[Cite as *Wooster v. Enviro-Tank Clean, Inc.*, 2015-Ohio-1876.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

CITY OF WOOSTER	C.A. No. 13CA0012
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ENVIRO-TANK CLEAN, INC., et al.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellees	CASE No. 12-CV-0268

DECISION AND JOURNAL ENTRY

Dated: May 18, 2015

MOORE, Judge.

{¶1} Plaintiff-Appellant City of Wooster ("the City") appeals from the judgment of the Wayne County Court of Common Pleas granting summary judgment to Defendants-Appellees Enviro-Tank Clean, Inc., dba Enviro Clean Services and Belpre Enterprises, Inc. (collectively "Enviro-Tank") on the City's complaint and dismissing the complaint. We reverse.

I.

{¶2} The City initiated the instant action in April 2012 against Enviro-Tank Clean, Inc. and Belpre Enterprises, Inc. Belpre Enterprises, Inc. owns the real estate upon which Enviro-Tank Clean, Inc. operates. The six-count complaint alleged that Enviro-Tank's facility in Wooster was engaged in the business of collecting and pre-treating industrial waste and that that process caused the emission of noxious odors causing "injury and discomfort to those living in proximity to the facility, as well as substantially and unreasonably interfering with their use and enjoyment of the surrounding properties." The City maintained that "those who reside or work

in proximity to the facility have complained of headache, nausea, and irritation to the eyes, nose, skin, mouth and throat[,]" and that the odors "permeate the residences of those living in proximity to the [] facility, at times making it extremely difficult for them to use and enjoy their homes, as well as the outdoor areas of their properties." The City also asserted in the complaint that the odors "endanger the health, safety, and/or welfare of the public, and/or cause[] unreasonable injury, and/or damage to property." Essentially, the City alleged that the actions of Enviro-Tank created a nuisance and Wooster sought injunctive relief to abate the nuisance.

{¶3} Enviro-Tank moved for summary judgment asserting that Wooster lacked standing to bring the suit, in part, because it was doing so on behalf of its citizens and not based upon any injury to property owned by the City. Additionally, Enviro-Tank argued that the City could not maintain an action under any theory alleged in the complaint. The City responded in opposition and included affidavits that detailed property owned by the City that was allegedly affected by Enviro-Tank's activities. The City also filed a motion to amend the complaint seeking to include allegations with respect to property owned by the City.

{¶4} The trial court denied the City's motion to amend and concluded that the City lacked standing to bring the complaint. Specifically, the trial court concluded that the City "fail[ed] to show that [the City] itself [had] a personal stake in the matter or identify any harm that was done to [its] properties." The trial court dismissed the complaint.

{¶5} The City has appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ENVIRO[-TANK], FINDING THAT THE CITY LACKED STANDING.

{¶6} The City asserts in its first assignment of error that the trial court erred in concluding that the City lacked standing and granting judgment in favor of Enviro-Tank. Because the trial court failed to consider the arguments made below and the particular claims at issue, we agree.

{¶7} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). It applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983). Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). The moving party bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996). Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293; Civ.R. 56(E).

{¶8} On appeal, the City contends that it has standing based upon its ownership of affected property and that it is also authorized to bring suit to protect the rights of its residents to be free from nuisance.

{¶9} The City's complaint contained six counts all related to nuisance: the first sought an injunction pursuant to R.C. 2727.03, the second alleged a public nuisance in violation of Ohio Adm. Code 3745-15-07(A), the third alleged a public nuisance in violation of R.C. 3767.02, the

fourth alleged a public nuisance in violation of Wooster Codified Ordinance 1143.09, and the fifth and sixth claims alleged a negligently caused nuisance and an intentionally caused nuisance, respectively. We note that the trial court denied as untimely the City's motion to amend the complaint to include allegations concerning the impact of Enviro-Tank's activities on property owned by the City. The City has not appealed that determination, and thus, it is not before us. Instead, the City asserts that the trial court nonetheless erred in failing to consider its summary judgment materials detailing the impact on its own property, as the allegations in the complaint were broad enough to encompass damage to City owned property given that Ohio is a notice pleading state. *See* Civ.R. 8(A). Accordingly, the City argues that the trial court's determination that the City failed to demonstrate damage to its own property was erroneous.

{¶10} The City is correct that "Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 29. Instead, "[u]nder the Ohio Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the party is entitled to relief.'" *Id.*, quoting Civ.R. 8(A)(1). The City asserts that because of these legal principles, it was not required to specify the property being damaged because the complaint included allegations that Enviro-Tank's activities "endanger the health, safety, and/or welfare of the public, and/or cause[] unreasonable injury, and/or damage to property." Thus, according to the City, Enviro-Tank was on notice that the City was alleging damage to its property, including its own. While we do not disagree with the City that notice pleading would not require the City to specify all of the property allegedly being damaged or affected, we cannot agree that the City's complaint put Enviro-Tank on notice that the City was alleging that it was seeking relief based upon damage to City-owned property. Instead, even a generous reading of the complaint evidences that the City

was seeking injunctive relief to abate a public nuisance. None of the allegations demonstrate an intent on the part of the City to seek relief or recover on its own behalf. The complaint states that Enviro-Tank's actions are "causing harm to Wooster citizens living in proximity to the facility," and are causing "injury and discomfort to those living in proximity to the facility[.]" None of the allegations mention damages to City-owned property or mention City-workers. We cannot conclude that mentioning that there was "damage to property" apprised Enviro-Tank that the City was seeking to recover on its own behalf. Therefore, the evidentiary materials submitted by the City in order to demonstrate damage to the City's property were outside the allegations raised in the complaint and were properly disregarded by the trial court in ruling on the motion. *See Alfonso v. Marc Glassman*, 9th Dist. Summit No. 24604, 2009-Ohio-5149, ¶ 18 (noting that while a trial court has a duty to "thoroughly review all evidentiary materials submitted in support of, or in opposition to, a motion for summary judgment, that requirement must necessary[ily] be tempered by the prohibition against considering issues outside the scope of the motion, and certainly any issues beyond the scope of the complaint[]").

{¶11} The City next contends that the trial court erred in concluding that the City lacked standing to bring the action to protect the health, safety, and welfare of the public. In ruling on the motion, the trial court relied upon the fact that the City had not pled allegations of damage to its own property to conclude that the City had failed "to show that [the City] itself has a personal stake in the matter" as it failed to "identify any harm that was done to [the City's] properties." Based on that finding, the trial court used general common law standing principles to determine that the City lacked standing to pursue its action against Enviro-Tank.

{¶12} "Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue." *ProgressOhio.org, Inc. v. JobsOhio*, 139

Ohio St.3d 520, 2014-Ohio-2382, ¶ 7, quoting *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal,* 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 27. Standing can be based on general common law principles or can be founded on a grant of authority from a statute. *See Middleton v. Ferguson,* 25 Ohio St.3d 71, 75 (1986). Under the common law, "'Standing' requires that: 1) a plaintiff suffer an actual injury, defined as an invasion of a legally protected interest that is concrete and particularized; 2) the alleged wrongful conduct be causally connected to the injury; and 3) it be likely that a favorable decision will redress the injury." *State ex rel. Dellagnese v. Bath-Akron-Fairlawn Joint Economic Dev. Dist.*, 9th Dist. Summit No. 23196, 2006-Ohio-6904, ¶ 9; *see also Ferguson* at 75. However, "standing may also be conferred by statute." *Ferguson* at 75. Thus,

> [w]here the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a 'personal stake in the outcome of the controversy' [citation omitted] * * *. Where, however, * * * [a legislative authority] has * * * provided by statute for judicial review * * *, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

Ferguson at 75-76, quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732 (1972).

{¶13} Here, the trial court confined its examination to general common law standing principles. In fact, the cases relied upon by the trial court did not involve a municipality, nor did they involve an action seeking injunctive relief to abate a public nuisance. While Enviro-Tank did raise the broad issue of standing in its motion for summary judgment, it did so in the particular context of the doctrine of parens patriae.[1] Its argument was not solely that the City had

[1] "*Parens patriae* means 'parent of his or her country,' and refers to '[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.'" (Emphasis in original.) *Steele v. Hamilton Cty Community Mental Health Bd.,* 90 Ohio St.3d 176, 185 (2000), fn.5, quoting *Black's Law Dictionary,* 1137 (7th Ed.1999).

not alleged injury to itself, but it was also that, because the City was not a sovereign, it did not have the power or authority to bring the action. Yet, it agreed that the doctrine of parens patriae authorized the *State* to represent the interests of its citizens in an action enjoining a public nuisance and that the State could authorize the City to do so. Enviro-Tank acknowledged that provisions in Chapter 3767 of the Ohio Revised Code do permit a city law director to bring an action in the name of the state to abate a nuisance, *see* R.C. 3767.03; however, Enviro-Tank argued that the City had not complied with the requirements of the statute. The trial court did not address any of these arguments.

{¶14} The trial court's entry does not mention parens patriae nor does it mention Chapter 3767 of the Ohio Revised Code as a possible source of standing. Additionally, the trial court failed to discuss common law actions for public nuisance or consider whether other authority authorized the City's suit. *See Kenwood Plaza Ltd. Partnership v. Stephens*, 1st Dist. Hamilton No. C-961106, 1997 WL 33825949, *2 (Aug. 1, 1997) ("Generally, public nuisances are subject to abatement only by the state or by individuals who can show particular harm of a kind different from that suffered by the general public.") (Internal quotations and citation omitted.); *see also* 1 Cetrulo, *Toxic Torts Litigation Guide*, Section 2:19 (2014) ("Public nuisance falls into the category of minor criminal offenses and normally can be prosecuted only by the government."); Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Fin. Crisis Litigation,* 24 Notre Dame J.L. Ethics & Publ. Pol'y 7, 8 (2010) ("[F]or centuries courts have recognized that municipalities could assert public nuisance claims without any special claim of damages.").

{¶15} Thus, while the trial court correctly cited the law concerning common law standing, it did not consider the precise issues raised by the parties or the possibility that the City

could have standing notwithstanding the lack of allegations in the complaint concerning damage to City-owned property. *See Ohio Valley Assoc. Builders & Constr. v. DeBra-Kuempel,* 192 Ohio App.3d 504, 2011-Ohio-756, ¶ 22 (2d. Dist.) ("[C]ommon-law standing requirements, such as establishing a 'personal stake' in a case, do not apply when the issue is statutory standing * * *."). Moreover, the trial court considered the action as a whole and did not consider the individual counts to determine whether it was possible that the City might have standing on some counts even if it lacked it on others. Given these circumstances, we conclude the trial court erred in dismissing the action based only upon general common law standing principles. As the trial court failed to address the issues raised in the parties' motions, we decline to consider them in the first instance. *See Neura v. Goodwill,* 9th Dist. Medina No. 11CA0052-M, 2012-Ohio-2351, ¶ 19. Upon remand, the trial court is instructed to consider in the first instance the arguments of the parties concerning standing and determine whether the City possesses standing in light of its stance as a municipality bringing a nuisance abatement action.

{¶16} We sustain the City's first assignment of error.

ASSIGNMENT OF ERROR II

GENUINE ISSUES OF LAW AND GENUINE ISSUES OF MATERIAL FACT EXISTED THAT PRECLUDED THE TRIAL COURT FROM GRANTING SUMMARY JUDGMENT IN FAVOR OF ENVIRO[-TANK].

{¶17} The City argues in its second assignment of error that the trial court erred in granting summary judgment to Enviro-Tank because genuine disputes of material fact remain which would preclude summary judgment. As this matter is being remanded for the trial court to consider whether the City possessed standing in light of the parties arguments below, this issue is not properly before us and we decline to address it.

III.

{¶18} We reverse the judgment of the Wayne County Court of Common Pleas and remand this matter for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

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