[Cite as *State ex rel. Walgate v. Kasich*, 2013-Ohio-946.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Robert L. Walgate, Jr. et al.,	:	
Relators-Appellants,	:	
		No. 12AP-548
v.	:	(C.P.C. No. 11CVH-10-13126)
John R. Kasich et al.,	:	(REGULAR CALENDAR)
Respondents-Appellees.	:	

D E C I S I O N

Rendered on March 14, 2013

Black, McCuskey, Souers & Arbaugh, Thomas W. Connors, and *James M. Wherley, Jr.*, for appellants.

Michael DeWine, Attorney General, *Aaron D. Epstein, Pearl M. Chin, Peter M. Thomas, Michael A. Rzymek, Brian P. Mooney, Julie E. Brigner,* and *Ryan P. O'Rourke*, for state appellees.

Ice Miller, LLP, Matthew Fornshell, Albert Lin, and *Ross R. Fulton,* for appellees Central Ohio Gaming Ventures, LLC, and Toledo Gaming Ventures, LLC.

Calfee, Halter & Griswold LLP, Christopher S. Williams, James F. Lang, and *Matthew M. Mendoza*, for appellees Rock Ohio Caesars LLC, Rock Ohio Caesars Cleveland LLC, and Rock Ohio Caesars Cincinnati LLC.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Relators-appellants appeal from the judgment of the Franklin County Court of Common Pleas granting the motions to dismiss filed by respondents-appellees for lack of standing. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} Appellants consist of 13 litigants, The American Policy Roundtable dba Ohio Roundtable ("Roundtable"), Robert L. Walgate, Jr., ("Walgate Jr."), David P. Zanotti ("Zanotti"), Sandra L. Walgate ("Walgate"), Agnew Sign & Lighting, Inc. ("ASL"), Linda Agnew ("Agnew"), Paula Bolyard ("Bolyard"), Jeffrey Malek, Michelle Watkin-Malek ("the Maleks"), Thomas W. Adams, Donna J. Adams ("the Adams"), Joe Abraham ("Abraham"), and Frederick Kinsey ("Kinsey"). Though litigation originated with the filing of an initial complaint on October 21, 2011, currently at issue before us is the amended complaint ("complaint") filed on January 5, 2012.

{¶ 3} Seeking declaratory relief, injunctive relief, and a writ of mandamus, the complaint named the following 21 appellees, the State Lottery Commission, Lottery Commission Interim Director Dennis Berg, Lottery Commission Members Ershkine E. Cade, Allan C. Krulak, Patrick McDonald, Clarence E. Mingo, II, William Morgan, Amy Sabbath, Elizabeth D. Vaci, Michael G. Verich (collectively referred to as "Lottery Commission"), the Casino Control Commission, Casino Commission Chairman Jo Ann Davidson, Casino Commission Executive Director Matt Schuler, Casino Commission Vice Chairman June E. Taylor, Casino Commission Members Martin R. Hoke, Ranjan Manoranjan, Peter R. Silverman, John S. Steinhauer, McKinley E. Brown (collectively referred to as the "Casino Commission"), Ohio Governor John R. Kasich, and Ohio Tax Commissioner Joseph W. Testa.

{¶ 4} The complaint challenges legislation recently enacted and amended, primarily by Am.Sub.H.B. No. 1 ("H.B. 1") signed into law on July 17, 2009 and Am.Sub.H.B. No. 277 ("H.B. 277") signed into law on July 15, 2011, as it pertains to casinos and video lottery terminal games ("VLTs"). Specifically, appellants assert the amendments made to R.C. Chapters 3770, 3772, 5751, and 5753, and the administrative rules implemented thereunder violate Article XV, Section 6, Article VIII, Section 4, Article IV, Section 2, and Article II, Section 15 of the Ohio Constitution.

{¶ 5} Ohio Constitution, Article XV, Section 6, provides in relevant part:

> Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.
>
> (A) The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.
>
> * * *
>
> (C)(2) A thirty-three percent tax shall be levied and collected by the state on all gross casino revenue received by each casino operator of these four casino facilities. In addition, casino operators, their operations, their owners, and their property shall be subject to all customary non-discriminatory fees, taxes, and other charges that are applied to, levied against, or otherwise imposed generally upon other Ohio businesses, their gross or net revenues, their operations, their owners, and their property. Except as otherwise provided in section 6(C), no other casino gaming-related state or local fees, taxes, or other charges (however measured, calculated, or otherwise derived) may be, directly or indirectly, applied to, levied against, or otherwise imposed upon gross casino revenue, casino operators, their operations, their owners, or their property.
> * * *
>
> (4) * * * Said commission shall require each initial licensed casino operator of each of the four casino facilities to pay an upfront license fee of fifty million dollars ($ 50,000,000) per casino facility for the benefit of the state, for a total of two hundred million dollars ($ 200,000,000).
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> * * *
>
> (5) Each initial licensed casino operator of each of the four casino facilities shall make an initial investment of at least two hundred fifty million dollars ($ 250,000,000) for the development of each casino facility for a total minimum

> investment of one billion dollars ($ 1,000,000,000) statewide. A casino operator: (a) may not hold a majority interest in more than two of the four licenses allocated to the casino facilities at any one time: and (b) may not hold a majority interest in more than two of the four casino facilities at any one time.
>
> * * *
>
> (8) Notwithstanding any provision of the Constitution, statutes of Ohio, or a local charter and ordinance, only one casino facility shall be operated in each of the cities of Cleveland, Cincinnati, and Toledo, and in Franklin County.
>
> (9) For purposes of this section 6(C), the following definitions shall be applied:
>
> "Casino facility" means all or any part of any one or more of the following properties (together with all improvements situated thereon) in Cleveland, Cincinnati, Toledo, and Franklin County:
>
> * * *
>
> "Gross casino revenue" means the total amount of money exchanged for the purchase of chips, tokens, tickets, electronic cards, or similar objects by casino patrons, less winnings paid to wagerers.

{¶ 6} Ohio Constitution, Article VIII, Section 4 provides, "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever." Ohio Constitution, Article IV, Section 2 sets forth the cases in which the Supreme Court of Ohio has original jurisdiction. Ohio Constitution, Article II, Section 15 provides, in relevant part, "(C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement. (D) No bill shall contain more than one subject, which shall be clearly expressed in its title."

{¶ 7} In the first five counts of the complaint, appellants allege VLTs, their conduction by third-parties, the manner in which the state plans to use their net proceeds, and the state becoming a joint owner in a private venture are constitutionally prohibited. In counts six and seven, appellants contend H.B. 1 violates the "single subject rule" and the "three day rule" in contravention of the Ohio Constitution. Count eight alleges H.B. 1 unconstitutionally expands the jurisdiction of the Supreme Court of Ohio. Counts eleven and twelve allege casino operators are both unconstitutionally exempted from certain taxes and required to pay taxes they should not. Count thirteen asserts casinos are or were not required to post initial investments as required by the Constitution. Counts nine, ten, fourteen, fifteen, and sixteen seek mandamus relief, and the final count of the complaint alleges Ohio's gambling laws unconstitutionally create a monopoly.

{¶ 8} Motions to dismiss were filed by Governor Kasich, Tax Commissioner Testa, the Casino Commission, and the Lottery Commission. Additionally, seven entities were granted leave to intervene as party appellees. In the motions to dismiss, appellees argued appellants lacked standing, appellants' complaint failed to state a claim, and appellants' claims were not ripe for judicial review. By decision and entry rendered on May 30, 2012, the trial court agreed with appellees' contention that each appellant lacked standing and consequently granted appellees' motions to dismiss.

II. ASSIGNMENTS OF ERROR

{¶ 9} This appeal followed, and appellants bring the following two assignments of error for our review:

> [I.] The trial court erred in dismissing appellants' claims for lack of standing.
>
> [II.] The trial court erred in dismissing appellants' claims for lack of standing without allowing the filing of an amended complaint pleading additional facts in support of standing.

III. STANDARD OF REVIEW

{¶ 10} In order to sue, a plaintiff must have standing to bring the suit. As recently stated by this court, " '[t]he question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented. Standing is a threshold test that, if satisfied, permits the court to go on to decide whether the plaintiff has a good cause of

action, and whether the relief sought can or should be granted to plaintiff.' " *League of United Latin Am. Citizens v. Ohio Governor*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 20, quoting *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998), citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975). *See also Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320 (1994) (standing is whether a litigant is entitled to have the court determine the merits of the issues raised).

{¶ 11} Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. *Tiemann* at 325. 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.*, quoting *Baker v. Carr*, 369 U.S. 186, 204 (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." *League of United Latin Am. Citizens* at ¶ 21, citing *Tiemann* at 325, citing *Allen v. Wright*, 468 U.S. 737 (1984). *See also State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368 (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.)

{¶ 12} 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-Ohio-3230, ¶ 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, 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 (1975), syllabus. 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. *Brown* at ¶ 5, citing *Estate of Sherman v. Millhon*, 104 Ohio App.3d 614, 617 (10th Dist.1995). 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.

IV. DISCUSSION

{¶ 13} Founded in 1980 as a public policy organization, Roundtable is an Ohio non-profit corporation. The complaint asserts Roundtable is actively opposed to the expansion of legalized gambling in Ohio. Walgate Jr. and Zanotti are officers of Roundtable. Additionally, according to the complaint, Walgate Jr. is a recovering addicted gambler whose addiction "in the past caused great distress and hardship to his family" and adversely affected his ability to pursue college and hold employment. (Complaint, 2.) The complaint also alleges Agnew owns ASL that pays the commercial activity tax ("CAT tax"), which in turn is allocated, in part, to the school district tangible tax replacement fund and the Ohio local government tangible property tax replacement fund. It also alleged that Bolyard, the Maleks, and the Adams are parents of public school students. Further, it is alleged that Walgate is a public school teacher and the mother of a recovering gambling addict. The complaint asserts Walgate and her family "have suffered" great emotional and financial stress because of her son's gambling addiction. With respect to Kinsey, the complaint alleges he is being denied the right to exercise the trade or business of casino gambling. With the exception of Roundtable, all appellants allege they are Ohio citizens, residents, and taxpayers.

{¶ 14} It is appellants' position the trial court erred in concluding each appellant lacks standing. According to appellants, standing has been established under five theories, to wit: (1) gambling's negative effects constitute injury in fact, (2) taxpayer standing based on the adverse effect to special funds, (3) standing due to adverse effects by diversion of funds from schools and local governments, (4) standing under traditional public duty laws, and (5) standing based on Kinsey's alleged "denial of equal treatment" resulting from the laws limitation of casino gambling to certain entities.

{¶ 15} "[I]n 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." (Citations and internal quotations omitted.) *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469 (1999); *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-79 (1973), citing *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). An association has standing to bring a lawsuit on behalf of its members when: " '(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *League of United Latin Am. Citizens* at ¶ 19, quoting *Tiemann* at 324. 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. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 27 (1992); *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169 (1987), syllabus; *Anderson v. Brown*, 13 Ohio St.2d 53 (1968), paragraph one of the syllabus.

{¶ 16} In the present matter, we conclude none of appellants have private standing because they have not suffered or are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Walgate Jr. and Walgate allege that, due to Walgate Jr.'s gambling addiction, they and their family have suffered in the past. However, the complaint does not allege that the laws in question have caused the injury or that the relief requested will redress such injury. *Sheward* at 469-70. To the extent the complaint can be interpreted as an allegation that increasing the availability of gambling in Ohio *may* cause them injury, such injury is purely speculative and hypothetical and, thus, does not constitute actual or concrete injury to justify a finding of standing. *Wurdlow v. Turvy*, 10th Dist. No. 12AP-25, 2012-Ohio-4378, ¶ 15, citing *Tiemann* at 325 (a bare allegation that a plaintiff fears some injury will or may occur is insufficient to confer standing).

{¶ 17} Similarly, Zanotti and Abraham fail to allege the injury required to confer standing. Other than a general allegation of "irreparable harm," the complaint contains no allegation of injury with respect to either Zanotti or Abraham. In the brief, Zanotti and Abraham contend they will suffer negative social effects due to their communities being subjected to increased gambling. Not only is this alleged harm abstract and speculative, but, also, such allegation is not contained within the complaint. *See* Civ.R. 12(B)(6); *Brown*.

{¶ 18} Agnew is the owner of ASL that pays the CAT tax from which certain casino revenues are excluded. Because monies from the CAT tax are partially allocated to the school district tangible tax replacement fund and the Ohio local government tangible property tax replacement fund, Agnew and ASL argue they have standing as taxpayers with a special interest in a special fund similar to the taxpayers with standing in *Racing Guild of Ohio v. Ohio State Racing Comm.*, 28 Ohio St.3d 317 (1986), and *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677.

{¶ 19} In *Dann*, a mandamus action was filed seeking records from the Governor's office regarding the administration of the Workers' Compensation Fund. In addressing whether Dann had standing, the Supreme Court of Ohio discussed that, as an employer, Dann had contributed to the fund and, therefore, arguably had a special interest in the management of the fund to confer standing. *Dann* recognizes a narrow exception to the well-established premise that a taxpayer lacks legal capacity to institute a taxpayer action unless the taxpayer has some "special interest" in the fund at issue. *Gildner v. Accenture*, 10th Dist. No. 09AP-167, 2009-Ohio-5335, ¶ 19, appeal not allowed, 124 Ohio St.3d 1446, 2010-Ohio-188.

{¶ 20} Here, the complaint does not allege any special interest in a special fund, nor does it challenge the administration of a special fund. Rather, the complaint challenges the fact that some Ohio industries are being taxed differently than others. Such an allegation is not sufficient to confer standing under *Racing Guild* or *Dann*, as it fails to allege damage distinct from the damages suffered by the general public and fails to allege a special interest in a special fund. *Gildner*; *Masterson*. Accordingly, Agnew and ASL lack standing.

{¶ 21} Appellants Bolyard, the Maleks, and the Adams assert they have standing because they are the parents of public school students, and Walgate asserts she has standing because she is a public school teacher. According to appellants, because the challenged legislation redirects general funds from public education and replaces the reduction with proceeds projected to be generated by the Lottery Commission, such is unconstitutional. After review of the complaint, we find the complaint fails to allege these five appellants will suffer a direct and concrete injury that is different from that suffered by the public in general. *Brown* at ¶ 7. In *Brown*, taxpayers and school district residents claimed Ohio's school funding system was unconstitutional. In affirming the trial court's judgment that the plaintiffs lacked standing, this court noted the plaintiffs did not allege they were students or parents of students in the school system. *Id*. at ¶ 13. According to appellants, this statement alone confers standing upon Bolyard, Walgate, the Maleks, and the Adams. We disagree.

{¶ 22} In challenging the constitutionality of school funding, the plaintiffs in *Brown* asserted the Columbus City School District's allocation of funds caused a per-pupil disparity within the district. Hence, it appears that in *Brown* the complaint alleged there were, at least potentially, individuals actually and directly being harmed by the per-pupil disparity in funding; however, those persons were not parties to the litigation. When read in context, the decision did not go so far as to hold that those particular students and their parents did have standing, but, rather, pointed to groups that could potentially assert direct and actual harm.

{¶ 23} The complaint presented before us is unlike the one presented in *Brown*. The complaint fails to allege any direct and concrete injury and, at most, alleges an injury that *could* occur *if* there is a deficit in funds and the funds are not adequately replenished and *if* their particular schools and districts are affected. Not only is this allegation purely speculative, but it also fails to allege appellants' interests are being threatened in a way that is distinct from the general public.

{¶ 24} With respect to Kinsey, he asserts he has standing due to his alleged violation of his right to equal protection and to exercise a trade or business in legalized casino gambling. The complaint states only that Kinsey "would engage in casino gaming in Ohio" but for the state's grant of such privilege to two gaming corporations.

(Complaint, 4.) In support of his position that he has standing, Kinsey relies on *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir.1999). Appellees, also relying on *Lac Vieux*, assert Kinsey does not have standing.

{¶ 25} In *Lac Vieux*, the plaintiff asserted statutes and ordinances that provided a preference in the development of casino gambling to particular parties was unconstitutional. The federal district court concluded the plaintiff lacked standing, but that judgment was reversed by the Sixth Circuit Court of Appeals. The court reviewed the three elements of standing, specifically, (1) that injury be concrete, particularized, actual or imminent, (2) that there be a causal connection between the injury and the conduct complained of, and (3) that it is likely, as opposed to speculative, that injury will be redressed by a favorable decision. *Id*. at 403. Quoting *Associated Gen. Contrs. of Am. v. Jacksonville*, 508 U.S. 656 (1993), the court stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. ... In the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Lac Vieux at 404.

{¶ 26} The court then stated the standing issue presented hinged on whether the plaintiff "has sufficiently alleged that it is able and ready to bid for a casino license." Because the complaint in *Lac Vieux* alleged the plaintiff had "arranged for the development of major casino resort development" and at all times relevant "has been ready and has had the ability to submit the requisite information for a casino development proposal" in accordance with the applicable laws, the court concluded the plaintiff sufficiently showed it could have submitted a timely proposal and was still ready to do so should the preference be struck down. *Id*.

{¶ 27} In contrast, the complaint before us does not allege Kinsey is "ready and able" to engage in the business of casino gambling in Ohio. Instead, the complaint alleges only in a general and conclusory fashion that, but for casino gambling being limited to two gaming corporations, Kinsey would operate a business of casino gambling in Ohio. Thus, the trial court correctly concluded Kinsey's alleged injury was hypothetical and speculative and, therefore, insufficient to confer standing.

{¶ 28} As previously indicated, an association has standing on behalf of its members when " '(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *League of United Latin Am. Citizens* at ¶ 19, quoting *Tiemann* at 324. The Supreme Court of Ohio has emphasized that "to have standing, the association must establish that its members have suffered actual injury." *State ex rel. Am. Subcontrs. Assn. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, ¶ 12, quoting *Bicking* at 320. "At least one of the members of the association must be actually injured." *Id.*, citing *Warth* at 511; *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health*, 10th Dist. No. 07AP-490, 2007-Ohio-7147, ¶ 21. "[T]he injury must be concrete and not simply abstract or suspected." *Bicking* at 320.

{¶ 29} Appellant Roundtable has not met its burden with respect to standing. As has been discussed, the complaint does not allege Roundtable's members have suffered actual injury that is concrete and not simply abstract or suspected. *Id.* Consequently, we conclude Roundtable lacks standing as well.

{¶ 30} Appellants also assert they have standing, pursuant to the "public right" exception provided in *Sheward*, which provides that, when 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 the named parties. *Id.* at 471. 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. According to the relators in *Sheward*, the legislation re-enacted legislation the Supreme Court had already found in prior decisions to be unconstitutional.

The respondents argued the 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 that suffered by the general taxpaying public. Though the Supreme Court concluded the relators bringing the action lacked the usual personal stake requirement for standing, the court found the issues presented were of such a high order of public concern that it was justifiable to allow the action as a public right action. *Id.* at 474. As summarized by this court in *Brown*, the Supreme Court indicated it "would entertain a public-right action under circumstances when, by its refusal, the public injury will be serious." *Id.* at ¶ 8. The Supreme 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*. Rather, "[t]he 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*. Additionally, "[t]he 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.*

{¶ 31} Recently, relying on *Brown*, this court found the plaintiffs did not have public right standing in *ProgressOhio.org, Inc. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655, in which the plaintiffs raised a constitutional challenge to the JobsOhio Act enacted and amended through H.B. 1 and No. 153 of the 129th General Assembly. On appeal, the plaintiffs argued they had public right standing because the complaint concerned a matter of great public interest and importance. This court rejected the plaintiffs' position and concluded that, unlike the statutory scheme in *Sheward* that affected every tort claim filed in Ohio, the JobsOhio Act was not the "assault on the power of the judicial branch that concerned the Supreme Court of Ohio in *Sheward*." *Id*. at ¶ 32.

{¶ 32} Similar to *Brown* and *JobsOhio*, the matter before us does not fall within the public right exception explained in *Sheward*. The legislation challenged here is not of the same magnitude as that presented in *Sheward*, which concerned separation of powers and the ability of the Ohio legislature to re-enact legislation expressly prohibited by the judiciary. *Brown* at ¶ 14.

{¶ 33} For all the foregoing reasons, we conclude each appellant lacks standing to pursue this matter and, accordingly, overrule appellants' first assignment of error.

{¶ 34} In their second assignment of error, appellants contend the trial court erred in dismissing their complaint without allowing them an opportunity to file a second amended complaint in order to plead additional facts.

{¶ 35} Initially, we note the record does not contain a motion or any other request by appellants asking that the trial court grant them permission to file a second amended complaint. Moreover, the record contains no indication that appellants provided any grounds for why leave should be granted, no explanation regarding new matters appellants wished to include in an amended pleading, nor an explanation of how an amendment would cure the deficiencies in their complaint. *Richard v. WJW TV-8*, 8th Dist. No. 84541, 2005-Ohio-1170, ¶ 24; *Riverview Health Inst., LLC v. Kral*, 2d Dist. No. 24931, 2012-Ohio-3502, ¶ 26.

{¶ 36} Accordingly, appellants' second assignment of error is overruled.

V. CONCLUSION

{¶ 37} Having overruled both of appellants' assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
