

[Cite as *State ex rel. O'Brien v. Watts*, 2011-Ohio-4363.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Ron O'Brien, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-1107
 : (C.P.C. No. 10CVH-01-45)
 Ronald W. Watts, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on August 30, 2011

Ron O'Brien, Prosecuting Attorney, and *R. Matthew Colon*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Ronald W. Watts ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas in which the court granted summary judgment in favor of plaintiff-appellee, Ron O'Brien ("appellee"), denied appellant's motion for summary judgment, and issued a permanent injunction enjoining appellant from residing at his current residence. Because there is no genuine issue of material fact and appellee is entitled to judgment as a matter of law, we affirm.

{¶2} On June 19, 2007, appellant was adjudicated a sexually oriented offender by the Fairfield County Court of Common Pleas. As a sexually oriented offender, appellant is subject to the residency restrictions imposed upon sex offenders under former R.C. 2950.031, which has been revised and codified as R.C. 2950.034.

{¶3} As of December 7, 2009, appellant registered his residence as 45 West Park Avenue, Columbus, Ohio 43222. This residence is within 1,000 feet of Starling Middle School, which qualifies as a school for purposes of R.C. 2950.034. On January 4, 2010, appellee filed a complaint against appellant, asserting that, because appellant has been convicted of or pled guilty to either a sexually oriented offense that is not a registration exempt offense or to a child-victim oriented offense and he resides in a location within 1,000 feet of a school, appellant is in violation of R.C. 2950.034. Appellee requested both an injunction to restrain appellant from maintaining this residence and to enforce the residency restrictions. Appellant filed an answer to the complaint on January 29, 2010, and admitted that he resided at the address on 45 West Park Avenue.

{¶4} On October 8, 2010, appellant filed a motion for summary judgment, arguing the application of R.C. 2950.034 to appellant is unconstitutional because it is an ex post facto law, imposes duplicative punishment, and deprives him of liberty and property without due process. On October 19, 2010, appellee filed its own motion for summary judgment, arguing that appellant is clearly in violation of R.C. 2950.034 and as a result, appellee is entitled to injunctive relief as a matter of law.

{¶5} On November 1, 2010, the trial court issued a decision denying appellant's motion for summary judgment and granting appellee's motion for summary judgment. The trial court rejected appellant's constitutional challenges and found appellant to be in

violation of R.C. 2950.034. On November 8, 2010, an entry was filed journalizing the trial court's decision and ordering a permanent injunction which prevents appellant from residing at the 45 West Park Avenue address. This timely appeal now follows. Appellant raises a single assignment of error for our review:

[I.] The trial court erred in failing to find that Ohio's residency restrictions violate the Due Process Clause of the United States Constitution and Section 16, Article I of the Ohio Constitution.

{¶6} Appellate courts review decisions on summary judgment motions de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio

St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.*

{¶8} In his sole assignment of error, appellant argues the residency restrictions imposed against sexually oriented offenders, like him, violate substantive due process rights protected by the state and federal constitutions. Appellant argues R.C. 2950.034 infringes upon a fundamental interest—the right to establish a residence of one's own choosing. Because the restriction under R.C. 2950.034 affects a fundamental interest, appellant submits it is subject to a strict scrutiny standard of review. He argues the trial court failed to make the necessary findings to satisfy the strict scrutiny standard. Appellant further argues that other appellate districts have recognized an individual's right under the Ohio Constitution to live wherever he or she chooses.

{¶9} Appellee, on the other hand, argues R.C. 2950.034 does not violate the substantive due process rights protected by the United States and Ohio Constitutions. Appellee disputes appellant's contention that the statute impinges upon a fundamental right and points out that this court has previously rejected the argument that an individual has a fundamental right to live wherever he or she wishes. Based upon previous rejections of this argument, appellee submits the statute is subject to only a rational basis review, rather than strict scrutiny. Appellee cites to *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550; *State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-4741, and *Franklin Cty. Pros. Atty. O'Brien v. Smith*, 10th Dist. No. 10AP-52, 2010-Ohio-3748, in support of its position.

{¶10} R.C. 2950.034, which is entitled "Residing within 1,000 feet of school, preschool, or child day-care center premises prohibited," reads, in relevant part, as follows:

(A) No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises.

(B) If a person to whom division (A) of this section applies violates division (A) of this section by establishing a residence or occupying residential premises within one thousand feet of any school premises * * * the prosecuting attorney, * * * has a cause of action for injunctive relief against the person. * * *

{¶11} As appellee has noted, we have previously resolved a substantive due process challenge to the residency restriction imposed by former R.C. 2950.031, now recodified as R.C. 2950.034. In *Heimlich*, we determined the residency restriction statute did not infringe upon a fundamental right because the right to live where one wishes is not a fundamental right. "Although the freedom to live where one wishes is certainly of utmost importance to any individual, it is not a fundamental interest entitled to the highest constitutional protection." *Heimlich* at ¶32. We further found that the offender had "not established that the right to 'live where he wishes' is a fundamental right under either the federal or state Due Process Clause requiring strict scrutiny of Ohio's residency restriction. Appellant's interest in living 'where he wishes' is, therefore, entitled only to rational-basis review." *Id.* at ¶35.

{¶12} We went on to find that the state has a legitimate interest in protecting children from known sexual offenders. "The registration and notification laws, as well as the laws compelling a measurable distance between children and sex offenders, bear a

rational relationship to this legitimate state interest and set forth a reasonable method of furthering that interest." *Id.* at ¶38. Therefore, we determined that the residency restriction "bears a rational relationship to the state's legitimate interest in protecting children from identified sexually oriented offenders." *Id.* at ¶39.

{¶13} We have continued to follow the rationale of *Heimlich*. In *Smith*, we relied upon *Heimlich* to conclude that the residency restriction did not infringe upon substantive property or liberty rights under the United States and Ohio Constitutions. Next, approximately one month after we decided *Smith*, we issued our decision in *Messina*,¹ in which we held that the residency restriction in R.C. Chapter 2950 bears a rational relationship to a legitimate government interest in protecting children from sexually oriented offenders. More recently, in *O'Brien v. McGraw*, 10th Dist. No. 10AP-1198, 2011-Ohio-3826, we reiterated our previous findings in *Heimlich*, *Smith*, and *Messina*, and we again determined there is no fundamental right violated by the residency restriction in R.C. 2950.034, and therefore, rational basis review is proper.

{¶14} Appellant argues our findings in this line of cases are in conflict with other appellate districts that have recognized an individual's right under the Ohio Constitution to live where he or she chooses. However, none of the appellate cases cited by appellant involved restrictions placed upon sexually oriented offenders. Instead, those cases involved residency restrictions for municipal employees and a prohibition against the posting of real estate "for sale" signs within a designated area of a municipality. As such,

¹ At the time of the filing of the briefs in this matter, the defendant-appellant in *Messina* had recently filed a notice of appeal in the Supreme Court of Ohio, asking the court to accept jurisdiction and asserting the case involved a substantial constitutional question. On June 8, 2011, the Supreme Court of Ohio declined jurisdiction to hear the case and dismissed the appeal as not involving a substantial constitutional question. See *State ex rel. O'Brien v. Messina*, 128 Ohio St.3d 1514, 2011-Ohio-2686.

we find them to be inapposite, in addition to being non-binding. We shall continue to rely upon the precedent we have established in *Heimlich, Smith, Messina, and McGraw*.

{¶15} Accordingly, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
