[Cite as *Brown v. Columbus City Schools Bd. of Edn.*, 2009-Ohio-3230.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Willis Brown et al.,	:	
Plaintiffs-Appellants,	:	
		No. 08AP-1067
v.	:	(C.P.C. No. 07CVH09-12492)
Columbus City Schools Board of Education et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 30, 2009

Benesch Friedlander Coplan & Aronoff LLP, and *William M. Todd*, for appellants.

Porter Wright Morris & Arthur LLP, Kathleen M. Trafford, and *Kendall V. Shaw*; *Loren L. Braverman*, for appellee Columbus City Schools Board of Education.

Richard Cordray, Attorney General, and *Todd R. Marti*, for appellees Ohio Department of Education and State Board of Education.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Willis Brown, Yolanda Jones-Brown, Aurora Brown, Dana Moessner, and Kim Miller, plaintiffs-appellants, appeal from a judgment of the Franklin County Court of Common Pleas, in which the court granted the motion to vacate judgment for lack of

jurisdiction filed by Columbus City Schools Board of Education ("board"), defendant-appellee.

{¶2} On September 17, 2007, appellants filed a complaint for declaratory judgment and injunctive relief against the board; Susan Tave Zelman, Ohio Superintendent of Public Instruction; Ohio Department of Education; and Ohio State Board of Education. In their complaint, appellants requested that the court declare that the current system of school funding in Ohio, in which there exists disparities in per-pupil education funding within a school district, is inconsistent with the mandate in Section 2, Article VI, of the Ohio Constitution that the State of Ohio and local school districts maintain a "thorough and efficient" system of public schools; declare that the current system of school funding in Ohio does not provide equal education opportunities for all Ohio students; and enjoin the implementation and administration of this allegedly unfair and inequitable system of school funding. Appellants sought to have declared that the "district-centric" funding method used by Columbus City Schools to allocate funds among the various schools within the district is unconstitutional, and Columbus City Schools must use the "weighted student funding" method. Under the weighted student funding method, all funding from government sources follows the student to whatever school he or she attends; the amount of funding varies according to each student's needs; and the funding is directed to the school the student is attending as real dollars that can be spent flexibly. Appellants indicated in their complaint they were taxpayers and residents of the city of Columbus and resided within the Columbus City Schools District.

{¶3} On November 27, 2007, the board filed a motion to dismiss pursuant to Civ.R. 12(B)(1) and (6). On October 20, 2008, the trial court granted the board's motion to

dismiss based upon alternate grounds: (1) appellants did not have standing to bring an action against appellees; or (2) even if appellants had standing, Section 2, Article VI, of the Ohio Constitution does not obligate a board of education to allocate its funds on a per-pupil school basis. The court filed a final judgment entry journalizing the dismissal on November 5, 2008. Appellants appeal the judgment of the trial court, asserting the following assignments of error:

> I. The Common Pleas Court Erred In Dismissing Plaintiff-Appellants' Complaint Pursuant To Rule 12(B)(1) Of The Ohio Rules of Civil Procedure[.]
>
> II. The Common Pleas Court Erred In Offering, In the Alternative, A discussion Of Whether The Complaint Could Be Dismissed Pursuant To Rule 12(B)(6) Of The Ohio Rules Of Civil Procedure[.]

{¶4} In appellants' first assignment of error, appellants argue that the trial court erred when it dismissed their complaint based upon lack of standing pursuant to Civ.R. 12(B)(1). We first note the trial court did not indicate that dismissal for lack of standing was based upon Civ.R. 12(B)(1). The board filed its motion to dismiss based upon Civ.R. 12(B)(1) or (6), and the trial court reviewed the standards for dismissal under both sections in its decision. Lack of standing challenges the capacity of a party to bring an action, not the subject-matter jurisdiction of the court. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275. These issues are properly raised by a Civ.R.12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, ¶10, citing *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267 (noting that dismissal for lack of standing is a dismissal pursuant to Civ.R. 12(B)(6)); *Bourke v. Carnahan,* 163 Ohio App.3d 818, 2005-Ohio-5422, ¶10 (finding elements of standing are

an indispensable part of a plaintiff's case); and *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), 9th Dist. No. 18250 (affirming Civ.R. 12(B)(6) dismissal of complaint for plaintiff's lack of capacity to sue). Therefore, we will review the trial court's dismissal based upon lack of standing under Civ.R. 12(B)(6).

{¶5} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. This court reviews a trial court's disposition of a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6) de novo. *Stewart v. Fifth Third Bank of Columbus* (Jan. 25, 2001), 10th Dist. No. 00AP-258. In addressing a Civ.R. 12(B)(6) motion, a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617.

{¶6} In the present case, the trial court found appellants lacked the requisite standing to maintain their action against appellees. 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-Ohio-123. Civ.R. 17(A) requires that every action be prosecuted in the name of the real party in interest. The Supreme Court of Ohio has defined standing 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, citing Black's Law Dictionary (8th ed. 2004) 1442. If a party to a suit is not the real party in interest, that party lacks standing to pursue the cause. *Krieger v. Cleveland Indians Baseball Co.*, 176 Ohio App.3d 410, 2008-Ohio-2183. A true party in interest is able to demonstrate an injury in fact. *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, ¶13. In order to demonstrate an injury in fact, a party must be able to demonstrate that it has suffered or will suffer a specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction. *In re Estate of York* (1999), 133 Ohio App.3d 234, 241.

{¶7} Here, the trial court found appellants lacked standing to sue appellees because appellants failed to allege any facts showing they have or will suffer a direct and concrete injury stemming from any per-pupil funding disparities within Columbus City Schools that is different from that injury suffered by the public in general, and the public-right exception to such rule does not apply. In so finding, the trial court relied upon three cases, which we also find instructive: *Sheward*; *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372; *Smith v. Hayes*, 10th Dist. No. 04AP-1321, 2005-Ohio-2961. In *Sheward*, several organizations and individual taxpayers and citizens filed an original action in prohibition and mandamus in the Supreme Court of Ohio against several Ohio common pleas court judges, challenging the constitutionality of tort reform legislation in Am.Sub.H.B. No. 350. Relators asserted the legislature re-enacted legislation the Supreme Court of Ohio had already found in prior decisions to be unconstitutional. Respondents argued that relators had no standing to bring an action as taxpayers

because they were not enforcing a public right, and because they failed to demonstrate pecuniary harm different from the harm suffered by the general taxpaying public. In reviewing authority related to the standing of private citizens, the court stated:

> Accordingly, in the vast majority of cases brought by a private litigant, " 'the 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.' " * * * In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury. * * *

Id. at 469-70 (citations omitted).

{¶8} However, the court in *Sheward* also explained that there exists a "public-right" exception to the usual personal stake requirement for standing. When the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties. Id. at 471. Although the court found the attorneys bringing the action in *Sheward* did not have a private action, the circumstances fit within the parameters of the public-right exception. The court found the issues sought to be litigated in *Sheward* were of such a high order of public concern as to justify allowing this action as a public-right action. Id. at 474. The court explained the people of Ohio have delegated their judicial power to the courts and have expressly prohibited the General Assembly from exercising it. Id. The court in *Sheward* found it was difficult to imagine a right more public in nature than preventing the General Assembly from re-enacting legislation declared unconstitutional

by the court and requiring the courts to treat the law as valid. Id. The court further explained that not all alleged illegalities or irregularities are thought to be of that high order of concern. Id. at 503. Thus, the court would entertain a public-right action under circumstances when, by its refusal, the public injury will be serious. Id. The court made clear that it was not suggesting that citizens have standing to challenge the constitutionality of every legislative enactment that allegedly violates the doctrine of separation of powers or exceeds legislative authority. Id. at 503-04. The court emphasized it will entertain a public-right action only in the rare and extraordinary case where the challenged statute operates directly and broadly to divest the courts of judicial power. Id. at 504. The court refused to entertain a public-right action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of Am.Sub.H.B. No. 350. Id.

{¶9} The trial court in the present case also relied upon *Brinkman*. In *Brinkman*, Brinkman sought a declaration that Miami University's policy of providing health insurance benefits to same-sex domestic partners of its employees violated the Ohio Constitution. The trial court granted summary judgment in favor of the university. On appeal, as pertinent to the present case, Brinkman argued he had taxpayer standing because the university uses a portion of his tax dollars to pay for the benefits. Brinkman also argued he had a public-right standing because the subject of his lawsuit was a matter of great public interest.

{¶10} The court of appeals rejected Brinkman's arguments. With regard to taxpayer standing, the court cited *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, for the proposition that a taxpayer has a right to call upon a

court of equity to prevent public officers from attempting to make an illegal expenditure of public money that the taxpayer in common with other property holders of the taxing district may otherwise be compelled to pay. *Brinkman* at ¶32, citing *Masterson* at 368. However, a taxpayer cannot bring an action to prevent the expenditure of public funds unless he has some special interests therein by reason of which his own property rights are put in jeopardy. Id., ¶33, citing *Masterson* at 368. In other words, 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. Id. The court in *Brinkman* also cited this court's decision in *Andrews v. Ohio Bldg. Auth.* (Sept. 11, 1975), 10th Dist. No. 75AP-121, in which this court interpreted *Masterson* to mean that a taxpayer challenging expenditures from the state's general revenue fund, as opposed to some special fund, must show that the action has affected her pecuniary interests differently than the general taxpaying public. Relying upon these cases, as well as others, the court in *Brinkman* concluded that Ohio law does not permit a taxpayer who contributes to the state's general revenue fund to challenge any and all general revenue expenditures; thus, Brinkman lacked taxpayer standing to challenge Miami University's expenditure of public funds.

{¶11} With regard to the public-right exception to standing, Brinkman asserted he possessed public-right standing because his lawsuit involved a matter of great public interest, citing *Sheward*. Based upon *Sheward*, and other cases, the court in *Brinkman* found Brinkman did not have public-right standing. The court concluded that Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs, and all of the cases cited by the parties

included requests for relief in mandamus. *Brinkman* at ¶59. Even if public-right standing might be available in other contexts, the court found, judicial recognition of the doctrine plainly is correlated with the filing of an original action, which *Brinkman* was not. Id. The court also noted that public-right standing had been found to exist when a lawsuit demands early resolution, which the case under review did not. Id., citing *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717. The court further found that the case was not the "rare and extraordinary" case warranting invocation of the public-right exception to traditional standing rules, as it was not of a magnitude and scope comparable to the separation of powers issue in *Sheward*.

{¶12} The trial court in the present case also relied upon this court's decision in *Smith*. In *Smith*, the appellant filed an action for declaratory judgment and injunctive relief. Appellant sought a declaration by the trial court that the provisions of Ohio's "Desertion of Child Under 72 Hours Old" Act were unconstitutional. The trial court dismissed the action, finding appellant did not have standing to seek the relief requested because he failed to allege any concrete interest threatened by the legislation. On appeal, this court, relying on *Sheward*, held that the challenged statute was not of the same magnitude or comparable to the tort reform enactment in *Sheward*, and we agreed with the trial court that this is not the rare and extraordinary case that would give rise to application of the public-right doctrine. Id., ¶11. Therefore, we concluded that the appellant did not have public-right standing.

{¶13} In the present case, we believe the trial court properly applied the concepts explained in *Sheward*, and as applied in *Brinkman* and *Smith*. As for private standing, appellants clearly have no private standing in this matter. Appellants have no direct

personal stake in the outcome of the controversy. Appellants have not suffered and are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Appellants alleged only that they were taxpayers in the city of Columbus. Appellants do not allege they are students in the Columbus City Schools system or are parents of students in the school system. If the merits of their action were to be unsuccessful, they could show no personal harm or damage that would result as separate from any harm suffered by the general taxpaying public. In other words, if the present system of allocating funds between Columbus City Schools would remain as is, appellants would suffer no individual injury. Appellants merely contributed to the school district's funding as other citizens in the district generally contributed, as opposed to contributing to some special fund, thereby failing to demonstrate the funding method used by Columbus City Schools affected their pecuniary interests differently than the general taxpaying public. Therefore, we find appellants lacked private standing to challenge Columbus City Schools' method of funding within the school system.

{¶14} The present case also does not fall within the public-right exception explained in *Sheward.* The court in *Sheward* indicated that, when the issues sought to be litigated are of great importance and interest to the public, no personal stake is required for standing. However, here, appellants here can point to no similar case in which a court has permitted a taxpayer to bring a declaratory action against a school district to challenge its method of funding allocation. The issue here, weighted per-pupil funding within a school district, does not meet the required standard to justify allowing this action as a public-right action. The weighted per-pupil funding issue is not of the same magnitude as the issue in *Sheward*, which addressed separation of powers and the ability

of the Ohio Legislature to re-enact legislation expressly prohibited by the judiciary. Also, as pointed out by *Brinkman*, public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs, such as mandamus or prohibition, and the present case is not such an action. The present issue of weighted school funding also lacks a demand for early resolution, as discussed in *Brinkman* at ¶59, citing *Ohio AFL-CIO.* Finally, we do not view the present case as being one of a rare and extraordinary nature. Given the *Sheward* majority's own insistence that public-right exception be used only in rare and extraordinary circumstances, we decline to expand it to these circumstances. For the above reasons, appellants' first assignment of error is overruled.

{¶15} Appellants argue in their second assignment of error that the trial court erred in finding, in the alternative, that, even if appellants had standing to bring their action, the funding method utilized by Columbus City Schools did not violate Section 2, Article VI, of the Ohio Constitution known as the thorough and efficient clause. However, as we have found under appellants' first assignment of error that appellants lacked standing to bring their action, we need not address the application of the thorough and efficient clause. Therefore, appellants' second assignment of error is moot.

{¶16} Accordingly, appellants' first assignment of error is overruled, appellants' second assignment of error is moot, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.

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