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2018 CV 0074

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IN THE COURT OF COMMON PLEAS  
ERIE COUNTY, OHIO

STATE OF OHIO  
ex rel. George Sortino  
1210 Sycamore Line  
Sandusky, OH 44870

Relator/Plaintiff,

v.

STATE OF OHIO, DEPARTMENT  
OF NATURAL RESOURCES  
c/o James Zehringer, Director  
2045 Morse Road  
Columbus, OH 43229

and

**JAMES ZEHRINGER, DIRECTOR**  
Ohio Department of Natural Resources  
2045 Morse Road  
Columbus, OH 43229

and

STATE OF OHIO  
c/o John Kasich, Governor  
77 South High Street, 30<sup>th</sup> Floor  
Columbus, OH 43215

ALSO SERVE:

MIKE DEWINE  
ATTORNEY GENERAL  
30 E. Broad Street, 14<sup>th</sup> Floor  
Columbus, OH 43215

Respondents/Defendants.

CASE NO. 2018-CV-

JUDGE

**COMPLAINT FOR DECLARATORY  
JUDGMENT, MANDAMUS AND  
OTHER RELIEF**

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## **PARTIES**

1. This action arises from the actions and inactions of the Ohio Department of Natural Resources (“ODNR”), acting on behalf of the State of Ohio, by which they have unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie. In the past ODNR had intentionally and willfully misrepresented to property owners and to the public that the State of Ohio owns a part of their properties, and ODNR had persisted in this campaign of falsehoods despite knowing that it was in conflict with all Ohio laws, with published opinions of the Attorney General of Ohio and the Ohio and U.S. Constitutions.

2. Relator George Sortino (“Relator”, “Plaintiff” or “Sortino”) is, and at all times pertinent to this cause of action, was an owner of record of certain real property abutting Lake Erie. His property is located in Erie County, Ohio.

3. Relator commences and will maintain this litigation as a named relator/plaintiff on behalf of his putative class hereinafter further set forth.

4. Respondents/Defendants are the ODNR, its Director, James Zehringer and the State of Ohio (collectively “ODNR”).

## **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action on the basis that Relator is a resident of Ohio and the sole relief sought by Relator is a declaratory judgment and other equitable relief.

6. Venue is proper in this Court because the claims of Relator arose in Erie County, Ohio. Relator resides in Erie County, Ohio, and Erie County, Ohio is the county in which the defendant, ODNR, conducted activity that gave rise to the claim for relief

## **BACKGROUND**

7. The first section of the first article of the Bill of Rights of the Ohio Constitution proclaims the inalienable right of people in this state to acquire, possess, and protect property. The Ohio Constitution further prohibits the state from taking private property for a public use without first paying compensation to the property owner. The United States Constitution contains equivalent provisions. As well the 14<sup>th</sup> Amendment to the United States Constitution prohibits the conduct of ODNR complained of, herein.

8. Legal title to many parcels of real property abutting Lake Erie have been held in private ownership since before Ohio was admitted into the Union as a state in 1803. Since that time, Ohio law has recognized and protected the inalienable property rights of those holding legal title to these parcels, for purposes of this litigation known as “upland” or “littoral” owners.

9. For over 200 years, Ohio law has recognized the property rights of littoral owners, both with regard to the ownership in fee simple of the upland property as defined by the owner’s deed or original patent and also as to the rights – known as littoral rights – such property owners have to access and use of the adjoining waters of Lake Erie. Ohio law also has long recognized that the lakeward property line of a littoral owner whose ownership extends to Lake Erie is a “moveable freehold” in that such property line can move either lakeward or landward by virtue of accretion, erosion, or reliction. The property owned by the littoral Class Owners abuts the submerged lands of Lake Erie, title to which, together with the waters of Lake Erie and their contents, is held in trust for the benefit of the people of Ohio for the public uses of navigation, water commerce, fishing and fisheries.

10. This concept of trust ownership by the State of the waters of Lake Erie and the soil beneath currently is codified in Section 1506.10 of the Ohio Revised Code and is expressly

made subject to the property rights of littoral owners. That section also designates ODNR “as the state agency in all matters pertaining to the care, protection, and enforcement of the state’s rights designated in this section.”

11. Under cover of its “coastal management program,” ODNR had abused its authority by willfully ignoring the boundary between private and public ownership fixed by Ohio law.

12. ODNR had asserted that the state of Ohio owned all land lakeward of the “ordinary high water mark,” or “OHW,” which for administrative convenience the ODNR defined as wherever the U.S. Army Corps of Engineers defined the Ordinary High Water for purposes of federal law. Thus, contrary to established Ohio law, ODNR sought to exercise all property rights of fee ownership as to all property lakeward of OHW, regardless of whether that property is submerged and regardless of whether that property is privately owned.

13. Littoral owners are required to pay real estate taxes based upon the whole of their privately owned fee. Some littoral owners wishing to use their private property located below OHW had been required by ODNR to lease this land from the state, despite that the land was owned in fee by the littoral owners. ODNR had maintained that no littoral owner might make use of their own property, nor exclude third parties from such property, as long as that property lies below OHW. Such conduct constituted a taking by the State.

14. ODNR’s actions threw doubt upon the littoral owners’ title to their properties and prevented some of them from obtaining title insurance for their private property located below OHW but landward of the state’s actual fee ownership.

15. In response to ODNR’s actions, a group of littoral landowners filed a lawsuit in the Court of Common Pleas of Lake County challenging the designation of OHW as the property line for all land abutting Lake Erie. The case, *State ex rel. Merrill v. Ohio Dept. of Natural*

*Resources*, Lake Co. Case No. 04CV001080, was brought on behalf of a class of all littoral property owners bordering Lake Erie. The plaintiffs in *Merrill* sought a declaratory judgment that the class members own fee title to the lands located between OHW and the actual legal boundary of their properties and to declare that the submerged land leases were void and invalid as to any land below OHW owned by the class. The *Merrill* plaintiffs also sought a writ of mandamus to compel ODNR to commence appropriation proceedings for all class members to determine the amount of compensation due to each of them for the temporary taking of the property by the State.

16. The *Merrill* trial court certified a class under Civ.R. 23(B)(2) for Count I, the declaratory judgment. A class may be maintained under Civ.R. 23(B)(2) when the party opposing the class has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. A Civ.R. 23(B)(2), moreover, is a mandatory class with no right to opt out of the certification and no requirement of notice to class members. This class was defined as “all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio.”

17. That Court also granted partial summary judgment for the benefit of the Class, concluding that the public trust neither extended to the ordinary high-water mark nor terminated at the low-water mark. The trial court held that the boundary is “a moveable boundary consisting of the water’s edge, which means the most landward place where the lake water actually touches the land at any given time.”

18. The case eventually made its way to the Ohio Supreme Court. In *State ex rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, the Supreme Court held that “the territory of Lake Erie held in trust by the state of Ohio for the people of Ohio extends to the ‘natural shoreline,’ which is the line at which the water usually stands when free from disturbing causes.” *Id.* at ¶4. In doing so, the Ohio Supreme Court rejected ODNr’s assertion that the proper boundary is OHW. The case was remanded to the trial court for further proceedings on the pending claims consistent with the opinion of the Ohio Supreme Court.

19. On August 27, 2012, on remand, the trial court issued an Order clarifying and defining what constitutes the “natural shoreline,” as that concept was not directly addressed by the Ohio Supreme Court. Such Order also granted the relief requested, to declare as void and invalid any submerged land lease as to land below the OHW and above the natural shoreline and for ODNr to return all submerged land lease fees collected between OHW and the natural shoreline which were paid by the Class Members between 1998 and the present.

20. The August 27, 2012 Order also extended the class certification to Count II, the mandamus claim. The trial court reasoned that:

[t]o the extent Count II of the First Amended Complaint seeks a declaration that the state’s assertion of ownership up to the OHWM constitutes an unconstitutional temporary taking against all owners of littoral property bordering Lake Erie, the class that would be certified for resolution of that issue would have the exact same members as the class currently certified to Count I, *i.e.*, all littoral property owners bordering Lake Erie. Thus, the class certified for Count I could be maintained through the conclusion of Count II of the First Amended Complaint. The relief sought in Count II does not change the analysis, as a writ of mandamus is in the nature of an injunction, albeit mandatory rather than prohibitory, and thus subject to certification on a class-wide basis under Civil Rule 23(B)(2).

On March 1, 2014, the Eleventh District Court of Appeals affirmed the trial court’s Order.

21. On May 27, 2016, the parties to the *Merrill* litigation entered into a proposed settlement agreement, which was filed with the Lake County Court. ODNR agreed to pay a set sum to and/or for a Settlement Class. A certain amount was allocated to the return of submerged land lease rentals and attorneys fees with respect to Count I. The remainder of the settlement fund was to be distributed according to a plan of allocation, to proportionally allocate the funds to any settlement class members, who filed acceptable Proofs of Claims.

22. The *Merrill* Class as initially certified by the trial court for Count II was properly certified under Civ.R. 23(B)(2), because the relief sought in the First Amended Complaint was declaratory and for mandamus relief. Despite the certification of the *Merrill* Class as a Civ.R. 23(B)(2) class, the terms of the Settlement Agreement provided class members with money damages, not the equitable relief that had originally been sought. If the *Merrill* case had not settled, the *Merrill* court would have been required to issue a declaration on the question of an unconstitutional taking, and ODNR would have been compelled to seek out each property owner to settle or to commence appropriation proceedings, thereby making further actual notice to each class member unnecessary. However, with the addition of monetary damages allocated to property owners that did not have submerged land leases with ODNR, this class action should have been only and appropriately certified under Civ.R 23(B)(3). Payment of money damages triggered the due process requirements that *require* the provision of notice to class members as described in Civ.R. 23(C)(2)(b).

23. However, instead of recognizing the due process requirements, the parties and the trial Court continued to treat the settlement class as certified only under Civ.R 23(B)(2). Notice of the settlement was mailed *only* to those class members with submerged land leases. Because the *Merrill* Class was certified under Civ.R. 23(B)(2), no Class Member was given notice of the



right to *opt out* of the settlement and all Class Members were denied any right to opt out. Class members who are owners of littoral property without submerged land leases were, for the most part, unaware of the action and the need to file a Proof of Claim in order to claim the funds due them. The individual named Plaintiff in this Complaint did not receive notice of the *Merrill* settlement, but would have filed a Proof of Claim had he been advised of the settlement. He was not aware of his right to object to the settlement. Although the settlement agreement provides that the class members have released all claims, the class members who did not receive notice are unaware of what they had purportedly surrendered. Because of this due process violation, all settlement class members who were denied their due process rights when they were not provided notice, as required under Civ.R 23(C)(2)(b), continue to be able to seek the remedy that they were denied in the *Merrill* action and which is being sought by the filing of this cause of action.

#### **CLASS ALLEGATIONS**

24. Plaintiff brings this action as a class action under Civ.R. 23(B)(2) on behalf of himself and all other members of a Class defined as all of the approximately 15,500 private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio who were not sent notice of the settlement of the case captioned *State ex rel. Robert Merrill, et al v. State of Ohio, Department of Natural Resources, et al*, Case No. 04CV001080, filed in the Court of Common Pleas, Lake County Ohio; and who did not file a Proof of Claim with the Settlement Administrator.

25. The members of the Class are so numerous that the joinder of all individual members is impracticable.

26. There are common questions of law and fact as to the unconstitutional taking of private property by ODNR which was owned by the Plaintiff and his Class Members in this case.



27. The claims of the Plaintiff are typical of the claims of the Class, and ODNR's defenses are typical of the defenses pertinent to all of the members of the Class.

28. Plaintiff will fairly and adequately protect the interests of the Class.

29. ODNR has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory relief and associated injunctive relief with respect to the Class as a whole.

30. Adjudication of this case as a class action will facilitate judicial economy.

**COUNT I**  
**Declaratory Judgment**

31. The facts alleged in paragraphs 1 through 30 of this Complaint are realleged and incorporated herein by reference.

32. Prior to the decision of the Ohio Supreme Court in *State ex rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ODNR contended that the State of Ohio held title to all lands located below the administratively arbitrary line of OHW.

33. ODNR contended that Plaintiffs were prohibited from using any land located below OHW, regardless of fee ownership of that land.

34. Pursuant to Ohio Revised Code Chapter 2721, Plaintiffs are entitled to an order of this Court declaring that ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW constituted an unconstitutional temporary taking of those lands; and the Plaintiff and Class Members should be declared to have a clear right to receive compensation from ODNR for such taking and de facto appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

**COUNT II**  
**Mandamus/Inverse Takings Compensation**

35. The facts in paragraph 1 through 34 of this Complaint are realleged and incorporated herein by reference.

36. Plaintiff and the Class Members have no plain and adequate remedy in the ordinary course of law other than to require ODNR to compensate each of them, individually, fairly for the losses and damages that they have incurred as a result of ODNR's uncompensated taking of their privately owned real property.

37. ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the properties owned by Plaintiff and Class Members are located, to determine the amount of compensation due to each of them for the real property temporarily taken and for damage to the residue of their respective real properties.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Plaintiff, on behalf of himself and the Class Members, requests that this Court grant the following relief:

- 1) Pursuant to Ohio Civil Rule 23(B)(2), certify this case as a class action and certify that the class shall include each and every owner of a parcel of privately owned real property abutting Lake Erie located within the State of Ohio to whom they received neither actual notice of the settlement of *State ex rel. Merrill v. Ohio Department of Natural Resources*, nor any compensation related to that settlement.
- 2) A declaratory judgment that that ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW constituted an unconstitutional temporary taking of those lands and the Plaintiff, and each member of his Class, have a clear right to receive compensation

from ODNR for such taking by appropriation, pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

- 3) A Writ of Mandamus compelling and ordering ODNR to commence appropriation proceedings in the Probate Court of the respective counties in which the properties owned by the Plaintiff and Class Members are located to determine the amount of compensation due to each for the real property taken and for damage to the residue of their real properties.
- 4) An award of Plaintiff's attorneys' fees and costs.
- 5) Any other relief that this Court deems equitable, proper, necessary, or just.

Respectfully submitted,

s/ Margaret M. Murray

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**INSTRUCTIONS TO THE CLERK:**

Please cause to be served upon all Defendants a copy of the Complaint. Said service is requested by certified mail.

s/ Margaret M. Murray  
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