A PICTURE IS WORTH A THOUSAND WORDS: A LOOK AT OHIO'S TAKE ON INVOLUNTARY TAKINGS

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I. INTRODUCTION

Sometimes nothing beats the clarity of an image. It is one thing to read about heavy construction equipment, its size and weight, and the kind of encroachment it can cause. It is quite another to see road construction in action, either in person or in a picture.

The State often relies upon its eminent domain power for road construction projects because such projects involve a widely accepted public use.[1] Sometimes, however, disputes arise concerning how much land should have been taken when construction projects do not go as planned and stray outside of appropriated areas.[2] The Ohio Supreme Court recently considered such issues and elaborated on Ohio's involuntary takings law in *State* ex rel. *Blank v. Beasley*.[3]

The case involved road widening and the resulting physical damage to two neighboring properties along State Route 5 in Cortland, Ohio.[4] Although the Ohio Department of Transportation took both temporary and perpetual easements, as well as a small portion in fee simple, the landowners claimed that extensive additional damage was done to their properties.[5] The landowners argued that the encroachments to their property were a direct result of the work performed on the appropriated property; and thus, the State should have anticipated the encroachments.[6] The Ohio Department of Transportation argued that the claims were not takings under the Ohio constitution; rather, they were claims for damage

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[1] *See* Tracey v. Preston, 181 N.E.2d 479, 482 (Ohio Ct. App. 1960) ("[A] public highway is unquestionably for the public use, and may be established by eminent domain . . . .").

[2] *See, e.g.*, State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196 (Ohio 2009).

[3] *Id.*

[4] *Id.* at 1198.

[5] *Id.*

[6] *Id.* at 1200.

resulting from alleged improper or negligent conduct of the State's contractor.[7] These arguments highlight one of the problems explored in this note, which is whether tort-like damages occurring in the process of state construction projects for the benefit the public should be resolved as a taking or as a tort.

In *Blank*, the Ohio Supreme Court spent much of its opinion reviewing well-settled principles of Ohio takings law[8] and looking at persuasive authority from other jurisdictions.[9] This review supported the rule that if damage for which recovery is sought is the result of negligent construction, the proper remedy is a common law action for damages, not a condemnation proceeding.[10] The Ohio Supreme Court then held, seemingly illogically,[11] that because "the state acted with knowledge amounting to a substantial certainty that its conduct would cause such damage,"[12] the landowners were entitled to compensation for the taking of their property that resulted from the operation and parking of the heavy construction equipment on their parking lots.[13] The court held that there was not a taking with respect to the remaining damages.[14] This holding raises the question of whether the traditional definition of a taking has been expanded in Ohio to include construction-related damages.[15]

In exploring the court's holding, this note surveys Ohio eminent domain law as it relates to inverse condemnation and its relationship to tort concepts such as negligence. First, it examines the background of Ohio eminent domain law, particularly as it relates to the "public use" requirement. Next, it looks at how negligence fits into the takings puzzle, including the line drawn between takings and torts and the policy

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[7] *Id.*

[8] *Id.* at 1200–02.

[9] *Id.* at 1202–03.

[10] *Id.* at 1201–02.

[11] *Id.* at 1204 (Lanzinger, J., dissenting).

[12] *Id.* at 1203 (majority opinion).

[13] *Id.* at 1203–04.

[14] *Id.* at 1204. See discussion *infra* Part III.A.1–2, for a complete list of the damages claimed by the parties.

[15] Stephen D. Richman, *Is Private Property Damaged by Public Use, "Taken" for a Public Use?*, THE OHIO REAL ESTATE BLOG (May 1, 2009, 2:46 PM), http://ohiorealestateblog.blogspot.com/2009/05/is-private-property-damaged-by-public.html ("[F]rom the property owners' vantage point . . . this case seems to widen the 'spectrum definition of takings,' to include 'public damages' that were not necessarily intentionally caused, but resulted in foreseeable circumstances beyond mere negligence.").

considerations for drawing this line. Then, the Ohio Supreme Court's decision and reasoning is thoroughly analyzed in an effort to support the proposition that, while an initial reading of *Blank* might lead to the conclusion that Ohio has created some room for landowners to recover in takings from the negligent acts of contractors on state projects, the court's holding is actually quite limited by the facts and circumstances of the case, and despite the dissent's concerns, logically flows from the facts.

II. BACKGROUND

A. Ohio Constitutional Protection Against Takings

Article I, § 19 of the Ohio constitution provides that "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury."[16] Many early cases addressing the subject stressed the profound importance of this constitutional provision in protecting individual rights.[17]

1. Early Interpretations

The key language cited in numerous Ohio opinions on the subject of takings comes from the Ohio Supreme Court's decision in *Lake Erie & Western Reserve Railroad Co. v. Commissioners*. The case involved the construction of a ditch and subsequent necessary excavation under the railroad's tracks.[18]

The court first elaborated on what constitutes public, as opposed to private, use. While something more than just "private and individual advantage" is undoubtedly required, there need not be a general public benefit.[19] The purpose need only "be conducive to the public health, convenience, or welfare of the neighborhood through which it is constructed."[20] In *Lake Erie*, the court found the evidence supported the jury's determination that the two-mile long ditch would supply needed drainage to an area with inadequate drainage.[21]

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[16] OHIO CONST. art. I, § 19.

[17] *See, e.g.*, Lake Erie & W. Reserve R.R. Co. v. Comm'r, 57 N.E. 1009, 1009 (Ohio 1900); Chesbrough v. Comm'r, 37 Ohio St. 508, 511–12 (Ohio 1882).

[18] *Lake Erie*, 57 N.E. at 1009.

[19] *Id.* at 1010.

[20] *Id.* (citing *Chesbrough*, 37 Ohio St. at 515).

[21] *Id.* at 1010–11.

Next, the court went on to discuss the jury's determination that no compensation was due to the railroad. The jury reached this result because the ditch was only to consist of a pipe completely underneath the surface of the railroad's land.[22] The court rejected this logic, holding that "[a]ny direct encroachment on land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property for a public use" for which § 19 of the Ohio Bill of Rights guarantees compensation.[23] The construction of a perpetual easement with which landowners cannot interfere deprives landowners of the absolute right to use and dispose of their property for which some compensation, however small, is due.[24]

2. Modern Interpretations

Jumping to the present, the Ohio Supreme Court recently addressed the protections afforded by the takings clause and the confines of the public use requirement in its seminal decision, *City of Norwood v. Horney*.[25] In *Horney*, the court, in considering the use of eminent domain in an urban renewal project where the appropriated land was transferred to a private developer, held that economic or financial benefits alone are not sufficient to meet the public use requirement.[26] While there is much to be said about the importance and impact of this decision, particularly relevant to this note is the court's reflection on the "inherent tension between the individual's right to possess and preserve property and the state's competing interests in taking it for the communal good."[27] The court noted that the concept of public use has been "malleable and elusive" with understanding of the term varying greatly and causing uncertainty.[28] Despite this lack of precision in interpreting the constitutional protection against takings, what is clear is the understanding that individuals have fundamental rights in property.[29]

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[22] *Id.* at 1011.
[23] *Id.*
[24] *Id.*
[25] 853 N.E.2d 1115 (Ohio 2006).
[26] *Id.* at 1124–25, 1142.
[27] *Id.* at 1129.
[28] *Id.* at 1131.
[29] *See id.* at 1128–29, 1141.

3. Protecting the Landowner's Rights: Inverse Condemnation

In order to protect the rights guaranteed by the constitution, it sometimes becomes necessary for a landowner to take action on their part if the government has not exercised its eminent domain power. Inverse condemnation is a cause of action against a governmental defendant to recover the value of property taken by the government in fact, even though the government has not formally exercised its eminent domain power.[30] The Ohio Supreme Court has held that mandamus is the appropriate vehicle for compelling appropriation proceedings where there is an alleged involuntary taking of private property.[31]

These basic principles provide the framework of protection for individual rights in property, which are at the heart of the constitutional provision against takings. Such important protections, however, are not without limitation.

B. Drawing the Line: Takings v. Torts

Even though protecting the private property rights of individuals is a very important goal, it is also important to protect the public from paying for encroachments to private property (in the form of additional damage from contractor negligence) that does not benefit the public in any way.[32] Under these circumstances, the presence of negligence limits a landowner's ability to claim constitutional protection because of the public use requirement.[33] There are positives and negatives to drawing this distinction, and limiting landowner's rights to tort actions can have important implications.

1. Policy Considerations

"[I]t has been argued that takings clauses should be construed broadly in the interest of fairness and public economy."[34] If the government cannot anticipate and protect against an accidental injury that results from a government action, why should an individual landowner be burdened with

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[30] 36 NICHOLS ON EMINENT DOMAIN § 36.02[1] (2010).

[31] State *ex rel.* Levin v. Sheffield Lake, 637 N.E.2d 319, 323 (Ohio 1994) (citing State *ex rel.* McKay v. Kauer, 102 N.E.2d 703 (Ohio 1951)).

[32] *See, e.g.*, *Norwood*, 853 N.E.2d at 1129.

[33] *See, e.g.*, State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1200 (Ohio 2009).

[34] Jadd F. Masso, *Mind the Gap: Expansion of Texas Governmental Immunity Between Takings and Tort*, 36 ST. MARY'S L.J. 265, 290 (2005).

the loss?[35] It can also be argued that the public use requirement should be broad enough to encompass damages that arise, even negligently, from public improvement.[36] This is because if it were not for the public improvement, such losses would not occur, and it is fairer to put the burden on the public as a whole instead a few individuals.[37]

Governmental immunity from liability for negligence also raises concerns about prevention. Individuals who do not have special limitations on liability have the incentive to proceed with caution.[38] However, if governments are not liable for their own negligence, they have much less incentive to prevent it.[39] Governmental liability is an extra incentive for careful planning that ultimately benefits the public. "It has been speculated that such an assurance of compensation for loss would alleviate economic insecurity, promote economic development, and ensure fiscal responsibility on the part of the government."[40]

Some courts find that negligence is just not a relevant factor in takings analysis.[41] This is a more expansive reading of the public use requirement, such that if private property is damaged by a public project, redress should be made regardless of the presence of negligence or a lack of skill in completing the project.[42] An additional consideration in the public use requirement for some courts is the nature of the project.[43] If the project was one in which the government could have used the power of eminent domain in the first instance, then any resulting damage should be compensable.[44]

Courts that find negligence to be irrelevant do so on several different theories. Some courts hold that common rules of governmental immunity from tort liability are not applicable in fact situations implicating a constitution.[45] This is because of the self-executing nature of the

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[35] *Id.*

[36] *Id.* at 290–91.

[37] *See id.*

[38] *Id.* at 291.

[39] *Id.*

[40] *Id.* at 290.

[41] A. W. Gans, Annotation, *Damage to Private Property Caused by Negligence of Governmental Agents as "Taking," "Damage," or "Use" for Public Purposes, in Constitutional Sense*, 2 A.L.R.2d 677, 680–81 (1948).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 684.

constitution, which requires no legislative implementation.[46] Because the constitution prescribes redress to persons whose property has been injured, any rule against liability must be carefully limited.[47]

Another commonly used theory for dealing with negligence comes under an implied contract theory. Some courts hold that despite governmental immunity, recovery may be had under an implied contract for consequential damage that is occasioned by negligent performance of public work.[48] The state constitutional right to compensation is thought to be an implied contract by the State to compensate for any damage it causes.[49] "The state has [effectively] consented to be sued in cases 'arising upon contract' . . . which include implied as well as express contracts."[50]

Despite the above fairness concerns from the perspective of individual landowners bearing the burden, there are benefits that flow from limiting governmental liability for negligence.[51] Such a limitation requires less strain on the most intuitive and literal interpretation of the public use requirement because it does not put the financial burden on the public for negligent damages with no resulting public benefit.[52] Additionally, there are concerns that claims against the government could be potentially limitless and could interfere with effective administration.[53]

2. Tort Remedy: The Ohio Court of Claims

Just because negligence can bring a claim outside of the constitutional protection against takings does not mean that the innocent landowner is left with no remedy, and that the government is free from liability for its negligence. In 1912, the Ohio constitution was amended so that "[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law."[54] However, this amendment did not change the Ohio common law principle that sovereign immunity applied to suits against the State without its express consent.[55] In 1975, the general assembly enacted the Court of Claims Act, which provides that the State

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[46] *Id.*
[47] *Id.*
[48] *Id.* at 687.
[49] *Id.* at 687–88.
[50] *Id.*
[51] *See* Masso, *supra* note 34, at 290.
[52] *Id.* at 280.
[53] *Id.* at 292.
[54] OHIO CONST. art. I, § 16.
[55] Manning v. Ohio State Library Bd., 577 N.E.2d 650, 654 (Ohio 1991).

waives its immunity to liability, subject to a limited number of exceptions, and consents to be sued and have liability determined in the Court of Claims.[56] Ohio Revised Code § 2743.03(A)(1) creates the Court of Claims as a court of record with exclusive, original jurisdiction over all civil actions against the State as a result of the waiver of immunity provided in the Act.[57] This gives the Court of Claims the exclusive, original jurisdiction over civil suits for money damages against the State.[58]

The purpose of the Act was to centralize the filing and adjudication of all claims against the State by making the Court of Claims the "sole trial-level adjudicator" of such claims.[59] In order to keep this purpose from being frustrated, the Ohio Supreme Court held that any exceptions to the exclusive jurisdiction of the Court of Claims should be "strict and narrow."[60] Litigants should not be able to get around the exclusive, original jurisdiction of the Court of Claims through creative pleading.[61]

Many states have enacted waiver of immunity statutes similar to Ohio's statute, removing a longstanding obstacle to recovery for tort-like damages.[62] Given this state-provided avenue to recovery, the use of the eminent domain theory is no longer needed to get around governmental immunity. Because of this, there is less need today to use inverse condemnation as a means of recovery so long as litigants follow the procedures set up in waiver of immunity statutes.

Whether it is advisable from a policy standpoint to prohibit claims from being brought as takings where state negligence is involved remains debatable, as does the adequacy of the remedy in the Court of Claims.[63] As a general proposition, however, it appears to be well-settled law in Ohio

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[56] OHIO REV. CODE ANN. § 2743.02(A)(1) (West 2010); Friedman v. Johnson, 480 N.E.2d 82, 83 (Ohio 1985).

[57] OHIO REV. CODE ANN. § 2743.03(A)(1).

[58] *Manning*, 577 N.E.2d at 654.

[59] *Friedman*, 480 N.E.2d at 84.

[60] *Id.*

[61] *See* discussion *infra* Part III.B.

[62] *Compare* OHIO REV. CODE ANN. § 2743.03(A)(1), *with* ILL. CONST. art. 13, § 4, PA. CONST. art. 1, § 11, *and* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (West 2005). Despite statutes waiving governmental immunity, indemnification clauses in government contracts requiring state contractors to indemnify the government against damages may ultimately limit the government's liability, as was the case in *Blank*. State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1198 (Ohio 2007).

[63] See discussion *infra* Part III.B., for the landowners' arguments against bringing a separate action in the Court of Claims.

that the State is not liable in takings for negligent actions.[64] This leaves open the question of the application of the negligence limitation, and under what circumstances actions taken in the course of government improvement, while unplanned, cannot be said to be negligent.

III. DISCUSSION: *STATE* EX REL. *BLANK V. BEASLEY*

A. Facts

In 2002, the Ohio Department of Transportation (ODOT) undertook a construction project involving State Route 5, which runs through Cortland, Ohio.[65] The project was an effort to widen the existing asphalt pavement of State Route 5 and to upgrade companion curbs, sidewalks, drainage, signing, markings, and signals.[66] To accomplish this project, ODOT used its eminent domain power to appropriate land, including portions owned by the two neighboring landowners who brought suit in mandamus in this case.[67]

1. The Blanks' Property and Damage Claims

At the time of the State Route 5 project, Relator June L. Blank and the estate of Richard L. Blank owned real property in Cortland, Ohio on which there was a restaurant and a florist shop.[68] As part of the State Route 5 project, ODOT required perpetual and temporary easements over the Blanks' property, and when the parties were unable to agree on a price, an appropriation petition was filed in the Trumbull County Court of Common Pleas.[69] In April 2002, ODOT took physical possession of the property in accordance with the easements.[70]

In their suit, the Blanks claimed that during the course of the construction project, ODOT damaged portions of their property that were not appropriated.[71] These damages included:

> (1) operating highway-construction equipment on parking lots, which cracked and gouged the lots, (2) breaking a sewer line and then failing to adequately fix it, causing the

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[64] *See Blank*, 903 N.E.2d at 1201–02.
[65] *Id.* at 1198.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1197–98.
[69] *Id.* at 1198.
[70] *Id.*
[71] *Id.*

> backup of sewage in the kitchen and restrooms of the restaurant, (3) leaving holes and cracks in sidewalks and hitting the building-support post in front of the florist shop with excavating equipment and failing to adequately repair the damages, (4) blocking a rear entrance to the restaurant used for bulk deliveries, (5) causing a brick wall of the restaurant to crack and bow out after excavating on nearby property subject to a sewer easement, (6) removing existing catch basins in front of the florist shop, lowering the grade around an existing drain, and raising the grade of the highway, all of which caused water to go through the front doors of the florist shop, damaging the carpet and impeding business during heavy rainfall, (7) temporarily blocking an access drive used for deliveries to the florist shop, and (8) cracking a sanitary-sewer line leading from the florist shop to the main sewer line and not properly repairing it.[72]

2. The Kardassilarises' Property and Damage Claims

Relators Kathy and Panagiotis Kardassilaris also owned real property in Cortland, Ohio at the time of the project.[73] To complete the State Route 5 project, ODOT found it necessary to take part of their property in fee simple and to take temporary easements over other portions.[74] ODOT took physical possession in January 2003 after petitions were filed in the Trumbull County Court of Common Pleas to appropriate the required land.[75]

The Kardassilarises also claimed that property was used and damage was done during the course of the project to portions of their land not appropriated.[76] These damages included:

> (1) moving the water line in front of the market, causing water to back up into the building for about eight days, until the Kardassilarises had a plumber install a new check valve, (2) breaking a natural-gas line, causing the Kardassilarses to close the market for several hours,

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[72] *Id.*
[73] *Id.* at 1199.
[74] *Id.*
[75] *Id.*
[76] *Id.*

> (3) removing survey pins marking boundary lines and failing to replace them, (4) cracking blacktop and concrete areas outside the appropriated property by operating and parking heavy construction equipment, (5) disturbing or removing a catch basin, which caused flooding of a customer parking lot six or seven times between January and September 2003, when the department installed new catch basins to fix the problem, (6) breaking or disconnecting the sanitary-sewer line, causing sewage to back up into the market, and not repairing it properly, and (7) disconnecting the electrical line illuminating the market's signs and not property fixing the line, causing the Kardassilarises to hire an electrician after the signs had been out of order for about six weeks.[77]

3. ODOT's Position

ODOT's district real estate administrator argued that the damage alleged in both these cases was "consistent with claims of physical damage or trespass caused by the contractor during the course of construction," and that the damage did not indicate that any additional right-of-way was necessary to complete the project.[78] Because the claims were essentially for money damages, the remedy was with the Court of Claims, which had exclusive and original jurisdiction.[79] ODOT also argued that the State could not have anticipated the alleged damage and that the project could have been completed without causing the alleged damage.[80]

B. Procedural History: Mandamus to Compel Appropriation—the Ohio Supreme Court's First Decision in this Case

It is well established that "unless [a state] expressly consents to be sued[, it] is not subject to suit in its own courts."[81] Relevant to this case, the Ohio Revised Code (R.C.) provides that "[t]he director of

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[77] *Id.*

[78] *Id.* at 1198.

[79] Motion of Respondent Under S. Ct. Prac. R. X(5) to Dismiss Amended Complaint of Relator for a Writ of Mandamus at 1, 4, *Blank*, 903 N.E.2d 1196 (No. 2007-2217).

[80] *Blank*, 903 N.E.2d at 1198–99.

[81] Proctor v. Kardassilaris, 873 N.E.2d 872, 874 (Ohio 2007) (citing Manning v. Ohio State Library Bd., 577 N.E.2d 650, 654 (Ohio 1991)).

transportation shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside Franklin county."[82]

In the two initial appropriation cases brought by ODOT in Trumbull County, both "the Blanks and the Kardassilarises filed counterclaims in mandamus [seeking] to compel ODOT's director to appropriate additional portions of their property that they claimed had been taken."[83] The court dismissed these claims for lack of subject matter jurisdiction according to R.C. § 5501.22.[84] In *Proctor v. Kardassilaris*,[85] the Ohio Supreme Court was faced with the issue of whether R.C. § 5501.22 applied to counterclaims filed in an ongoing appropriation action in a different county.[86]

Counsel representing both landowners argued that the word "suable" in the statute referred only to original actions and not to counterclaims.[87] Their position was that, had the general assembly intended the statute to apply to counterclaims, they would have included the word "counter-suable," because statutes are generally interpreted using the maxim "expressio unius est exclusio alteruis[—]to express one thing is to exclude the other."[88]

The Ohio Supreme Court was not persuaded by this argument and stated that only when a statute is ambiguous may rules such as "expressio unius" be used to construe the language.[89] The only possible ambiguity with R.C. § 5501.22 is in the word "suable," but because the court concluded that "counter-suable" is not a word defined or used in any state or federal cases, the plain meaning of the statute provides that the action against the director of transportation must be brought in Franklin County.[90]

The landowners also argued that Ohio Civil Rule 13 either permitted or required them to join the claims in the pending action.[91] Support for this claim, as argued by the landowners, was founded in Article IV, § 5 of the Ohio constitution, which provides that the Ohio Supreme Court has the

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[82] OHIO REV. CODE ANN. § 5501.22 (West 2008).
[83] *Blank*, 903 N.E.2d at 1199.
[84] *Id.*
[85] 873 N.E.2d 872 (Ohio 2007).
[86] *Id.* at 874.
[87] *Id.* at 875.
[88] *Id.*
[89] *Id.* (citing State v. Porterfield, 829 N.E.2d 690, 692–93 (Ohio 2005)).
[90] *Id.*
[91] *Id.* at 876.

power to create rules of practice and procedure for the state courts.[92] It also expressly provides that the "rules created in this manner 'shall not abridge, enlarge, or modify any substantive right.'"[93] Because of this, when there are conflicts with statutes, a rule created pursuant to § 5(B), Article IV will control for procedural matters, and the statute will control for substantive law matters.[94] This made the issue before the court on this argument one of substance versus procedure.

"Substantive" has been defined as "that body of law which creates, defines and regulates the rights of parties."[95] R.C. § 5501.22 constitutes substantive law by giving courts in Franklin County subject matter jurisdiction over actions against the Department of Transportation.[96] Because it is well settled that statutes establishing subject matter jurisdiction are substantive law because they "create and define the rights of the parties to sue and be sued in certain jurisdictions," the statute controlled over procedural rules on mandatory and permissive counterclaims.[97] The court found this conclusion to be further supported by language in Ohio Civil Rule 13, which states, "These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against this state, a political subdivision or an officer in his representative capacity or agent of either."[98]

The landowners' final argument was that "no logical or practical reason" supported conducting "two separate suits in two separate counties," particularly because the trial court had already established jurisdiction over all of the parties and because the counterclaim arose "from the same transaction and occurrence as the original claim."[99] The court rejected this argument, holding that "[w]hen this court has been called upon to give effect to an Act of the General Assembly, a standard of judicial restraint has developed when the wording of the enactment is clear and unambiguous."[100] Statutes that are not ambiguous and are free from doubt cannot be judicially modified under the pretext of interpretation.[101]

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[92] *Id.* (citing OHIO CONST. art. IV, § 5(B)).
[93] *Id.* (quoting OHIO CONST. art. IV, § 5(B)).
[94] *Id.* (citing Boyer v. Boyer, 346 N.E.2d 286, 288 (Ohio 1976)).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* (quoting OHIO CIV. R. 13).
[99] *Id.* at 876–77.
[100] *Id.*
[101] *Id.* at 877.

Because the court had already concluded the statute unambiguously covered both original actions and counterclaims, they "decline[d] to change the plain meaning of the statute in the name of public policy."[102] As such, the court did not determine the merits of the case and sustained the earlier rulings to dismiss by both the trial court and the court of appeals.[103]

C. Issue and Holding

The issue before the Ohio Supreme Court in *Blank* was whether the landowners' damage claims rose to the level of a taking under the Ohio constitution.[104] The court reviewed testimony and photographic evidence, ultimately concluding that the property owners demonstrated the State operated and parked heavy construction equipment on portions of their parking lots that the State had not appropriated.[105] "While the state may not have intended this result, given the size and weight of the equipment involved as well as the extent of the encroachment, [the court] conclude[d] that the state acted with knowledge amounting to a substantial certainty that its conduct would cause such damage."[106] Based on this, the court concluded that the landowners were entitled to relief in mandamus "for the state's taking of their property from the operation and/or parking of heavy construction equipment on their parking lots."[107] The court concluded that because the relators did not demonstrate that the State actually foresaw the remaining damages or deliberately inflicted harm for the purpose of carrying out the governmental project, the remaining damages did not constitute a compensable taking.[108] As such, the landowners' remedies were limited to injunctions for the alleged trespass and actions for damages based in negligence.[109]

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[102] *Id.*

[103] *See id* at 874, 877. After this ruling, the landowners filed the present mandamus action, which is the subject of this note, directly with the Ohio Supreme Court, *see* State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, as it has original jurisdiction over such actions. OHIO CONST. art. IV, § 2.

[104] *Blank*, 903 N.E.2d at 1200.

[105] *Id.* at 1203.

[106] *Id.*

[107] *Id.* at 1203–04.

[108] *Id.* at 1204.

[109] *Id.* at 1203–04.

1. *Majority's Rationale*

a. *Key Ohio Principles*

In reaching its conclusion, the majority reviewed its interpretation of the Ohio constitution and briefly set forth several important and well-established principles relevant to this case.

First, compensable takings require that the landowner "prove something more than damage to his property."[110] The Ohio constitution requires that property "be *taken* for public use" in order for compensation to be required,[111] as opposed to some state constitutions, which provide for compensation when private property is "taken for or *damaged by* public use."[112] As previously mentioned, the term "taking," as used in the Ohio constitution, includes "'[a]ny direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it.'"[113] This meaning conveys something very different from property damage, and the Ohio Supreme Court has held that trying to construe the language in such a way "would be strained and unnatural."[114] Proof of damage is not by itself enough to entitle compensation.[115]

The second principle mentioned by the court is "that the claimed encroachment [must] subject the private property to a public use."[116] While this principle sounds basic, its application has proven to be less than straightforward.[117] Third, the encroachment must be caused "'without negligence or malice.'"[118] This requires that the physical encroachment be solely the result of the creation of a public improvement; it cannot be the

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[110] *Id.* at 1200 (citing State *ex rel.* Fejes v. City of Akron, 213 N.E.2d 353, 366 (Ohio 1966)).

[111] OHIO CONST. art. I, § 19 (emphasis added).

[112] *Blank*, 903 N.E.2d at 1200.

[113] *Fejes*, 213 N.E.2d at 354 (quoting Lake Erie & W. Reserve R.R. Co. v. Comm'r, 57 N.E. 1009, 1009 (Ohio 1900)).

[114] *Id.* at 355.

[115] *Id.*

[116] *Blank*, 903 N.E.2d at 1200–01.

[117] *See generally* Emily L. Madueno, *The Fifth Amendment's Takings Clause: Public Use and Private Use; Unfortunately, There Is No Difference*, 40 LOY. L.A. L. REV. 809 (2007) (analyzing the development of public use jurisprudence, including different constructions of the term).

[118] *Blank*, 903 N.E.2d at 1201 (quoting Lucas v. Carney, 149 N.E.2d 238, 239 (Ohio 1958)).

result of negligence or malice.[119] This deprivation of use and enjoyment to the owner of the property entitles them to institute an appropriation action to determine the compensation due.[120]

The last principle mentioned by the court is that a taking may occur when a property owner establishes damage "'intentionally directed at her property.'"[121] Here the court cited to an example where it was held that odor from a municipal sewage-disposal plant was not intentionally directed, and thus, not a taking.[122] The court found it important that the landowner was not displaced from any of her property, and that she was not deprived of all or most of her interest in the property because she was still able to live in her home.[123] Aside from a brief mention of these general principles, the court did not elaborate on the factual application of the cases and under what circumstances a taking is likely or unlikely to occur.[124]

b. Other Authority in Support of the Majority's Holding

After briefly reviewing key principles found in Ohio law, the court next spent a significant portion of the opinion reviewing persuasive authority from other states that have similar takings provisions in their constitutions.

For further elaboration on the public use requirement, the court cited to the Wyoming Supreme Court decision of *Chavez v. City of Laramie*.[125] This case involved property damage resulting from the negligence of a state contractor who crushed a sewer line severing a water main.[126] The resulting damages were accidental and unintentional and served no public use.[127] The Wyoming Supreme Court held that not "every destruction of property or injury thereto by public officers or their agents, in the discharge of governmental functions, is covered by the constitutional guaranty relied upon."[128] Because the injury involved a tort caused by the

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[119] *Id.*

[120] *Lucas*, 149 N.E.2d at 239.

[121] *Blank*, 903 N.E.2d at 1201 (quoting McKee v. City of Akron, 199 N.E.2d 592, 595 (Ohio 1964)).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 1200–02.

[125] 389 P.2d 23 (Wyo. 1964); *Blank*, 903 N.E.2d at 1201.

[126] *Chavez*, 389 P.2d at 24.

[127] *Id.*

[128] *Id.* at 25.

negligence of the State or its agents, the court held that the State did not take or damage the property for public use under the Wyoming constitution.[129]

The Wyoming Supreme Court stated that the applicable rule in such cases is "'[i]f the damage for which recovery is sought is the result of improper, unlawful or negligent construction . . . recovery may not be had therefor in the [condemnation] proceeding; the owner is relegated in such case to a common-law action for damages.'"[130] The court's rationale for adopting this rule was grounded in protecting the State against liability for damage and destruction of private property from the torts of its agents.[131]

In *Blank*, the Ohio Supreme Court also cited decisions from New Mexico, Utah, Alaska, and Connecticut.[132] The New Mexico Supreme Court held that for there to be a compensable taking, "the act must at least be one in which the risk of damage to the owner's property is actually foreseen by the governmental actor, or in which it is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental project."[133] In *Framers New World Life Insurance Co. v. Bountiful City*,[134] the Utah Supreme Court found:

> All damages *necessarily* resulting from the construction of [a culvert to prevent flooding] and not otherwise paid for would be recoverable in an inverse condemnation action as damages incurred for a public use under the terms of the constitutional provision . . . , however, . . . damages which are not a direct and necessary consequence of the construction or operation of a public use are not recoverable in an inverse condemnation action.[135]

Similarly, the Alaska Supreme Court held that "[w]hen the damage to the remaining portion of the condemnee's tract necessarily results from the imposition of the easement or the proper construction of the improvement, then the claim may properly be considered an element of the property owner's damage due to the condemnation."[136] The court further went on to

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[129] *Id.*

[130] *Id.* (quoting 4 NICHOLS ON EMINENT DOMAIN § 14.245[1] (rev. 3d ed. 1964)).

[131] *Id.*

[132] State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1202 (Ohio 2007).

[133] Electro-Jet Tool & Mfg. Co., Inc. v. Albuquerque, 845 P.2d 770, 777 (N.M. 1992).

[134] 803 P.2d 1241 (Utah 1990).

[135] *Id.* at 1245.

[136] Anchorage v. Scavebius, 539 P.2d 1169, 1177 (Alaska 1975).

stress that damages claims based upon negligent construction of an improvement cannot be considered part of the taking.[137] Lastly, the Ohio Supreme Court in *Blank* cited to a recent Connecticut Supreme Court decision which held,"[I]f damage to the untaken land is the necessary, natural, and proximate result of a public use, then the land, or at least certain interests in it, have been taken by inverse condemnation."[138] If damages are caused by contractor negligence, however, plaintiffs must seek damages in tort.[139]

Following its review of authority from other states, the Ohio Supreme Court summarized its findings by noting that there are difficulties in reconciling many of these decisions, and they cannot be condensed into a simple test of "'whether the injury was a necessary consequence of the thing done, as distinguished from the manner of doing it.'"[140] Despite this, "'the fact that the injury was a necessary consequence'" is a factor of great weight, "'even if not wholly determinative.'"[141]

2. Dissent's Rationale

Two judges dissented from the majority's opinion. Though quite brief, the dissenters argued that neither landowner had "established entitlement to mandamus in this case," and that the majority had reached an "illogical conclusion."[142] In the dissent's view, damage to parking lots from heavy construction equipment is not a taking for which the State should be forced to commence an appropriation proceeding.[143] Because the State provided assurance that the damaging construction activities would be confined to the area over which an easement was obtained, the parking lot damage was not a "necessary consequence" of the construction project.[144] As such, "[t]he negligence of the contractors should not be imposed on the state."[145]

The dissent also argued that "[t]he majority's justification for its conclusion [came] out of the blue."[146] Particularly troublesome to the

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[137] *Id.*

[138] State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1202 (Ohio 2007) (quoting Albahary v. Bristol, 886 A.2d 802, 809 (Conn. 2005)).

[139] *Id.* (quoting *Albahary*, 886 A.2d at 811).

[140] *Id.* (quoting Gans, *supra* note 41, at 681).

[141] *Id.* at 1202–03 (quoting Gans, *supra* note 41, at 681).

[142] *Id.* at 1204 (Lanzinger, J., dissenting).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

dissent was the majority's holding "'that *the state acted with knowledge amounting to a substantial certainty* that its conduct would cause such damage . . . given the size and weight of the equipment [and] the extent of the encroachment.'"[147] When reading the opinion, it is very easy to agree with the dissent because the majority spends much time examining cases that support the view that tort-like damages caused by the negligence of public officers or agents do not constitute property that is taken for public use.[148] The court then seemed to switch gears by concluding that the landowners did establish compensable takings with respect to the parking lot damage.[149] This is where a better visual image of the equipment involved is enlightening in understanding how the majority reached its conclusion.

IV. ANALYSIS

In deciding this case, the Ohio Supreme Court relied on several fairly well-settled principles of law, but it can be difficult to sort out the relationship between them and decide which is determinative of the outcome of this case. For example, the court noted that the plaintiff must prove something more than damages,[150] but how much more must they prove? Even though the Ohio constitution's takings clause does not expressly mention damages,[151] this case illustrates that sometimes damage can elevate to the level of a taking.[152] Additionally, in concluding that negligence prevents an encroachment from meeting the public use requirement,[153] when is something so foreseeable that it becomes a necessary consequence, and thus, not negligent for the purpose of takings? What exactly permitted the court to find a taking in this case despite the presence of negligence?

A. Proving Something More than Damage . . . but how Much More?

In a relatively short opinion, the court found it important to discuss the significance of the specific language used in the Ohio constitution. The court pointed out that the Ohio constitution only uses the word "taken" as

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[147] *Id.* (quoting the majority opinion).
[148] *Id.* at 1201–03 (majority opinion).
[149] *Id.* at 1203–04.
[150] *Id.* at 1200.
[151] OHIO CONST. art. I, § 19.
[152] *Blank*, 903 N.E.2d at 1203–04.
[153] *Id.* at 1201–02.

opposed to the words "taken or damaged."[154] This distinction is further discussed in *State* ex rel *Fejes v. City of Akron*,[155] which involved a landowner's claim that his land was taken for public use because it was damaged by earth tremors from the temporary use of heavy machinery in nearby highway construction.[156] In its opinion, the court observed that the Ohio constitution is silent with regard to property "damage."[157] Even though construction of public improvements can often lead to the decrease in value of property near construction that was not taken, courts have held that such loss in value is not a compensable taking where the constitutional provision mentions a taking only.[158]

It has been said that there is a very important difference in protection where a constitution specifically allows takings to flow from damage because "a constitutional phrase employing the term, 'taken or damaged,' is much broader and more comprehensive than one where the word, 'taking,' alone is used."[159] This distinction is highlighted by the fact that such modifications arose out of a movement for constitutional change by people who were concerned with the importance of individual property rights.[160] Because of this concern, many states amended their constitutions to allow compensation today for property that is "taken or damaged" by public improvements.[161] This wording has led many courts to allow "recovery for consequential damages without any taking."[162] Ohio is not one of these states, and the Ohio Supreme Court has stressed in its holdings that, had the framers of the Ohio constitution wanted compensation to flow

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[154] *Id.* at 1200.

[155] 213 N.E.2d 353 (Ohio 1966).

[156] *Id.* at 353–54.

[157] *Id.* It should be noted that damage resulting from construction activity should not be confused with damage to the residue. "Damages" in the strict sense "used in an appropriation proceeding, means an allowance made for any injury that may result to the remaining lands by reason of the construction of the proposed improvement, after making all permissible allowances for special benefits . . . resulting thereto." *See* City of Norwood v. Forest Converting Co., 476 N.E.2d 695, 700 (Ohio Ct. App. 1984).

[158] *Fejes*, 213 N.E.2d at 355 (citing Smith v. Erie R.R. Co., 16 N.E.2d 310, 314 (Ohio 1938)).

[159] *Id.* at 356.

[160] *Id.* at 355 (citing *Smith*, 16 N.E.2d at 314).

[161] *Id.* (citing *Smith*, 16 N.E.2d at 314).

[162] *Id.* (quoting *Smith*, 16 N.E.2d at 314).

from governmental damage, they could have provided for this through "'unmistakable language.'"[163]

It is debatable, however, how great of an effect the absence of the word "damages" in the Ohio constitution is to the outcome of many takings cases. As written, the Ohio constitution provides compensation when property is "taken for public use."[164] Taking has been defined as "any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it."[165] An encroachment is defined as "[a]n infringement of another's right" or "[a]n interference with or intrusion onto another's property."[166] It is permissible that at some point damages will meet this definition.

Additionally, the *Fejes* case, which was cited by the Ohio Supreme Court in *Blank* for the proposition that something more than damage must be proven,[167] was not a very difficult case. In *Fejes*, the damage to the property was caused by earth tremors from the temporary employment of heavy construction equipment nearby.[168] The court cited with approval the idea that "[w]here there is no actual appropriation of any property, the owner is not entitled to claim damages for merely incidental, indirect and consequential injuries which his property may sustain by reason of a public work or construction."[169] It was apparent in *Fejes* that "there was no direct or immediate physical contact" with the landowner's property as a consequence of the construction work, as opposed to cases involving direct intrusion and encroachment.[170] This is where *Fejes* clearly differs from the facts in *Blank*, which involved the actual appropriation of some property and activity on the property.[171] Because of this, *Fejes* does not provide much guidance beyond a general rule.[172]

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[163] *Id.* (quoting McKee v. City of Akron, 199 N.E.2d 592, 593 (Ohio 1964)).

[164] OHIO CONST. art. I, § 19.

[165] Lake Erie & W. R.R. Co. v. Comm'r, 57 N.E. 1009, 1011 (Ohio 1900).

[166] BLACK'S LAW DICTIONARY 568 (9th ed. 2009).

[167] State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1200 (Ohio 2007).

[168] *Fejes*, 213 N.E.2d at 353.

[169] *Id.* at 355 (quoting Loomis v. City of Augusta, 99 P.2d 988, 990 (Kan. 1940)).

[170] *Id.* at 354.

[171] *Blank*, 903 N.E.2d at 1197.

[172] In distinguishing the appropriation action in *Blank* from the fact that there was no appropriation in *Fejes*, it is important to note that an appropriation action alone does not convert an uncompensable action into a compensable one. *See* Richley v. Jones, 310 N.E.2d 236, 239–40 (Ohio 1974).

In addition, in looking at state constitutions that do allow damages to constitute takings, it is clear that the addition of the word "damaged" can only go so far. In its analysis in *Blank*, the court found support in the Wyoming Supreme Court decision of *Chavez v. City of Laramie*.[173] In that case, there was no taking found where a contractor hired by the State and city negligently crushed a sewer line, severing a water main and causing water to backup in the Chavez's basement apartment.[174] This decision was made based upon the Wyoming constitution,[175] which provides that "[p]rivate property shall not be taken *or damaged* for public or private use without just compensation."[176] The court noted that a claim of damage alone is not enough, and claims of accidental and unintentional damage do not serve a public purpose, as required by the Wyoming constitution.[177] Additionally, the constitutions of three other states cited by the Ohio Supreme Court in *Blank* for support include the word "damaged" in their takings clauses.[178]

In analyzing cases under the language of different constitutional provisions, it becomes apparent that while in theory the inclusion of the word "damaged" is more comprehensive and broad, the public use requirement, with its interpretation of the negligence limitation, puts heavy burdens on the "taken" language, regardless of whether the word "damaged" is also included.

B. The Public Use Requirement and the Negligence Limitation

The public use requirement is one of the most important checks on the State's eminent domain power,[179] and it seems that this important requirement is one of the main justifications for denying that a taking occurs when negligence is the cause.[180] In general, it is hard to say that any damage done to property through someone's negligence benefits the

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[173] *Blank*, 903 N.E.2d at 1201–02 (citing Chavez v. Laramie, 389 P.2d 23 (Wyo. 1964)).

[174] *Chavez*, 389 P.2d at 23, 26.

[175] *Id.* at 24.

[176] WYO. CONST. art. 1, § 33 (emphasis added).

[177] *Chavez*, 389 P.2d at 24.

[178] ALASKA CONST. art. I, § 18 ("Private property shall not be taken or damaged for public use without just compensation."); N.M. CONST. art. II, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation.").

[179] *See* United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 679–80 (1896).

[180] *See* State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1200–01 (Ohio 2007).

public in any way. In proving this point, the court briefly cites to the holding of several Ohio cases but does not look into the factual application of the negligence limitation.[181] Looking more closely at these key cases is helpful in analyzing the court's conclusion.

First, the court cites to *Norwood v. Sheen*.[182] The case involved a claimed taking resulting from flood and pollution damages from a city sewer and drainage facility.[183] The court found that even though there was "no actual taking of land itself, [] there was a direct encroachment [on] the land," interfering with the landowner's dominion and control.[184] In determining if the temporary interference constituted a taking, the court discussed the extent of the constitutional taking provision.[185] Such provisions are intended to protect "all the essential elements of ownership which make property valuable,"[186] including the rights of the owner to include and exclude. Any physical interference that substantially abridges these rights results in a taking to the extent the right is deprived.[187] Because the court found that there was an encroachment restricting the owner's dominion and control, the court found a taking of the property for public use.[188]

Given this holding, it is apparent that reconciliation of takings cases can be quite difficult as noted by the court in its opinion in *Blank*.[189] Some important, overarching principles have been delineated, however, with important factors including:

> (1) [] the form of the constitutional provision involved; (2) whether, in the jurisdiction, recovery is allowed at all in any type of case under the "eminent domain" theory; (3) the mode in which the asserted cause of action was presented to the court; (4) whether the project itself negligently planned or constructed was an activity for the original establishment of which the right of eminent domain could have been exercised; (5) and, similarly,

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[181] *Id.*
[182] 186 N.E. 102 (Ohio 1933); *Blank*, 903 N.E.2d at 1200–01.
[183] *Norwood*, 186 N.E. at 104.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 104–05.
[189] *See* State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1202–03 (Ohio 2007).

> whether damages which resulted were a necessary consequence or result of the work undertaken.[190]

But even with these common considerations, it is not always easy to distinguish cases such as *Norwood* and *Blank*. In trying to do so, the facts of each case become quite important. In *Norwood*, the court's opinion states, "The jury by its verdict evidently found as a fact that there was negligent maintenance of the sewer."[191] If this were the end of the inquiry, it would seem that the negligent action would prevent such damage from meeting the requirement of public use. However, the court went on to elaborate that sewage disposal and drainage is a public function.[192] Thus, it is important to the facts of *Norwood* that the city was engaged in control and maintenance of the sewer and not the construction of the sewer.[193] While this distinction does shed some light, it is not entirely satisfactory in explaining why there was a taking if the jury did in fact find negligence. Even though operating and maintaining a sewer is a public function,[194] it is hard to say that the negligent maintenance of a sewer benefits the public. Perhaps the law in *Norwood* is stated in close conjunction with its facts; and thus, its analysis provides little guidance in future cases.[195]

Returning to the opinion in *Blank*, the Ohio Supreme Court next cited to its decision in *Lucas v. Carney*[196] as authority that a taking only occurs in the absence of negligence or malice.[197] *Lucas* involved damage to additional land that occurred when the grade and surface level of an appropriated tract was changed.[198] This change caused flooding to the cellar of the landowner's home and additional damage to their garage and other outbuildings.[199] A wall was built in an attempt to fix the problem, but this was ineffective for diverting the excessive flow of water.[200] The court of appeals found that there was not a taking on the premises and that "an action in tort may not be brought against a county for negligence in the

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[190] Gans, *supra* note 41, at 681.
[191] *Norwood*, 186 N.E. at 105.
[192] *Id.*
[193] *See id.*
[194] *See id.*
[195] *See* Steinle v. City of Cincinnati, 52 N.E.2d 80, 84–85 (Ohio Ct. App. 1943).
[196] 149 N.E.2d 238 (Ohio 1958).
[197] *See* State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1201 (Ohio 2007).
[198] *Lucas*, 149 N.E.2d at 240.
[199] *Id.*
[200] *Id.* at 241.

performance of a public duty resulting in a private injury . . . and that a governmental authority is not liable for consequential damages resulting to adjoining property in condemnation proceedings."[201] The Ohio Supreme Court reversed.[202]

In addressing this case, the court looked at the meaning of consequential damages in this context. They held that consequential damages are the "lessening of the value of the property adjoining land which has been condemned, because of the use to which the land condemned has been subjected."[203] However, when "property is taken by a governmental authority, either completely or *pro tanto*," compensation is guaranteed by the Ohio constitution.[204] The court then moved on and only briefly mentioned in passing that "the present actions [were] not based upon . . . negligence."[205]

Lucas is particularly interesting in conjunction with *Blank* because it shows how important negligence can be in interfering with a landowner's recovery of damages as a taking. *Lucas* and *Blank* both involved water and other damages,[206] but in *Lucas*, the court found a taking and in *Blank*, it did not.[207] This can be explained partly by the extent of the flooding and damage in *Lucas*, but a major difference between the two cases is the absence of negligence in *Lucas* and the allegations of negligence in *Blank*.[208] Because of this, while *Lucas* is authority for the general rule and while the damages in the cases share some relation, *Lucas* is not particularly helpful as an example of the application of negligence in a takings case.

Lastly, in the *Blank* opinion, the court also found it prudent to note that a taking occurs when a property owner establishes damages "'intentionally directed at her property.'"[209] In *McKee v. Akron*, the court was faced with a damage claim for the taking of private property for public use due to odor

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[201] *Id.* at 242.

[202] *Id.* at 245.

[203] *Id.* at 242.

[204] *Id.*

[205] *Id.* at 244.

[206] State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1198 (Ohio 2007); *Lucas*, 149 N.E.2d at 240.

[207] *Blank*, 903 N.E.2d at 1204; *Lucas*, 149 N.E.2d at 245.

[208] *Blank*, 903 N.E.2d at 1200; *Lucas*, 149 N.E.2d at 244.

[209] *Blank*, 903 N.E.2d at 1201 (quoting McKee v. City of Akron, 199 N.E.2d 592, 595 (Ohio 1964)).

arising from a sewage disposal plant.[210] It is important in the context of Ohio's constitution that "more than a loss of market value or loss of the comfortable enjoyment of property" occurs.[211] Generally, to rise to the level of a taking, "the governmental activity must physically displace a person from space in which he was entitled to exercise dominion consistent with the rights of ownership."[212] Well-recognized examples include property that is repeatedly flooded, as in *Lucas*, and invasion into the airspace of one's property.[213]

Even though physical displacement is widely recognized as a compensable taking, it is not required.[214] A taking can occur when it is clear that the injury sustained by the landowner "differs substantially in kind from that sustained by others in the neighborhood, even though there has been no physical displacement."[215] This can occur through proof of intentional direction of damage to a person's property by showing extreme damage that "amount[s] to a substantial deprivation of all of the rights of ownership."[216] The court did not find this intentional direction to be the case in *McKee*.[217] *McKee* was much closer to *Fejes* where land appropriated nearby rendered the property less valuable because of the governmental activity, and the fact that land becomes less desirable as the result of governmental activity does not alone constitute a taking.[218] The landowners in *McKee* were not displaced from their property, the damage was not intentionally directed, and most of their interests were not deprived.[219] Because of this, the court in *McKee* did not find a compensable taking.[220]

In *Blank*, the court does not elaborate further on the intentional direction requirement.[221] It can be reasoned though, through the court's holding, that because the majority of the damages were held to be negligent, there was no intentional direction with respect to those damages.

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[210] *McKee*, 199 N.E.2d at 593.
[211] *Id.* at 594.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.* at 595.
[218] *Id.* at 594.
[219] *Id.* at 595.
[220] *Id.*
[221] State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1201 (Ohio 2007).

Further, while the damage was inconvenient, it did not rise to a level of physical displacement.[222] However, a different conclusion was reached with respect to the parking lot damage.[223] Even though the court noted in its opinion that "the state may not have intended the result,"[224] it can be argued that they intended it in a legal sense by meeting the knowledge amounting to a substantial certainty standard adopted by the court.

While the above noted cases help to demonstrate generally applicable rules, they do not go into detail regarding the consequence and application of negligence in a takings case, which is ultimately determinative in *Blank*. This is why the court turned to persuasive authority from other state supreme courts.[225] However, such a comparison further highlights the difficulty in weighing factors and the importance of the facts in any given case.

For example, the Ohio Supreme Court cited to *Electro-Jet Tool & Manufacturing Co., Inc. v. Albuquerque*,[226] where the New Mexico Supreme Court also noted the inherent difficulties in reconciling takings cases. They phrased the issue as "whether the taking or damaging is for a 'public use,' in a narrow sense ('use by the public') or in a broader sense ('public advantage')." [227] The court took a similar approach as the Ohio Supreme Court in reviewing cases from other states, noting that the review contained:

> a few of the countless decisions dealing with an almost infinite variety of fact situations and enunciating myriad rules governing instances in which compensation for an unintentional damaging of private property will be afforded as a matter of constitutional right and instances in which such damage has occurred as a result of, at most, simple negligence on the part of governmental agents carrying out public purposes.[228]

Many of the cases reach results and depend on principles that are hard to reconcile and inconsistent with the results and principles in other cases.[229]

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[222] *Id.* at 1203.
[223] *Id.*
[224] *Id.*
[225] *Id.* at 1201–02.
[226] 845 P.2d 770 (N.M. 1992); *Blank*, 903 N.E.2d at 1202.
[227] *Electro-Jet*, 845 P.2d at 773.
[228] *Id.* at 775.
[229] *Id.* at 775–76.

The New Mexico Supreme Court also noted the various language comparisons used to distinguish situations that provide for a constitutional right to compensation from those that do not—intentional versus unintentional, unavoidable versus accidental, necessary versus fortuitous, deliberate versus purposeful—but declined to add its own words to the list.[230] This list of words helps to demonstrate the "slippery and elusive concepts that permeate this area of the law."[231] The New Mexico Supreme Court went on to require a similar but less exacting standard than that chosen by the Ohio Supreme Court.[232] In *Electro-Jet*, the court rejected the knowledge amounting to a substantial certainty standard in favor of knowledge amounting to a substantial probability.[233] For the New Mexico Supreme Court, "'[t]he fundamental justification for inverse condemnation liability is that the public entity, acting in furtherance of public objectives, is taking a calculated risk that damage to private property may occur.'"[234] This approach is similar to Ohio but further highlights the difficulty faced by many states in sorting out the facts and rules of law that apply in inverse condemnation cases given the possible interpretations of public use.

V. SIGNIFICANCE OF THE DECISION AND FORESEEABLE CONSEQUENCES

After an initial reading of the *Blank* decision, it appears, as the dissent states, that the majority digressed from the well-established law regarding negligence as it relates to takings.[235] It is also not entirely clear exactly how or why some of the damages met the majority's "knowledge amounting to a substantial certainty" standard. This is where a better description of the evidence admitted at trial proves to be quite enlightening and is helpful in understanding how the court arrived at such a conclusion.

The court's specific holding was that "given the size and weight of the equipment involved, as well as the extent of the encroachment . . . the state acted with knowledge amounting to a substantial certainty that its conduct would cause such damage."[236] Looking at photos of the construction site is

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[230] *Id.*

[231] *Id.*

[232] *Compare id.* at 777 (adopting a knowledge amounting to a substantial probability standard), *with* State *ex rel.* Blank v. Beasley, 903 N.E.2d 1196, 1203 (Ohio 2007) (adopting a knowledge amounting to a substantial certainty standard).

[233] *Electro-Jet*, 845 P.2d at 777.

[234] *Id.* (quoting Yox v. City of Whittier, 227 Cal. Rptr. 311, 316 (Cal. Ct. App. 1986)).

[235] *See Blank*, 903 N.E.2d at 1204 (Lanzinger, J., dissenting).

[236] *Id.* at 1203 (majority opinion).

quite telling because some of the machines used were nearly as big as the portion of property appropriated.[237] Photos show huge construction machines parked just inside the boundaries of the appropriation.[238] Even though the State claimed that, but for the negligence of the contractor, the encroachment would not have happened,[239] the size of the equipment relative to the appropriated property makes this argument unlikely. The fact that the damage would have occurred with or without the presence of negligence is only true, however, for the parking lot damage because of the size of the machines. All of the other damage claimed by the landowners fits appropriately within the negligence exception—it was not substantially certain the project could not have been completed without such damage occurring.

Through careful analysis, it seems apparent that the facts of this case limit the significance of the holding to cases involving heavy construction equipment, although the general language of the opinion does not necessarily make this readily apparent. In the future, the State needs to do careful planning to ensure that there is enough area appropriated such that heavy construction equipment can realistically be maneuvered around on job sites. If projects are cut too close and a state contractor negligently exceeds the boundaries of the appropriation, they risk having to prove that the project could have been done within the land actually appropriated, and the size and weight of the machines used will be a key consideration in the feasibility of this argument.

VI. CONCLUSION

Takings cases are often messy and contain facts that are difficult to fit neatly within bright-line rules. The Ohio constitution contains a clear and important command that individual property rights are important and that if the State interferes with an individual's rights for the benefit of the public, just compensation is due.[240] This sounds simple, but the complexities of

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[237] Relator's Evidence for Alternative Writ of Mandamus at 8–9, 13–14, 16–17, 20, *Blank*, 903 N.E.2d 1196 (No. 2007-2217).

[238] *Id.*

[239] *Blank*, 903 N.E.2d at 1198–99.

[240] OHIO CONST. art. I, § 19. With regard to "just compensation" for the additional portion of land required to be appropriated for the parking lot damage held to be a compensable taking in *Blank*, in October 2010, the Blank's settled their claim with ODOT for $60,000, while a jury in the Trumbull County Common Pleas Court awarded the Kardassilaris' $19,000 in May of 2011. Letter from L. Martin Cordero, Assistant Attorney

(*continued*)

state improvement projects often make it difficult to determine if the simple sounding command of the takings clause is met.

There are important considerations from the perspective of the landowner, the State, and the public. In an effort to strike a balance, many states, including Ohio, have limited the scope of when negligent interference of property rights can constitute a taking.[241] While this might seem unfair to landowners, it protects the State and the public.[242] The State's waiver of sovereign immunity also protects landowners, so long as the landowners comply with the requirements of the Court of Claims.[243]

In staying true to the well-settled idea that negligent actions do not meet the public use requirement, and thus, cannot constitute takings,[244] the Ohio Supreme Court's approach is to weigh the facts of each individual case and only when the State acts with knowledge amounting to a substantial certainty that the damage will occur will the court find that the public use requirement is met and just compensation is due.[245] This is a very limited holding and hardly an expansion of long-standing Ohio law, but it may open the door for litigation efforts that might not have been attempted prior to this decision.

Gen., Transp. Section, Ohio Attorney Gen.'s Office, to Audra Lepi (Apr. 7, 2011) (on file with author).

[241] *See Blank*, 903 N.E.2d at 1201–02.

[242] *See* Masso, *supra* note 34, at 290–91.

[243] *See* OHIO REV. CODE ANN. § 2743.02(A)(1) (West 2010).

[244] *Blank*, 903 N.E.2d at 1201–02 (quoting 4 NICHOLS ON EMINENT DOMAIN § 14.245[1] (rev. 3d ed. 1964)).

[245] *See id.* at 1203.