bounds description but rather was designed for drainage purposes and to allow egress into the creek." Accordingly, respondents conclude that no taking has occurred even though the 12-inch pipe follows a completely different path than the original drainage lines, because it has the same ingress and egress points as the 8-inch lines that were replaced. Respondents further argue that the "No Trespassing" signs on their property are not meant to deny relators access to maintain the re-routed easement. Finally, respondents argue that relators have another adequate remedy at law through a tort action and, therefore, mandamus is not available in this instance.

{¶ 17} The rights to acquire, use, enjoy and dispose of private property "are among the most revered in our law and traditions." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 34. Accordingly, both "[t]he United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627, 765 N.E.2d 345, citing Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. Compensation is required for a physical taking of private property because it "'eviscerates the owner's right to exclude others from entering and use [his or] her property – perhaps the most fundamental of all property interests.'" *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d

385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 24, quoting *Lingle v. Chevron U.S.A., Inc.*, 54 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

{¶ 18} The Ohio Supreme Court has held that "mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Wasserman*, 131 Ohio St.3d 52, 2012-Ohio-27, 960 N.E.2d 449, ¶ 2, citing *State ex rel. Shemo, supra*. The party claiming entitlement to a writ of mandamus in an appropriation proceeding must establish by clear and convincing evidence "that a taking of their property by a public authority has occurred." *Id.* at ¶ 3-4. In order to establish that such a taking has occurred, "a landowner must demonstrate a substantial or unreasonable interference with a property right. Such interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises." (Other citations omitted.) *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 206, 667 N.E.2d 8 (1996).

In this case, the private property that has allegedly been taken is an easement across respondents' property. "An easement has been defined as an interest in the land of another created by prescription or express or implied grant, which entitles the owner of the easement to a limited use of the land in which the interest exists * * *." (Citations omitted.) *Myers v. McCoy*, 5th Dist. No. 2004CAE07059, 2005-Ohio-2171, ¶ 16. "The owner of the easement is referred to as the dominant estate and the land in which the interest exists is called the servient estate." *Id.* Ohio courts have held that "[t]he value of an appurtenant easement is compensable in an appropriation action." *Cincinnati*

Entertainment Assoc., Ltd. v. Hamilton Cty. Bd. of Commrs., 141 Ohio App.3d 803, 812, 753 N.E.2d. 884 (1st Dist.2001).

{¶ 19} The document executed in 1915 which established relators' easement ("easement agreement") states that relators' predecessor in interest, George H. Guth, would have the right to construct and maintain a 12-inch field tile drain

> from the west line of said lands of said Robertina McKenney through the said lands, on lines and at a depth to be fixed by her or her agents, and emptying into said [Minnow] creek at a point about fifty (50) feet south east of the point where said creek crosses said right of way and enters her lands * * *.

{¶ 20} The importance of drainage of both the dominant and servient parcels was implied in the easement agreement, which limited relators to draining no more than 70 acres through the drainage tile, and also limited McKenney and her successors to draining no more than "35 acres of any land of hers into said 12 inch tile drain."

{¶ 21} It is undisputed that, although relators and respondents jointly replaced the original 12-inch clay tile with two 8-inch perforated tiles in 2005, they did not alter the route of the drainage line from the original path chosen by Robertina McKenney in 1915 until 2009, when respondents unilaterally dug up the two 8-inch perforated tiles in preparation for constructing a reservoir to serve the city of Fremont. The record contains evidence that the reservoir was constructed across the original path of relators' drainage

easement, and that respondents moved the drainage tile to the edge of respondents' property, thereby obliterating the path of the original easement.

{¶ 22} Evidence was also presented that, even though the ingress and egress points of the new drainage line remained substantially the same, the two 8-inch tiles which the parties installed by mutual agreement in 2005 were destroyed and replaced in 2009 by one 12-inch, non-perforated tile. Because it has smooth walls, the 12-inch tile is incapable of draining any portion of respondents' property of excess water, therefore the flow and disbursement of runoff water across both properties was changed. Significantly, respondents' own witness, Christopher Grover, stated in his affidavit that the relocation of the drainage tile is of no consequence to respondents because drainage of their land for agricultural purposes is no longer needed.

{¶ 23} On consideration of the entire record in this case, we find that relators have shown by clear and convincing evidence that a taking of the easement established by the 1915 easement agreement occurred when respondents unilaterally removed the two 8-inch perforated drainage tiles and destroyed the pathway of the 1915 easement in order to construct a reservoir for the city of Fremont.[2] This conclusion is not affected by respondents' replacement of the two 8-inch drainage tiles with a 12-inch line and the subsequent relocation of that line. Such actions, and any subsequent increase in water

[2] The evidence which supports a taking in this case does not include the posting of a "No Trespassing" sign on respondents' property, since relators presented no evidence, beyond speculation, that respondents intended to exclude them from entering onto the property and respondents presented a reasonable explanation as to why the sign was posted.

accumulation on relators' land as a result, go to the issue of damages and not whether a taking occurred in the first place. *See Richley v. Bowling*, 34 Ohio App.2d 200, 207, 299 N.E.2d 288 (3d Dist.1972). Pursuant to R.C. 2731.07, we hereby issue a writ of mandamus and order respondents to commence eminent domain proceedings within 90 days to determine what, if any, compensation is due to relators.

{¶ 24} Writ granted. Costs assessed to respondents.

{¶ 25} To the clerk: Manner of Service

{¶ 26} The sheriff of Sandusky County shall immediately serve, **upon the respondents** by personal service, a copy of this writ in a manner pursuant to R.C. 2731.08. The clerk is directed to immediately serve upon all other parties a copy of this writ in a manner prescribed by Civ.R. 5(B).

{¶ 27} It is so ordered.

Petition granted.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE

Appendix A

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio, ex rel.
Stanley J. Wasserman and
State of Ohio, ex rel.
Kathryn A. Wasserman

Relators

v.

City of Fremont and Terry Overmyer

Respondents

Court of Appeals No. S-10-031

DECISION AND JUDGMENT

Decided: JAN 18 2011

* * * * *

On June 25, 2010, relators, Stanley and Kathryn Wasserman, filed a petition for a writ of mandamus against respondents, the city of Fremont, Ohio, and Terry Overmyer, Mayor of Fremont, Ohio. In support, relators stated that, pursuant to the terms of an "Agreement" signed by relators' predecessor-in-interest, George H. Guth, and respondents' predecessor-in-interest, Robert McKenney, in 1915, relators possess an easement through which they placed drainage tiles to drain excess water from their own farm property, across respondents' parcel, and into nearby Minnow Creek. Relators

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further claim that, due to certain acts performed by respondents, the drainage tile was destroyed when respondents excavated the land to make a reservoir, causing excess water to back up and flood relators' farm fields. Relators asked this court to order respondents to commence eminent domain proceedings to compensate them for the loss in value and crop yield of their property.

On July 20, 2010, this court issued an alternative writ, in which we ordered respondents to either do the act requested by relators in their petition, or show cause why they are not required to do so by filing either an answer pursuant to Civ.R. 8(B) or a motion to dismiss relators' petition pursuant to Civ.R. 12. On August 6, 2010, respondents filed a motion in which they asked this court to strike the mandamus petition and order relators to pay respondents' costs and attorney fees pursuant to Civ.R. 11 and R.C. 2323.51. Alternatively, respondents asked us to dismiss the petition pursuant to Civ.R. 12(B)(6).

In support of their motion to strike respondents stated that relators, through counsel, made untrue statements and "intentionally omitted certain facts," knowing that such omissions and misstatements "would utterly and completely change the nature of their pleadings and lead this Court to make inaccurate and untrue inferences." Specifically, respondents assert that relators intentionally omitted key relevant facts from their petition in an effort to increase the likelihood of its success in this court. Respondents further state that the drainage tile was repaired and/or fixed in a "timely

fashion," and that relators' property has since been restored to the same condition it was in before the reservoir was created.

In support of their motion to dismiss, respondents state that relators are not entitled to a writ of mandamus because they have suffered no damage as a result of respondents' actions, and they have an adequate remedy at law through an action for breach of contract. Finally, respondents state that relators' mandamus petition must be denied because relators' neighbors, Sharon and Thomas Kipps, are indispensable parties who have not been joined in this action.

On August 16, 2010, relators filed a motion for extension of time to respond, which this court granted on September 1, 2010. On September 15, 2010, a response was filed, in which relators assert that: (1) they are entitled to a writ of mandamus because respondents' acts amount to a taking of relators' drainage easement without due process of law; (2) relators' right to relief in mandamus is not dependent on the amount of monetary damages, if any, which have yet to be determined by a jury in an eminent domain action; (3) mandamus is proper in this case because, even if the easement was created pursuant to a contract, it is still a property right; and (4) the Kipps, which respondents claim are indispensable parties, have no property interest in the easement which is the subject of this action.

We note initially that, to establish the right to a writ of mandamus, the party seeking the writ must demonstrate: "(1) that the relator has a clear legal right to the relief sought, (2) that the respondent is under a clear legal duty to perform the requested act,

and (3) that the relator has no plain and adequate remedy in the ordinary course of law." *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶ 9, citing *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780. Ohio courts have held that an action for mandamus "is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred." *Beasley,* supra, ¶ 12, citing *State ex rel. Coles v. Granville*, 116 Ohio St.3d 331, 2007-Ohio-6057, ¶ 21, citing *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 2002-Ohio-1627.

We will first address respondents' motion to dismiss. A Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of a complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. For a court to grant a motion to dismiss pursuant to Civ.R. 12(B)(6), "it must appear that, accepting all of the allegations of the complaint as true, it appears beyond doubt that the complaining party can prove no set of facts entitling that party to the relief sought." *Beasley*, supra, at ¶ 10, citing *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242. Accordingly, if a complaint seeking a writ of mandamus alleges both the existence of a legal duty and the lack of an adequate remedy at law, and it appears that the party seeking the writ "might prove some set of facts entitling him to relief," the complaint is not subject to dismissal pursuant to Civ.R. 12(B)(6). *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 95-96; *Beasley*, supra.

In support of their motion to dismiss, respondents first assert that relators have an alternative remedy through which to obtain relief. Specifically, respondents argue that the relationship between the parties is "fundamentally contractual," entitling them to seek recovery for any damage to the drainage tiles or for denial of access to the servient estate through a contract action. Alternatively, relators argue that any decrease in the value of relators' land that is allegedly due to respondents' actions does not constitute a compensable "taking."

As to respondents' first argument, an "easement" is defined as "a property interest in the land of another that allows the owner of the easement a limited use of the land in which the easement exists." *McCumbers v. Puckett*, 183 Ohio App.3d 762, 2009-Ohio-4465, ¶ 14, citing *Colburn v. Maynard* (1996), 111 Ohio App.3d 246, 253. An easement may be created by an express grant. *McCumbers*, supra. Thus, even in cases where a document between parties states that it is a "contract," an easement can be created where the document clearly and unambiguously grants a right of way that is perpetual in nature and is to be used for a specific purpose. *Hinman v. Barnes* (1946), 146 Ohio St. 497, 504-507.

In this case, the agreement between the parties' predecessors in interest states the location and purpose of a right-of-way, which was created for the purpose of draining excess water from relators' property, over respondents' property, and into adjacent Minnow Creek. The Agreement further states that "this contract shall extend to the heirs and assigns of the parties hereto and shall continue in force forever unless terminated as

herein before provided. * * *" In addition, the record contains undisputed evidence that the city of Fremont and relators shared the cost of repairing and replacing the drainage tile across respondents' property in July 2005, pursuant to the terms of the original agreement. For the foregoing reasons, we find that the agreement, although contractual in nature, created an easement over respondents' property. Respondents' argument that the contractual nature of that agreement prevents relators from pursuing a remedy by way of a mandamus action is without merit.

As for respondents' second argument, Ohio courts have long held that, "[i]n order to establish a taking, the property owner must show a substantial or unreasonable interference with a property right, which may involve an actual physical taking of the property, or deprivation of an intangible interest in the property." *Beasley*, supra, ¶ 12, citing *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203; *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135. In addition, "'[a]ny taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises, entitles the owner to compensation.'" *State ex rel. OTR v. Columbus*, supra, at 206, quoting *Smith*, supra, paragraph one of the syllabus; *Mansfield v. Balliett* (1902), 65 Ohio St. 451.

Relators' petition states that, because of respondents' actions, the value of their land has been diminished through "decreased yields * * * as well as increased expenses related to the lack of drainage of the Dominant Parcel." Relators further state that respondents' actions have deprived them of their right to enter onto the servient parcel

and repair or replace the drainage tiles that were damaged by respondents' excavation of that property.

On consideration, we find that relators' petition alleges a taking that, if proved, is compensable through an eminent domain action. Accordingly, respondents' argument to the contrary is without merit.

For the foregoing reasons, respondents' motion to dismiss pursuant to Civ.R. 12(B)(6) is not well-taken and is denied. We will now address respondents' motion to strike the petition and for attorney fees and expenses pursuant to Civ.R. 11 and R.C. 2323.51.

Civ.R. 11, which governs the signing of pleadings, motions, or other documents in a civil action states, in pertinent part, that:

"The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. * * *"

In contrast, R.C. 2323.51 provides for an award of attorney's fees, costs and expenses "to a party who has been adversely affected by frivolous conduct in connection with a civil action. Any party who has commenced or persisted in maintaining a

frivolous action may be assessed sanctions." *Guy v. Axe*, 3d Dist. No. 14-09-31, 2010-Ohio-986, ¶ 10, citing *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 24434, 24436, 2009-Ohio-5148, ¶ 31-32. R.C. 2323.51(A)(2) sets forth the following relevant definitions of "frivolous action":

"(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

"(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief."

On consideration of the foregoing, and our determination that relators' petition has set forth facts sufficient to survive respondents' motion to dismiss, we find that the allegations and other factual representations made in relators' petition do not rise to the level of "frivolous conduct" as defined in R.C. 2323.51(A)(2). We further find that the record contains no evidence that relators' counsel has violated Civ.R. 11 at this stage of these proceedings. Accordingly, respondents' motion to strike is not well-taken and is denied.

Finally, we will address respondents' motion to join the Kipps as parties in this mandamus action. Civ.R. 19(A), which governs the joinder of persons needed for just adjudication states, in relevant part, that:

"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impeded his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest * * *." If he has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H). * * *"

A party is deemed "indispensable" if his or her "absence seriously prejudices any party to the action or prevents the court from rendering an effective judgment between the parties, or is one whose interests would be adversely affected or jeopardized by a judgment between the parties to the action." *State Farm Mut. Auto Ins. Co. v. Swartz*, 5th Dist. No. 2005CA0086, 2006-Ohio-2096, ¶ 14, citing *Layne v. Huffman* (1974), 43 Ohio App.2d 53.

Although not specifically stated in their motion, respondents arguably raised the defense of failure to join a party pursuant to Civ.R. 12(B)(7). Accordingly, the defense was not waived.

In support of their motion respondents state that the Kipps are "indispensable" parties because, if they are not joined, the city of Fremont may not be allowed "complete

relief" or may be subjected "to double or inconsistent obligations." Respondents further argue that the Kipps have an interest in the subject of this action by virtue of an "Easement Agreement" they entered into with relators on August 23, 2006. The Easement Agreement, attached to respondents' motion to dismiss as Exhibit 2, provides for an easement that runs from relators' property, over the Kipps' property, for the purpose of draining excess water from relators' property into the tile that eventually runs through the easement across respondents' parcel. We disagree, for the following reasons.

As set forth above, an easement appurtenant, such as the one in this case, is "a property interest in the land of another that allows the owner of the easement a limited use of the land in which the easement exists." *McCumbers v. Puckett*, supra, at ¶ 14. Another definition of an easement is "a right that the owner of one estate, referred to as the 'dominant estate,' may exercise for his benefit in or over another's estate, referred to as the 'servient estate.'" *McCumbers*, supra, citing *First Natl. Bank v. Mountain Agency, L.L.C.*, 12th Dist. No. CA2008-05-056, 2009-Ohio-2009. See, also, *Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008-Ohio-4166, ¶ 10.

Exhibit 2 establishes rights between the Kipps and relators. Although the agreement states that the drainage line across the Kipps' property will eventually connect with a tile that runs through respondents' property, it does not create any rights between the Kipps and respondents. Accordingly, respondents have failed to show that a failure to join the Kipps as parties will prevent complete relief from being accorded among those who are already parties in this mandamus action. Similarly, respondents have not shown

that the Kipps claim an interest relating to the subject of the action, or that they are so situated that the disposition of the action in their absence may impair respondents' ability to protect their interest or respondents.

Finally, Ohio courts have held that "[a]n 'indispensable' party may be one who might expose the defendant to the threat of multiple liability as distinguished from the threat of multiple litigation." *Layne v. Huffman*, supra, at 57, citing Civ.R. 19. The term "indispensable connotes that which cannot be done without that which is absolutely essential." Id. at 58-59. Accordingly, parties are considered "indispensable only where they have an interest of such a nature that a final judgment cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Id., citing *United States v. Aetna Casualty & Surety Co.* (1949), 338 U.S. 366, 73 S.Ct. 207, 94 L.Ed. 171. The merely possibility of exposure to multiple litigation "is not a sufficient basis to render one an indispensable party." Id. at syllabus.

On consideration, we find that: (1) the mere possibility of future litigation between respondents and the Kipps is not sufficient to justify joining them as indispensable parties; and (2) respondents have not otherwise demonstrated that the failure to join the Kipps as parties in this action will prevent either respondents or relators from obtaining complete relief in this action. Respondents' motions to join the Kipps as parties, and to dismiss this mandamus action for failure to join an indispensable party are

not well-taken and are denied. Pursuant to 6th Dist.Loc.App.R. 6, the parties are hereby ordered to submit their cases to this court within 20 days of the date of this decision.

The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal pursuant to Civ.R. 5(B). It is so ordered.

Mark L. Pietrykowski, J. _____ JUDGE

Thomas J. Osowik, P.J. _____ JUDGE

Keila D. Cosme, J. _____ JUDGE
CONCUR.

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