

MAR 03 2016

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103430

**MOTHERS AGAINST DRILLING
IN OUR NEIGHBORHOOD, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

STATE OF OHIO, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-836899

BEFORE: E.T. Gallagher, P.J., Stewart, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 3, 2016

CV14836899

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EILEEN T. GALLAGHER, P.J.:

{¶1} Plaintiffs-appellants, Mothers Against Drilling In Our Neighborhoods, et al., (collectively “MADION”), appeal from the judgment of the common pleas court dismissing their complaint against defendants-appellees, the state of Ohio, Governor John Kasich in his capacity as Governor of the state of Ohio, the city of Broadview Heights (the “City”), Bass Energy, Inc. (“Bass Energy”), and Ohio Valley Energy Systems Corp. (“OVE”) (collectively “appellees”). MADION raises the following three assignments of error for review:

1. The trial court erred in relying on the Bass [Litigation] and *Morrison* decisions and deciding this action on the basis of the municipal corporation’s authority, thus violating the people’s right of local community self-government.
2. The trial court erred in relying on Dillon’s Rule and the City of Broadview Heights’ limited home rule authority in invalidating the Charter Amendment, thus violating the people’s right of local community self-government.
3. The trial court erred in relying on the doctrine of preemption, thus violating the people’s right of local community government.

{¶2} After careful review of the record and relevant case law, we affirm the trial court’s judgment.

I. Procedural and Factual History

A. Amendment to the City of Broadview Heights Charter

{¶3} In 1965, the General Assembly enacted R.C. Chapter 1509 for the purpose of regulating oil and gas drilling throughout Ohio. To ensure more centralized and uniform regulation, the General Assembly amended R.C. Chapter 1509 by passing House Bill 278 in 2004. As codified in R.C. 1509.02, this amendment specifically granted the Ohio Department of Natural Resources Division of Mineral Resources Management (“ODNR”) with the sole and exclusive authority to regulate the permitting, locating, and spacing of oil and gas wells within Ohio. Additionally, R.C. 1509.02 contains an express prohibition against local governments exercising powers in a way that “discriminates against, unfairly impedes, or obstructs oil and gas activities and operations” regulated by the state under R.C. Chapter 1509. Pursuant to R.C. 1509.05 and 1509.06, any person desiring to drill an oil and gas production well must submit an application and obtain a permit issued by ODNR.

{¶4} Subsequent to the passage of H.B. 278, Beck Energy and OVE obtained permits from a division of ODNR for the purpose of drilling oil and gas wells on properties located within the City. In response, the residents of Broadview Heights proposed an amendment to the City’s Charter that included language that would make it illegal for any person or corporation to engage in new oil and gas drilling and the related maintenance of oil and gas wells. In

November 2012, the voters of Broadview Heights passed the proposed amendment, which became Article XV of the City's Charter.

{¶5} Relevant to this appeal, Article XV states as follows:

1. It shall be unlawful for any person or corporation to engage in the extraction of gas or oil within the City of Broadview Heights, with the exception of gas and oil wells installed and operated at the time of the enactment of the Charter provision, provided that the extraction of gas or oil from existing wells does not involve an [sic] practice or process not previously used for the extraction of gas or oil from those wells and providing those wells are capped securely when production ceases.

2. It shall be unlawful for any person or corporation, or any director, officer, owner, or manager of a corporation to use a corporation, to deposit, store or transport waste water, "produced" water, "frack" water, brine or other materials, chemicals or by-products used in the extraction of gas or oil within, upon or through the land, air or water of the City of Broadview Heights.

Article XV, Sections 1 and 2.

{¶6} In addition to these prohibitions, Article XV contains a general provision that prevents corporations engaged in the extraction of oil and gas from having the authority or power to enforce state or federal preemptive laws against Article XV. Article XV, Section 6. Thus, Article XV sought to invalidate any state or federal permit, license, privilege or other charter that authorized activities that would violate the terms of the City's Charter. Article XV, Section 7.

B. The “Bass Litigation”

{¶7} In June 2014, Bass Energy and OVE filed a complaint against the City in the Cuyahoga County Court of Common Pleas, arguing that Article XV’s ban on drilling new wells is unenforceable and preempted because it directly conflicts with R.C. Chapter 1509, which grants ODNR the sole and exclusive authority to regulate the drilling and operating of gas and oil wells within Ohio. Cuyahoga C.P. No. CV-14-828074 (the “Bass Litigation”). The complaint alleged that the companies, who possessed a drilling permit from ODNR, were “prepared to begin” preparations for drilling a new conventional well on property in the City, but had “been hampered” from doing so because Article XV would make the drilling “unlawful.” The complaint sought an order declaring that the City had no authority to prevent the state-authorized drilling and enjoining the City from taking any action to “inhibit” the drilling.

{¶8} In July 2014, MADION filed a motion to intervene as a defendant in the Bass Litigation. MADION, the creator and proponent of the Charter amendments, sought to intervene “on behalf of individual members of the entity” because, in MADION’s view, the City “would not adequately represent MADION’s interests” because City leaders had previously “expressed doubts” that the Charter amendments were enforceable against state law.

{¶9} In December 2014, the City and the energy companies filed competing motions for summary judgment. While the motions were pending, the

Ohio Supreme Court released *Morrison v. Beck Energy Inc.*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128. Relevant to the issues raised in the Bass Litigation, the *Morrison* court held that a local ordinance could not “restrict an activity” that a “state license permits.” *Id.* at ¶ 36 (city ordinance that precluded drilling oil and gas was preempted.).

{¶10} In August 2014, the trial court denied MADION’s motion to intervene, finding that the City was more than capable of representing the interests of all of its citizens. Further, in March 2015, the court granted summary judgment in favor of Bass Energy and OVE. The trial court’s judgment relied extensively on the *Morrison* decision, holding that the City’s “ban” on new oil and gas drilling “directly conflict[ed] with” the state’s “regulatory scheme” and was therefore “invalid” and “preempted.”

C. The MADION Litigation

{¶11} After the court denied the motion to intervene, but before it had ruled on the parties’ motions for summary judgment, MADION and three individual Broadview Heights residents filed the instant case in Cuyahoga C.P. No. CV-14-836899. As argued in its motion to intervene in the Bass Litigation, MADION’s complaint sought to enforce Article XV, citing the people of Broadview Heights’ “inalienable right” to “community self-government” that is unaffected by “state or federal law.”

{¶12} In January 2015, the state of Ohio and Governor John Kasich filed a motion to dismiss pursuant to Civ.R. 12(B)(6). In April 2015, Bass Energy and OVE moved for judgment as a matter of law pursuant to Civ.R. 12(C).

{¶13} In July 2015, the trial court entered judgment in favor of the appellees, finding that “[MADION] can prove no set of facts in support of their claims that would entitle them to relief.” In its judgment entry, the court concluded that the *Morrison* and Bass Litigation decisions “necessitated a finding that the City Amendments were preempted and unenforceable.”

{¶14} MADION now appeals from the trial court’s judgment.

II. Law and Analysis

{¶15} In its first, second, and third assignments of error, MADION collectively argues that the trial court erred in dismissing its case with prejudice. MADION contends that the trial court’s application of the doctrine of preemption and its reliance on the Bass Litigation and *Morrison* decisions ignored the people of Broadview Heights’ “right to local community self-government.”

{¶16} Civ.R. 12(C) states that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001).

{¶17} Although the standards for Civ.R. 12(B)(6) and (C) motions are similar, Civ.R. 12(C) motions resolve questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996). In ruling on a Civ.R. 12(C) motion, the court is permitted to consider both the complaint and answer. *Id.* A court must construe as true all of the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113 (1973). Dismissal is appropriate where a court finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Pontious* at 570. Our review of the appropriateness of judgment on the pleadings is de novo. *Thornton v. Cleveland*, 176 Ohio App.3d 122, 2008-Ohio-1709, 890 N.E.2d 353, ¶ 3 (8th Dist.).

{¶18} As stated, the trial court's judgment dismissing MADION's complaint relied extensively on the Ohio Supreme Court's decision in *Morrison* for the proposition that Article XV cannot obstruct oil and gas activities that the state has permitted under R.C. Chapter 1509.

{¶19} In *Morrison*, the court examined whether local ordinances passed by the city of Munroe Falls constituted "a valid exercise of its home-rule power" under Article XVII, Section 3 of the Ohio Constitution. The local ordinances at issue in *Morrison* prohibited and criminalized the act of drilling for oil and gas without a municipal permit.

{¶20} As stated by the court:

The question here is whether the city's ordinances represent a valid exercise of its home-rule power. Under the Home Rule Amendment to the Ohio Constitution, "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Article XVIII, Section 3. This amendment gives municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest." *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 212, 80 N.E.2d 769 (1948).

The Home Rule Amendment does not, however, allow municipalities to exercise their police powers in a manner that "conflict[s] with general laws." Article XVIII, Section 3; *see also State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack*, 86 Ohio St.3d 293, 296, 714 N.E.2d 917 (1999). Therefore, a municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute. *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17.

Morrison, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128, at ¶ 14-16.

{¶21} Applying the three-step analysis, the *Morrison* court struck down the local ordinance, holding that "the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, does not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted under R.C. Chapter 1509." *Id.* at ¶ 34.

{¶22} In this case, MADION does not dispute the conclusions reached by the Ohio Supreme Court in *Morrison*. However, MADION contends that *Morrison* is inapplicable to this case because the decision did not address the narrow arguments raised in MADION's complaint. MADION maintains that *Morrison* "only addressed home rule powers of *municipal corporations*," which according to MADION, "are distinct and apart from the *people's* inalienable and fundamental right to local community self-government." (Emphasis sic.)

{¶23} In its brief, MADION summarized the "people's right to local community self-government" as follows:

Pursuant to their inherent right of local community self-government, the people have the right to pass local laws such as the Community Bill of Rights. The people's right of local community self-government is fundamentally and historically distinct from a municipal corporation's statutory authority to legislate at a local level.

The right of local community self-government is an inherent fundamental right, inalienably held by the people of Broadview Heights, which the people may exercise to secure and protect their political and civil rights. * * * It is secured by the history of the founding of the United States, the American Declaration of Independence, the U.S. Constitution, the Ohio Constitution, and the Broadview Heights Charter's Community Bill of Rights.

{¶24} According to MADION, "preemption of the Community Bill of Rights by state law violates the superior right of the people to local community self-government." MADION explains that

when the people exercise their right of local community self-government to secure political and civil rights, and to enact

laws to protect those political and civil rights, state law doctrines concerning the lawmaking authority of municipal governmental units may not serve to defeat the people's lawmaking activity.

Thus, MADION asks this court to "recognize a categorical immunity from preemption for local law that is founded on the people's right to secure political and civil rights locally, and to protect those rights from violation."

{¶25} While MADION concedes that there is no case law to support its position, it maintains that the people's right to local community self-government is deeply rooted in our nation's history and tradition. In fact, MADION spends the majority of its brief undertaking a lengthy examination of American history, arguing that the people's right to local self-government has derived from historical documents such as the Mayflower Compact, the Exeter Compact of 1639, the Articles of Confederation for the United Colonies of 1643, and the Declaration of Independence. MADION also cites historical events leading up to the American Revolution, such as the Second Continental Congress, the British Parliament's enactment of the Currency Acts in 1764, the Stamp Act Riots in 1765, and the Boston Tea Party.

{¶26} After careful review of MADION's arguments in their entirety, we find no merit to its position that the right to local community self-government entitles the people of Broadview Heights to enact laws that may not be preempted by state law. In addition to MADION's inability to present any legal authority to support its arguments, MADION's historical discourse ignores

express provisions of the Ohio Constitution, including Article II, Section 1, which states, “[t]he legislative power of the state shall be vested in a General Assembly * * *.” In delegating legislative authority to the General Assembly, the people of Ohio reserved for themselves only the limited municipal powers of initiative and referendum. There is nothing in the Ohio Constitution to suggest that the “people” of a municipal corporation possess the authority, independent and apart from the municipal corporation itself, to enact local ordinances that conflict with state law. Thus, the “people’s” ability to enact local law is limited to those rights afforded to the municipality and is subject to the restrictions of the home rule amendment under Article XVIII, Section 3 of the Ohio Constitution.

{¶27} Based on the foregoing, we find the trial court’s reliance on *Morrison* and the application of the doctrine of preemption to be appropriate. Applying the three-part test set forth in *Morrison*, this court first finds that Article XV’s ban on oil and gas drilling is a clear exercise of the City’s police power. By attempting to ban oil and gas drilling, the City attempted to protect the “public health” and “general welfare of the public in addressing environmental concerns within the community.” See *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 30. Further, the Charter amendments were not related “solely to the government and administration of the internal affairs of the municipality.” *Id.*

{¶28} Secondly, we find that R.C. Chapter 1509 is a general law. R.C. 1509 is a “comprehensive” and “statewide” enactment that applies “uniformly” throughout Ohio in setting regulations that prescribe a general rule of conduct upon citizens. *See Morrison*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128, at ¶ 19, 23.

{¶29} Finally, we find that Article XV’s ban on new or expanding drilling of oil and gas wells directly conflicts with R.C. Chapter 1509’s state regulatory scheme. In short, the ordinance prohibits what R.C. Chapter 1509 permits. *Id.* at ¶ 24.

{¶30} Accordingly, we find the trial court did not err by granting appellees’ motions to dismiss. As stated, Article XV is an invalid exercise of the City’s home rule authority, and is therefore preempted by R.C. 1509. Thus, the trial court correctly determined that MADION can prove no set of facts in support of its claims that would entitle it to relief.

{¶31} MADION’s first, second, and third assignments of error are overruled.

III. Conclusion

{¶32} The trial court did not err in granting appellees’ motion to dismiss.

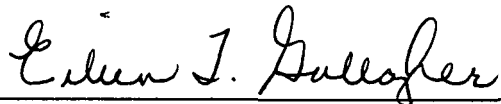
{¶33} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.




EILEEN T. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION)

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR 03 2016

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By  Deputy

MELODY J. STEWART, J., CONCURRING IN JUDGMENT ONLY:

{¶34} I agree with the majority's decision in this case, including its analysis of the home rule questions presented by this appeal. However, there is a narrower, nonconstitutional basis for deciding this appeal: that MADION is offering a collateral attack on the *Bass Energy* decision. Because of this, this court must adhere to the principle of appellate law that says that appeals must always be decided on nonconstitutional grounds if possible. *See Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, ¶ 13 (“Even when one of the parties has raised a constitutional issue, we do not decide on that basis unless and until absolutely necessary.”).

{¶35} The doctrine of collateral estoppel, sometimes known as “issue preclusion,” says that once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of the issue in a suit on a

different cause of action involving a party to the first case. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 27. Unlike claim preclusion (*res judicata*), which relates to parties and those in privity, collateral estoppel applies to both parties and nonparties. See *Moor v. Parsons*, 98 Ohio St. 233, 243, 120 N.E. 305 (1918) (an attack on a judgment “is collateral so far as it is sought to affect others than parties to the record.”).

{¶36} In *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, the Supreme Court held that a judgment is immune from collateral attack in another case unless the first ruling was issued without jurisdiction or was the product of fraudulent conduct. *Id.* at ¶ 37. In *Ohio Pyro*, a fireworks company brought suit against the state fire marshal challenging a moratorium on the issuance of licenses for fireworks wholesalers. Several companies, including Ohio Pyro, attempted to intervene but were refused and did not appeal. The underlying litigation settled with the fire marshal agreeing to consider the party’s application; that is, to permit an exception to the moratorium. That settlement was reduced to judgment. Ohio Pyro (a competitor to the fireworks company), filed suit seeking a declaration of its right to be the exclusive operator in the county where it did business, claiming that the fireworks company that had been granted a license to become a firework wholesaler had taken steps to become a direct competitor. The

Supreme Court noted that a collateral attack is actually “an attack on the integrity of the judgment.” (Emphasis sic.) *Id.* at ¶ 25. It concluded that Ohio Pyro’s action “can be characterized no other way than as an impermissible collateral attack” on the case settled by the state fire marshal and the competitor fireworks company. *Id.* at ¶ 26. For Ohio Pyro to say that the fire marshal was wrong to approve a competitor’s application to do business in its county territory, was to seek relief that directly conflicted with the terms of the judgment memorializing the settlement agreement. In reaching this conclusion, the Supreme Court specifically found “not relevant” Ohio Pyro’s argument that it had been denied the opportunity to intervene in the competitor’s action against the fire marshal because Ohio Pyro did not appeal. *Id.* at ¶ 34-36.

{¶37} MADION unsuccessfully attempted to intervene in *Bass Energy*. That was an indication that it believed its interests were involved in that litigation. Indeed, MADION makes no argument that *Bass Energy* involved issues that were not directly relevant to those raised in this case. MADION’s failure to cite *Ohio Pyro* in its appellate brief or make any attempt to explain why it should not be barred from relitigating the issues decided by the court in *Bass Energy* is telling. As the pleadings in this case make obvious, MADION desires to relitigate the issues decided adversely to it by *Bass Energy*. For these reasons, I would avoid reaching the constitutional issue and hold that the court properly dismissed the state and the governor, and properly granted judgment on the pleadings.