

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

ProgressOhio.org, Inc. et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 11AP-1136
 : (C.P.C. No. 11CVH08-10807)
 JobsOhio et al., :
 : (REGULAR CALENDAR)
 Defendants-Appellees. :

D E C I S I O N

Rendered on June 14, 2012

Victoria E. Ullmann; Friedman, Domiano, Smith Co., and Michael J. Skindell; Murray & Murray Co., L.P.A., and Dennis E. Murray, for appellants.

Organ Cole + Stock LLP, and Douglas R. Cole; Squire Sanders (US) LLP, and Aneca E. Lasley, for appellee JobsOhio.

Michael DeWine, Attorney General, Aaron D. Epstein and Pearl M. Chin, Constitutional Offices Section.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Plaintiffs-appellants, ProgressOhio.org., Inc. ("ProgressOhio" or "appellants"), Ohio Senator Michael J. Skindell, and Ohio Representative Dennis E. Murray ("legislators" or "appellants") appeal from the December 2, 2011 decision of the Franklin County Court of Common Pleas granting defendants-appellees Ohio Governor John R. Kasich, Director Christiane Schment, Director Timothy S. Keen, Ohio Treasurer

Josh Mandel ("State-defendants"), and not for profit corporation JobsOhio's motions to dismiss and denying in part ProgressOhio's motion to strike. Because appellants have not met their burden to establish that they have standing to bring their action, we affirm the judgment of the trial court.

{¶2} This case originated in the Franklin County Court of Common Pleas as a constitutional challenge to the JobsOhio Act, specifically R.C. 187.01 et seq. and R.C. 4313.01 et seq., enacted by means of Am.Sub.H.B. No. 1 of the 129th General Assembly and amended through Am.Sub.H.B. No. 153 of the 129th General Assembly. JobsOhio is a nonprofit corporation created by statute to promote economic development, job creation, job retention, job training, and the recruitment of business to the state of Ohio. R.C. 187.01. According to statute, it is under the control of a board of directors appointed by the governor, and is not a state agency. R.C. 187.01(B); 187.03(A). JobsOhio is designed to be funded by a combination of public and private revenue, including proceeds from the state's liquor enterprise. R.C. 4313.02(A); R.C. 187.07.

{¶3} According to the complaint, ProgressOhio "is a 501(c)(4) organization¹, * * * created to provide a progressive voice for Ohio citizens." (Amended Complaint, at ¶ 12.) It seeks to inform the public about progressive ideals, values and politics in order to provide a more just and democratic society. ProgressOhio claims a statewide membership of 350,000. *Id.*

{¶4} On August 29, 2011, ProgressOhio filed a complaint in the Franklin County Court of Common Pleas. They later filed an amended complaint on November 16, 2011, alleging that the General Assembly and the current administration had created an unconstitutionally chartered corporation that will spend government revenues secretly and free from accountability. More specifically, ProgressOhio alleges the legislation violates the Ohio Constitution in seven ways, summarized here as follows: (1) the JobsOhio Act violates Article XIII, Section 1 because it is a special act conferring corporate powers; (2) the JobsOhio Act violates Article XIII, Section 2, which requires all

¹ A 501(c)(4) organization is a non-profit entity operated to promote social welfare to benefit the community. Examples include civic leagues, social welfare organizations, and local associations such as volunteer fire companies. IRS Publication 557, at 51 (Rev.2011).

corporations to be filed under the general laws; (3) the JobsOhio Act violates Article VIII, Section 4, which prohibits the state from making equity investments; (4) the JobsOhio Act violates Article I, Section 16, which requires the courts be open so injured parties may obtain a remedy by due process; (5) the JobsOhio Act violates Article II, Section 22, by providing appropriation for JobsOhio for more than two years; (6) the JobsOhio Act violates Article VIII, Section 2(h), by authorizing the state to exceed its bond limit; and (7) the JobsOhio Act violates Article VIII, Section 4, by lending the credit of the state to a private corporation.

{¶5} JobsOhio and the State-defendants responded to the complaint by filing motions to dismiss, arguing that appellants lacked standing to bring their action and that ProgressOhio's claims were not ripe. The parties' arguments overlapped in some respects, but they can be summarized here as follows: (1) appellants lack standing because they have not been threatened with or suffered a direct and concrete injury in a manner or degree different from that suffered by the public in general; (2) appellants lack taxpayer standing because they have not shown a special interest different from that of taxpayers generally; (3) the legislators (who voted against the legislation) lack standing because they have not been prevented from casting an effective vote; (4) there is no statutory basis that confers standing on the plaintiffs; (5) appellants lack standing to bring a declaratory judgment action under R.C. 2721.02 et seq., because they cannot identify a legal right or interest that is affected by the legislation; (6) appellants' claims are premature because they assume future hypothetical events that may or may not occur; (7) appellants lack associational standing because none of its members can point to a legally cognizable injury that is different from anything suffered by the general public; and (8) appellants cannot show public right standing because their action is not one in mandamus or prohibition.

{¶6} The trial court analyzed the various grounds for standing that would allow appellants to move forward with their constitutional claims. The trial court rejected all of appellants' arguments and concluded that none of the appellants had standing to pursue their claims. The trial court dismissed the complaint, and this appeal followed.

{¶7} On appeal, appellants have asserted the following assignments of error:

[I.] The trial court erred in determining that constitutional challenges can only be brought by way of extraordinary writ.

[II.] The trial court erred in failing to find that R.C. 187.09 grants standing to all the plaintiffs to bring this action.

[III.] The trial court erred in denying Senator Skindell and Representative Murry [sic] legislative standing in this action.

[IV.] The trial court erred in denying plaintiffs' standing to bring this case as a matter of great public interest and importance.

[V.] The court erred in refusing to find that the relationship between the state and corporations is a core value enshrined in the Ohio Constitution that constitutes a matter of great public importance.

VI. The trial court erred in failing to recognize that control of state debt is a core feature in the Ohio Constitution and State Debt, equity and bond issues are matters of great public importance that justify public interest standing.

VII. The court erred in failing to find that privatization of government functions as well as avoiding entanglement with private enterprise is a constitutional matter of great public interest and importance.

VIII. The court erred in failing to find that the statutes of repose in [R.C.] 187.09 violate the Ohio Constitution.

{¶8} This court recently summarized the doctrine of standing and the standard of review normally applied to a dismissal for lack of standing as follows:

Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. *Tiemann* at 325, 712 N.E.2d 1258. Standing requires a litigant to have " 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult * * * questions.' " *Id.* at 325, 712 N.E.2d 1258, quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663

(1962). In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. *Id.* An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing. *Id.*, citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). See also *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954) ("private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally."). (Citation omitted.)

Dismissal for lack of standing is a dismissal pursuant to Civ.R. 12(B)(6). *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio3230, ¶ 4. "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt.*, 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 11. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

For purposes of appellate review, a question involving standing is typically a question of law and, as such, it is to be reviewed de novo. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶ 9.

League of United Latin Am. Citizens v. Kasich, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 21-23.

{¶9} With these standards in mind, we turn to the assignments of error.

{¶10} In their first assignment of error, appellants assert that the trial court erred in holding that their constitutional challenge to the JobsOhio Act could be brought only by means of an original action seeking an extraordinary writ.

{¶11} The trial court found that appellants' constitutional challenge based on public-right standing, as articulated in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), is limited to those rare cases that rise to the level of the legislation at issue in *Sheward* (attack on the judiciary) and *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717 (case involving mandatory drug testing of injured workers seeking to participate in workers' compensation system). The trial court then found that public-right standing has been limited solely to actions seeking extraordinary writs, namely, mandamus and prohibition. (Decision, at 24.)

{¶12} In *Sheward*, the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO brought an original action in prohibition and mandamus in the Supreme Court of Ohio challenging legislative tort reform. The Supreme Court of Ohio held that:

Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result to have standing, as it is sufficient that the relator is a citizen of State and as such interested in the execution of laws of State.

Id. at syllabus.

{¶13} The majority indicated that the public-right doctrine is an exception to the personal injury requirement of standing. *Id.* at 503. It is conceived as an action to vindicate the general public interest. *Id.*

{¶14} As can be seen from a close reading of the syllabus in *Sheward*, the Supreme Court of Ohio did not explicitly hold that public-right standing for matters of great public interest might only be brought by means of an original action. In fact, the court in discussing with approval *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130 (1991), stated, " '[a]lthough relators could seek a declaratory judgment coupled with a mandatory injunction in order to achieve nearly the same result we find that the alternative remedy would not be as complete as a writ of mandamus.' " *Sheward* at 508, quoting *Zupancic* at 134.

{¶15} In *Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669 (C.P.), citizens challenged the legitimacy of Ohio's participation in the multi-state lottery, Mega Millions, by means of declaratory judgment and mandamus actions. The trial court had to decide whether the action should be allowed to proceed as a public action, a private action, neither, or both. The court found both private standing and that the plaintiffs had standing to bring a public action. *Id.* at 44. The standing issue was not raised on appeal to this court. *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, *appeal not allowed*, 100 Ohio St.3d 1484, 2003-Ohio-5992.

{¶16} In at least one instance, the Supreme Court of Ohio has held that jurisdiction in mandamus or prohibition may be lacking in a constitutional challenge due to the existence of an adequate remedy at law by means of an action for declaratory judgment and injunctive relief. The Supreme Court of Ohio found that it lacked jurisdiction to consider the merits of a mandamus action challenging the constitutionality of new legislative enactments because they constituted disguised actions for declaratory judgment and prohibitory injunction. *State ex rel. United Auto. Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 41, 43. Since the Supreme Court of Ohio does not have original jurisdiction over actions for declaratory judgment, the only situations in which the Supreme Court of Ohio will initially find public-right standing will be original actions in mandamus or prohibition challenging the constitutionality of a statute. This is not the same as a rule permitting public-right standing only in original actions.

{¶17} Here, the trial court based its analysis on post-*Sheward* cases, one from the Twelfth District Court of Appeals, and one echoing the same language from our own district. In *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 11, this court discussed *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, a case in which the court said that Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs, or is found in situations where early resolution is necessary. *Id.* at ¶ 59. The court in *Brinkman* disagreed with the trial court finding

standing in *Ohio Roundtable*, stating that only the Supreme Court of Ohio has the discretion to find public-rights standing. *Brinkman* at ¶ 35.

{¶18} In *Brown*, the action was not one in mandamus or prohibition, and this court found that significant as did the trial court in the instant case. However, the court in *Brown* stopped short of holding that a case based on public-right standing must *inevitably* be brought as an original action. Even though it found the type of action filed significant for purposes of standing, the court had another, more primary reason for its decision. The court concluded that the weighted per-pupil funding issue in *Brown* did not rise to the rare and extraordinary nature of an attack on the judiciary as was the case in *Sheward*. *Id.* at ¶ 14.

{¶19} In our view, whether appellants have sought a writ of mandamus or a declaratory judgment is ultimately irrelevant. The trial court's denial of public-right standing based on the type of action brought did not prejudice appellants. As discussed in assignments of error four through seven below, appellants cannot find the kind of rare and extraordinary circumstances necessary to invoke public-interest standing, therefore, the public-right exception to the usual personal stake requirement for standing cannot be met.

{¶20} Being non-prejudicial, the first assignment of error is overruled.

{¶21} In their second assignment of error, appellants contend that R.C. 187.09(B) provides a statutory basis for standing for their constitutional challenge. Common-law standing requirements do not apply when standing is conferred by a specific statute. *Ohio Valley Associated Builders & Contrs. v. DeBra-Kuempel*, 192 Ohio App.3d 504, 2011-Ohio-756, ¶ 22 (2nd Dist.). Under normal rules of statutory construction, a statute will not be deemed to abrogate common-law standing requirements unless the legislature has stated so. *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304 (1993).

{¶22} Here, R.C. 187.09(B) provides as follows:

Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio

Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

{¶23} The provision cited by appellants does not contain any language conferring standing. Rather, it identifies where and when a suit may be brought. Appellants argue that standing is implied because of the Supreme Court of Ohio's decision in the first action brought by appellants *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101 ("*ProgressOhio.org. I*"). That case did nothing to dispense with standing requirements for a constitutional challenge to legislation. The case was decided solely on jurisdictional grounds, and the court found that it lacked original jurisdiction to grant the requested declaratory and injunctive relief. *Id.* at ¶ 2.

{¶24} The majority's remark that the amended statute provides, "[A] remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas" does not state explicitly or even impliedly that traditional standing requirements have been suspended or dispensed with. *Id.* at ¶ 6. The case was decided on jurisdictional grounds, and it appears the court was making clear that the amended statute now vested jurisdiction in the Franklin County Court of Common Pleas.

{¶25} Appellants also argue that the dissent gave no weight whatsoever to the standing issue in *ProgressOhio.org I*. Justice Pfeifer, in dissent, argued for sua sponte converting the action to a mandamus action and granting an alternative writ to begin the briefing process. He indicated that the challenged legislation made significant changes to the organizational structure of state government and did not involve complex factual issues that would benefit from development of a record in a trial court. *Id.* at ¶ 8, 9. The dissent would have found a need for early resolution, statewide public impact, and public-interest standing. *Id.* Even if the rest of the court had agreed with him, the dissent did not find or even imply the existence of standing on any statutory basis, but rather would have found an exception to the general standing requirements under the public-right doctrine.

{¶26} The second assignment of error is overruled.

{¶27} In the third assignment of error, the legislators argue they have legislative standing. Despite voting in the minority on the JobsOhio Act, the legislators argue they have standing because they are threatened with future harm. They claim that the JobsOhio Act will interfere with their ability to legislatively appropriate funds in the future because the JobsOhio Act unconstitutionally encumbers funds for more than two years.

{¶28} Legislative standing stems from vote nullification when the executive branch will not enforce a duly enacted law by the legislature and, therefore, a legislator who voted for a bill could show an injury not suffered by the public in general. In *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, ¶ 17, 20, the Supreme Court of Ohio found standing for the Senate President and Speaker of the House, as legislators who voted with the majority to prevent their votes from being nullified. The court indicated that a legislator voting in the minority would not have standing. *Id.* at ¶ 19. This is the scope of legislator standing recognized by the Supreme Court of Ohio.

{¶29} Here, the legislators, apparently recognizing the futility of arguing their votes were nullified, have theorized that the JobsOhio Act could impair their ability to allocate funds in the future if liquor revenue is obligated for more than two years. Appellants have cited no legal authority for their theory. Such a novel and speculative theory of standing bears no relationship to vote nullification—the narrow grounds for legislative standing recognized in Ohio. The third assignment of error is overruled.

{¶30} In the fourth through seventh assignments of error, appellants reiterate their arguments for the unconstitutionality of the JobsOhio Act. They claim that the matter is one of great public interest and importance because of media attention to the privatization of governmental functions, the historic importance of issues of public debt and the relationship of corporations to public expenditures, and the alleged lack of accountability and commingling of public and private funds.

{¶31} There is no question that appellants' challenge raises significant concerns about at least some of the provisions of the JobsOhio Act. However, in terms of great public interest, the most one can say about the challenged legislation is that it "makes

significant changes to the organizational structure of state government." See *ProgressOhio.org I* at ¶ 9 (Pfeifer, J., dissenting). This is not enough of a public concern to confer standing on appellants.

{¶32} In comparison, the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio. The statute at issue in *AFL-CIO* affected every injured worker in Ohio seeking to participate in the worker's compensation system. The JobsOhio Act is not the assault on the power of the judicial branch that concerned the Supreme Court of Ohio in *Sheward*. It "does not 'transform[] the civil justice system' " as did the tort reform legislation in that case. *United Auto., Aerospace & Agricultural Implement Workers of Am.*, at ¶ 50. The public-right doctrine exists to vindicate matters of great public interest and societal impact. " 'Not all alleged illegalities or irregularities are thought to be of that high order of concern.' " *Sheward* at 503, quoting Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv.L.Rev. 1265, 1314 (1961).

{¶33} Assignments of error four through seven are overruled.

{¶34} In the eighth assignment of error, appellants argue that the trial court should have found R.C. 187.09 unconstitutional because it has unnaturally short (60 and 90 day) statutes of limitations. Appellants argue that R.C. 187.09(B) that provides 90 days to bring an action to challenge the constitutionality of the act has now expired. Thus, they claim they are insulated from challenging the constitutionality of the statute later if they are found to lack standing in the instant case. They claim that the effect of the trial court's ruling is to deny *anyone* from bringing a constitutional challenge to the JobsOhio Act. They argue this is unconstitutional as it results in a violation of separation of powers. Appellants also argue that the 60-day period in R.C. 187.09(C) for bringing a claim based on any action taken by JobsOhio will result in the statute of limitations running before appellants are able to discover harm from wrongful actions by JobsOhio.

{¶35} Appellants' claims were dismissed because they lacked standing, not because of any issue with the statute of limitations. Until appellants can establish standing, this court cannot address the merits of this argument particularly as it relates to future actions. Appellants argue that a future contingency could affect their ability to

bring another action. As such, they are asking this court for an advisory opinion. Rather than issuing advisory opinions, courts must exercise judicial restraint.

{¶36} Obviously, the future contingency contemplated by appellants has yet to occur. If appellants or other parties can establish standing, and believe the statute fails to provide an adequate remedy at law, they have already demonstrated an awareness of alternative options. The eighth assignment of error is overruled.

{¶37} Additionally, appellants have filed a motion asking this court to declare R.C. 187.09 unconstitutional as a violation of separation of powers because R.C. 187.09(E) directs the court of appeals to expedite any appeal brought under division (B) or (C) and to give the case priority over all other civil cases before the court. Similarly to what was argued in *Sheward*, appellants represent that this is a fundamental assault on the judicial power of the court to regulate its docket.

{¶38} As discussed above, the proper procedure to challenge the constitutionality of a statute is not by way of motion in the court of appeals, but by an original action or by way of an action for declaratory judgment and an injunction. Lack of standing and our deliberation and disposition of the instant case render the motion moot. In accordance with principles of judicial restraint, " ' "if it is not necessary to decide more, it is necessary not to decide more." ' " *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, ¶ 50, quoting *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration*, 362 F.3d 786, 799 (D.C.Cir.2004) (Roberts, J., concurring in part and in judgment).

{¶39} Based on the foregoing, appellants' assignments of error numbered one through eight are overruled and appellants' motion to declare R.C. 187.09 unconstitutional is rendered moot. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Motion rendered moot;
Judgment affirmed.*

SADLER and DORRIAN, JJ., concur.
