[Cite as *Wurdlow v. Turvy*, 2012-Ohio-4378.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lawrence Earl Wurdlow,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-25 (M.C. No. 2010 CVH 047759)
Dale Turvy, Store Manager and CVS Drug Stores,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 25, 2012

Lawrence Earl Wurdlow, pro se.

Taft Stettinius & Hollister LLP, and *Jason H. Beehler*, for appellees.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶ 1} Plaintiff-appellant, Lawrence Earl Wurdlow, appeals from a judgment of the Franklin County Municipal Court in favor of defendants-appellees, Dale Turvy and CVS Drug Stores.

{¶ 2} Although the record reveals little attempt to establish the corporate identity or business organization of appellee CVS Drug Stores, for purposes of this action this entity can be presumed to be the operator of the CVS drug store chain. Appellee Dale Turvy is the manager of the CVS location at 2160 North High Street, in Columbus, Ohio (the "campus CVS"). For purposes of this action, we may characterize appellant Lawrence Earl Wurdlow as a private citizen and frequent patron of the campus CVS.

{¶ 3} Mr. Wurdlow initiated this action with a complaint seeking declaratory judgment on the basis that private tow-away signage in the parking lot of the campus CVS did not conform with the required language of R.C. 4513.60(B)(1) and (G). Mr. Wurdlow sought an order from the municipal court requiring appellees to correct the signage. Mr. Wurdlow also sought punitive damages in the amount of $10,000 as an "incentive" for the campus CVS to correct its signage. (Complaint, at 1.) Although Mr. Wurdlow attempted no service beyond personal service on Mr. Turvy and/or other store employees at the campus CVS, CVS Drug Stores has defended the action jointly with Mr. Turvy, and raises no allegation of improper service in the matter.

{¶ 4} The matter proceeded to a bench trial, at the outset of which the trial court denied as untimely Mr. Wurdlow's attempt to file an amended complaint. Trial testimony established that Mr. Wurdlow's vehicle had never been towed pursuant to the allegedly unlawful signage. Mr. Wurdlow introduced photographic evidence of the alleged non-conforming signs and compared them with the statutorily required language set forth in R.C. 4513.60. CVS Drug Stores and Mr. Turvy did not assert that the campus CVS tow-away signage complied strictly with the statute at the time Mr. Wurdlow took notice of them,[1] but defended on the basis that Mr. Wurdlow could show neither a right to sue nor damages.

{¶ 5} The trial court concluded that R.C. 4513.60(B)(1) and (G) does not confer a private cause of action to enforce the law. The trial court further concluded that there was no real controversy between the parties and that an action in declaratory judgment would not lie. Finally, the trial court denied Mr. Wurdlow's attempt to recast his action as a claim under the Consumer Sales Practices Act ("CSPA") both because the original complaint did not invoke the CSPA and because there was no underlying consumer transaction that could serve as a basis for such a claim.[2]

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[1] During oral argument of this appeal, counsel for CVS Drug Stores and Mr. Turvy asserted that the contracting towing company for the campus CVS lot has removed the offending signage and replaced it with signs that conform to the statute. Sadly, this information does not come to us in a form that would allow us to take judicial notice that the case is now moot.

[2] The trial court also noted that Mr. Wurdlow's complaint did not allege the existence of an implied contract created by the parking signage, and accordingly declined to address such arguments belatedly brought by Mr. Wurdlow in his post-trial brief. While Mr. Wurdlow continues to raise such contractual arguments in support of this appeal, we do not address them beyond observing that the trial court correctly found that they are outside the scope of the original complaint and his case-in-chief at trial.

{¶ 6} Mr. Wurdlow has timely appealed and brings the following assignments of error:

> [I.] The Court erred as a matter of law in not ruling that no Private Two-Away Zone was properly established at 2160 North High Street for the CVS Drugstore.
>
> [II.] The Court erred in not ruling that a violation of law, ORC 4513.60(B)(1) – (2), occurred when the signage requirements at 2160 North High Street were not met by the defendants/appellees.
>
> [III.] The Court erred in not recognizing that the imposition of an implied illegal contract upon the appellant was an injury to the appellant, a denial of a property right created by Ohio statutory law, [ORC] 4513.60(B)(1) – (G), a clear and not speculative deprivation, as the Ohio Jur 3rd proclaims in section 18, "Thus, any person whose right, status, or other legal relations are affected by a law may have determined any question of construction or validity arising under such law where actual, or threatened, prosecution under such law creates a justiciable controversy?["]

{¶ 7} This case allows us to address the three assignments of error jointly. Together, these raise two issues: (1) whether Ohio statutes governing private tow-away zones in Ohio create a private right of action under which a civil litigant may enforce compliance, even in the absence of any actual removal of the litigant's vehicle from the private tow-away zone, and (2) whether Mr. Wurdlow had standing to bring a declaratory judgment action under R.C. 2721.03.

{¶ 8} We first find that the statute governing creation of a private tow-away zone does not create a private right of action independent from other remedies generally available at law.

{¶ 9} R.C. 4512.60 addresses removal of impermissibly or improperly parked vehicles from various types of locations. R.C. 4513.60(A) authorizes removal by police agencies, upon the complaint of a property owner, of vehicles left on private residential or agricultural property without permission. R.C. 4513.60(B) governs the removal of vehicles from private parking lots that are properly established as private tow-away zones. R.C. 4513.60(C), (D) and (E) furnish additional guidance on removal of vehicles under

subsections (A) and (B) and subsequent recovery by vehicle owners. R.C. 4513.60(F) and (G) make improper removal of a vehicle from a properly established private tow-away zone a minor misdemeanor. *See generally, Chrapliwy v. Sawyer Towing*, 179 Ohio App.3d 215, 2008-Ohio-5762, ¶ 10 (5th Dist.). Importantly for later discussion in this case, R.C. 4513.60(F), after discussing removal of vehicles from properly established private tow-away zones, also specifies that "no person shall remove * * * any motor vehicle from any *other* private property other than in accordance with [R.C. 4513.60(A)(1)] or [R.C. 4513.61 to 4513.65]." (Emphasis added.) The statute under scrutiny in this case therefore does not directly address removal of improperly parked vehicles from commercial parking lots that are neither "private residential" or "private agricultural" property, nor properly created private tow-away zones as statutorily defined.

{¶ 10} In order to establish a private tow-away zone in Ohio, parking lot owners or operators must comply with R.C. 4513.60(B)(1), providing in pertinent part as follows:

> The owner of private property may establish a private tow-away zone only if all of the following conditions are satisfied:
>
> (a) The owner posts on the owner's property a sign, that is at least eighteen inches by twenty-four inches in size, that is visible from all entrances to the property, and that contains at least all of the following information:
>
> (i) A notice that the property is a private tow-away zone and that vehicles not authorized to park on the property will be towed away;
>
> (ii) The telephone number of the person from whom a towed-away vehicle can be recovered, and the address of the place to which the vehicle will be taken and the place from which it may be recovered;
>
> (iii) A statement that the vehicle may be recovered at any time during the day or night upon the submission of proof of ownership and the payment of a towing charge, in an amount not to exceed ninety dollars, and a storage charge, in an amount not to exceed twelve dollars per twenty-four-hour period; except that the charge for towing shall not exceed one hundred fifty dollars, and the storage charge shall not exceed twenty dollars per twenty-four-hour period, if the vehicle has a manufacturer's gross vehicle weight rating in excess of ten

> thousand pounds and is a truck, bus, or a combination of a commercial tractor and trailer or semitrailer.
>
> * * *
>
> (2) If a vehicle is parked on private property that is established as a private tow-away zone in accordance with division (B)(1) of this section, without the consent of the owner of the property or in violation of any posted parking condition or regulation, the owner or the owner's agent may remove, or cause the removal of, the vehicle, the owner and the operator of the vehicle shall be deemed to have consented to the removal and storage of the vehicle and to the payment of the towing and storage charges specified in division (B)(1)(a)(iii) of this section, and the owner, subject to division (C) of this section, may recover a vehicle that has been so removed only in accordance with division (E) of this section.

{¶ 11} The question of whether Mr. Wurdlow has a private right of action to enforce compliance with these provisions is somewhat subsumed under his general claim for declaratory judgment, since one aspect of that claim is that he seeks a declaration of his right to bring an action under the parking statutes. We nonetheless examine it separately here out of deference to the structure of Mr. Wurdlow's arguments as presented in his brief on appeal and because of his reference to the criminal provisions in the parking statute. Nowhere in these provisions do we find any language that allows an action by a private citizen to compel a parking lot owner to correctly post the signs necessary to create a private tow-away zone. R.C. 4513.60(F) and (G) do create a criminal penalty for certain conduct arising from improper towing, but these only arise if and when a vehicle has actually been towed. Furthermore, "[i]n the absence of a specific provision to the contrary, criminal statutes generally do not create a private cause of action, but give rise only to a right of prosecution by the state." *George v. State*, 10th Dist. No. 10AP-4, 2010-Ohio-5262, ¶ 32, citing *Lewis v. J.E. Wiggins & Co.*, 10th Dist. No. 04AP-469, 2004-Ohio-6724; *see also*, *Groves v. Groves*, 10th Dist. No. 09AP-1107, 2010-Ohio-4515. The trial court correctly held that the parking statutes cited here create no private right of action for Mr. Wurdlow to pursue.

{¶ 12} We now examine whether Mr. Wurdlow had standing to pursue a declaratory judgment action on any basis other than a specific right granted by the

parking statutes. Pursuant to Ohio's declaratory judgment action statute, R.C. 2921.03, any person "whose rights * * * are affected by a * * * statute * * * may have determined any question of construction or validity arising under the * * * statute * * * and obtain a declaration of rights, status, or other legal relations under it." *Id.*; *State ex rel. Cordray v. Court of Claims of Ohio,* 190 Ohio App.3d 161, 2010-Ohio-4437, ¶ 15 (10th Dist.). A declaratory judgment action is a civil proceeding that provides a remedy in addition to other available legal and equitable remedies. *Walker v. Ghee*, 10th Dist. No. 01AP-960 (Jan. 28, 2002). "The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677, 681 (10th Dist.2000).

{¶ 13} A court may deny declaratory relief when no justiciable issue or actual controversy exists between the parties, or if the declaratory judgment will not terminate the uncertainty or controversy. *Wilburn v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-198 (Nov. 27, 2001). For purposes of a declaratory judgment action, a "justiciable issue" requires the existence of a legal interest or right, and a "controversy" exists where there is a genuine dispute between parties with adverse legal interests. *Id.*

{¶ 14} A declaratory judgment action cannot be used to elicit a merely advisory opinion. *Smolak v. Columbus*, 10th Dist. No. 07AP-373, 2007-Ohio-4671. As with other forms of action, a plaintiff must establish standing as a proper plaintiff to seek declaratory relief: "It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469 (1999). " 'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.' " *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 27, quoting Black's Law Dictionary 1442 (8th Ed.2004). " '[T]he question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy * * *" as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." ' " *Id.*, quoting *State ex rel. Dallman v. Franklin Cty. Ct. of Common Pleas*, 35 Ohio St.2d 176, 178-79 (1973), quoting *Sierra Club v. Morton*, 405

U.S. 727, 732 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962) and *Flast v. Cohen*, 392 U.S. 83 (1968).

{¶ 15} Injury that is borne by the population in general and does not affect plaintiff in particular is typically insufficient to confer standing upon the plaintiff to bring suit against a defendant. *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998), citing *Allen v. Wright*, 468 U.S. 737 (1984). The proposed plaintiff's injury cannot be merely speculative. A bare allegation that plaintiff fears that some injury will or may occur is insufficient to confer standing. *Id.*, citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

{¶ 16} We find under this standard that Mr. Wurdlow does not have standing to bring this action. Mr. Wurdlow has not been towed in this case. His complaint and testimony in this case establish that his past use of the campus CVS lot is not unauthorized, and that he has no present intention of parking in the campus CVS lot other than as a customer of the campus CVS. He nonetheless seeks a declaration under the law of what would happen were he to (1) park impermissibly in the campus CVS lot, while (2) improper signage was in place, and (3) find his vehicle towed. The injury is too remote, the application of R.C. 4513.60 too speculative to create an actual controversy between the parties. The present case does not present a justiciable issue that would support declaratory judgment, and the trial court did not err in dismissing the case.

{¶ 17} Even if we were to find standing in the matter, however, we would find dismissal proper because Mr. Wurdlow has asked the court to examine his rights under an inapplicable statute. The predicate to Mr. Wurdlow's complaint in this matter is that the signage on the campus CVS parking lot does not comply with R.C. 4513.60(B)(1). Pursuant to that section, the parking lot owner may establish a private tow-away zone only by meeting the statutory requirements. Taking Mr. Wurdlow's allegations in his complaint as true and his evidence regarding the signage as reliable, it follows that no private tow-away zone existed in this case. We find no language in the cited statute that prohibits a parking lot owner from attempting and failing to establish a legally viable private tow-away zone.

{¶ 18} There is no direct penalty under the statute for failure to properly establish a private tow-away zone, just as there would be no penalty for failure to post any signage

whatsoever. The criminal penalty in R.C 4512.60(G) arises only when a tow-away zone is *properly established* and a vehicle is then *actually and improperly* towed. For a commercial lot that is not properly established as a private tow-away zone, any civil or criminal consequences that arise will result only through loss of the safe-harbor provisions of R.C. 4513.60(B)(2) for both the property owner and towing company. In other words, such a towing situation would be governed by all applicable law *except* the statute to which Mr. Wurdlow refers. The scope of the present case does not require us to explore the legal consequences of such a towing policy, but we can ascertain that it would require declaratory judgment that lies outside the allegations in Mr. Wurdlow's complaint.

{¶ 19} Based upon the foregoing, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and SADLER, JJ., concur.