[Cite as *McBee v. Toledo*, 2014-Ohio-1555.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark McBee	Court of Appeals No. L-13-1101
Appellant	Trial Court No. CI0201103937
v.	
City of Toledo, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: April 11, 2014

* * * * *

Paul T. Belazis and R. Michael Frank, for appellant.

Adam W. Loukz, Director of Law, and Michael A. Kyser, for appellees.

* * * * *

SINGER, J.

{¶ 1} Appellant, Mark McBee, appeals from the May 9, 2013 judgment of the Lucas County Court of Common Pleas granting summary judgment to appellees, city of Toledo and the Toledo Civil Service Commission, and dismissing the taxpayer action filed by McBee. For the reasons which follow, we affirm.

{¶ 2} This case arises out of the actions taking by the city of Toledo to provide the firefighting needs of the village of Ottawa Hills after the village determined that it could no longer afford to maintain its volunteer fire department. An important issue for the village was whether the firefighters for Ottawa Hills would lose their jobs after the city of Toledo took over the firefighting operations. Therefore, on December 17, 2010, the city of Toledo, through its Civil Service Commission, adopted civil service rule 60.19, which authorized the city to employ public employees from other public subdivisions through the process of "Annexation or Merger of Services," without a competitive examination or other process for determining the potential employee's relative "merit, efficiency, moral character, and industry," as required by Toledo City Charter, Chapter VIII, Sec. 172 for classified service, competitive class employees.

{¶ 3} On January 11, 2011, city council passed an ordinance authorizing the mayor to execute a contract between the city and the village of Ottawa Hills for the provision of fire services by the city and the employment of ten Ottawa Hills firefighters as proposed on December 15, 2010.

{¶ 4} On May 4, 2011, McBee requested that the city law director seek an injunction, but he declined to do so. Therefore, pursuant to Section 116 of the Charter of the city of Toledo and R.C. 733.59, McBee filed the present taxpayer action for injunctive and declaratory relief on June 23, 2011. McBee contends that the ordinance violates the city charter and civil service rules because the firefighters did not take a competitive exam to determine their relative "merit, efficiency, moral character, and

industry" and several of these firefighters are older than the age limit allowed for initial employment by the city as a firefighter. He also argued that unless the city is enjoined from continued performance of the contract, it will employ firefighters who did not take a competitive exam and this action will cause irreparable injury. McBee also sought a declaration that the employment of the ten Ottawa Hills firefighters was unlawful and that civil service rule 60.19 is unlawful and violates the city charter and civil service rules.

{¶ 5} Both parties filed motions for summary judgment. Without reaching the merits of the arguments raised, the trial court first determined that McBee lacked standing to bring the taxpayer action for declaratory relief. Second, the court determined that while McBee had standing to bring a taxpayer action, the issues he raised were moot. Therefore, the trial court denied McBee's motion for summary judgment and granted appellees' motion for summary judgment. McBee appealed this decision and asserts the following assignment of errors:

1. The trial court erred by denying Appellant's motion for summary judgment and granting Appellees' motion for summary judgment.

2. The trial court erred by determining that Appellant lacked standing to seek declaratory relief and in refusing to issue declaratory relief.

3. The trial court erred by determining that Appellant's claims for injunctive relief were moot and in failing to grant injunctive relief.

{¶ 6} We begin with consideration of McBee's second assignment of error that the trial court erred by finding that he lacked standing to seek declaratory relief. McBee asserted in his complaint that he was seeking declaratory relief under R.C. 733.59 and Section 116 of the Toledo City Charter.

{¶ 7} R.C. 733.56 authorizes the village solicitor or city law director to seek an "injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption." The solicitor or law director may also seek specific performance or mandamus pursuant to R.C. 733.57, and R.C. 733.58. Similarly, Section 113 of the Charter of the city of Toledo provides that:

> The City Attorney shall apply in the name of the City, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the City, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the City in contravention of law, or which was procured by fraud or corruption.

Section 114 and Section 115 mirror R.C. 733.57 and R.C. 733.58.

{¶ 8} If the solicitor or law director fails to act as required by R.C. 733.56, 733.57, or 733.58, a taxpayer may bring the action, pursuant to R.C. 733.59, for an injunction, specific performance, or mandamus on behalf of the municipal corporation. Likewise,

Section 116 of the Charter of the city of Toledo provides that if the city attorney fails to act pursuant to Section 113, 114, or 115, a "taxpayer may institute suit or proceedings for such purpose in his or her own name on behalf of the City."

{¶ 9} Neither the statutes nor the charter provisions authorize the solicitor, law director, city attorney, or taxpayer to seek declaratory relief. *State ex rel. Longville v. Akron*, 9th Dist. Summit No. 25354 and 25356, 2013-Ohio-1161, ¶ 10. Declaratory relief must be sought under R.C. Chapter 2721.

{¶ 10} Even if McBee had attempted to bring this action under Chapter 2721, the trial court determined that he lacked standing to bring the action because his only interest in the matter was based on his taxpayer status. We agree. R.C. 2721.03 governs standing to bring a declaratory judgment action and provides that:

> [A]ny person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

{¶ 11} Because a declaratory judgment action is a statutory remedy, the court's subject matter jurisdiction must be evident from the allegations in the complaint. *Mallory v. Cincinnati*, 1st Dist. Hamilton No. C-110563, 2012-Ohio-2861, ¶ 11. Plaintiff must

assert that: "(1) a real controversy exists between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties." *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 49 (citations omitted). Thus, the plaintiff must have a legal interest in the outcome of the case. *Driscoll v. Austintown Assoc*., 42 Ohio St.2d 263, 273, 328 N.E.2d 395 (1975). *Accord, Westgate Shopping Village v. Toledo*, 93 Ohio App.3d 507, 515, 639 N.E.2d 126 (6th Dist.1994).

{¶ 12} In this case, the trial court reasoned that McBee did not have an interest in the outcome of this case because his only interest in the matter is based on his taxpayer status and he was not individually impacted by the rule. We agree. McBee argues that he does not have to have a personal stake in the outcome of the case because he has standing pursuant to statute. While we agree that common law requirements for standing do not apply when standing is conferred by statute, R.C. 2721.12(A) specifically requires that the plaintiff have an affected legal interest.

{¶ 13} McBee also relies upon *Cincinnati ex rel. Smitherman v. Cincinnati*, 188 Ohio App.3d 171, 2010-Ohio-2768, 934 N.E.2d 985 (1st Dist.), which held that a taxpayer had standing to bring an action seeking declaratory and injunctive relief against the city of Cincinnati with allegations of the abuse of corporate power pursuant to R.C. 733.56. *Id.* at ¶ 19-20. While we agree with the holding that R.C. 733.56 gives the taxpayer the right to seek to enjoin the misapplication of city funds, we do not agree that the statute gives the taxpayer the right to seek declaratory relief.

{¶ 14} McBee also cites to *Local Union 340 v. City of Garfield Hts*., 8th Dist. Cuyahoga No. 38516, 1979 WL 210021 (Mar. 8, 1979), which involved an action filed by the union and individual members of the city's Division of Fire and Division of Police for damages and a declaratory judgment regarding their rate of compensation. We find that case irrelevant to the issues before us because it did not involve a taxpayer action. The plaintiffs in that case were asserting their individual rights.

{¶ 15} In *Gallagher v. City of Cleveland*, 10 Ohio App.3d 77, 460 N.E.2d 733 (8th Dist.1983), however, a declaratory judgment action was filed by eleven police officers and taxpayers to challenge the enactment of an ordinance creating a deputy chief position that allegedly conflicted with the city's charter and circumvented the city's civil service rules for appointment of officers. While this case proceeded as a declaratory judgment action, we find that it is distinguishable on the basis that it involved a joint suit by taxpayers and police officers, where the officers had a real interest in the outcome.

{¶ 16} Therefore, we conclude that McBee does not have standing to bring a declaratory judgment action under R.C. 733.56, Section 116 of the Charter of the city of Toledo, or R.C. 2721.03. Appellant's second assignment of error is not well-taken.

{¶ 17} In his third assignment of error, McBee argued that the trial court erred by finding that his claim for injunctive relief was moot. The court reasoned that the issue of hiring the firefighters was moot because the firefighters had already been employed

before McBee filed his action. The court also found neither of the exceptions to the mootness doctrine were applicable in this case: the issues raised were not capable of repetition, yet evading review, and were not issues of "great public interest."

{¶ 18} A court's jurisdiction is based upon the existence of a case or controversy. *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). No actual controversy exists once a case becomes moot. *Tschantz v. Ferguson*, 57 Ohio St.3d 131, 566 N.E.2d 655 (1991). Therefore, the court has a duty to dismiss an action when the court finds that the issues raised are moot and the court cannot grant the relief requested. *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910), syllabus.

{¶ 19} However, a court can consider a moot claim if the claim is "capable of repetition, yet evading review." *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947, 918 N.E.2d 515, ¶ 5, quoting *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000). This exception is applicable if: "(1) the challenged action is too short in duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.*

{¶ 20} A court may also consider an otherwise moot issue if it raises a debatable and substantial constitutional question or other matters of public or great general interest. *Smith v. Leis*, 111 Ohio St.3d 493, 2006-Ohio-6113, 857 N.E.2d 138, ¶ 14. The Tenth District Court of Appeals has held that appellate courts should exercise caution in finding a matter of public or great general interest because the Ohio Supreme Court is the

primary judicial policymaker. *Nextel West Corp. v. Franklin Cty. Bd. of Zoning Appeals*, 10th Dist. Franklin No. 03AP-625, 2004-Ohio-2943, ¶ 15, and *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 792, 600 N.E.2d 736 (10th Dist.1991). Generally, an intermediate court will not make the initial determination of whether a matter is one of public or great general interest unless the issue had a substantial impact on the taxpayers of the entire state. *Id*. at 791-92 and *Nextel*. We have done so only on rare occasion. *Village of West Unity ex rel. Beltz v. Merillat*, 6th Dist. Williams No. WM-03-016, 2004-Ohio-2682, ¶ 17 (prevailing wage law). The Tenth District Court of Appeals has reasoned that the legality of a public contract is not a matter of public or great general interest. *Keller*.

{¶ 21} In this case, McBee sought an injunction to prevent the city from performing the contract and hiring the firefighters without adhering to the competitive selection process previously required by the charter and the civil services rules. Since the city had already performed under the contract and hired the firefighters, the trial court determined that it could not grant the injunction McBee sought. Therefore, the court found the suit was moot and neither of the two exceptions applied in this case.

{¶ 22} McBee first argues the case is not moot because the employment contracts continue to be performed, the city continues to wrongfully expend funds to employ these firefighters, and their presence on the force continues to impact the employment of future firefighters. McBee cites *Local 330, Akron Firefighters Assn., AFL-CIO v. Romanoski*, 68 Ohio St.3d 596, 597, 629 N.E.2d 1044 (1994) to support his argument. However, we

find the *Local 330* case not on point. In that case, the union challenged whether the fire chief had authority to temporarily assign classified employees to acting positions. The issue of mootness was neither raised nor addressed in that case. More importantly, that case was not a statutory taxpayer action. The case involved a union seeking a declaration and enforcement of its rights under a contract with the city.

{¶ 23} We find appellant's argument lacks merit. The contract was fully performed once the city hired the firefighters and took over the firefighting operations for the village.

{¶ 24} Second, McBee argues the present case is capable of repetition, yet evading review because civil service rule 60.19 has not been repealed and was not limited to firefighters or the merger agreement with Ottawa Hills. The trial court held that there was no reasonable expectation or probability that the city would enter into a similar merger agreement with another government entity.

{¶ 25} Even if we agreed that the likelihood of another merger with another community under the same circumstances was reasonably possible, we disagree that a court would be unable to review the issue. If the city utilizes the rule again, a taxpayer can again seek an injunction to block implementation of the merger contract and seek temporary injunctions to delay the merger until the legality of civil service rule 60.19 is determined.

{¶ 26} Third, McBee argues that the violation of the city charter by the adoption of civil service rule 60.19 has a constitutional dimension because the charter is a

municipality's "constitution" and the passing of Rule 60.19 involved the legislative body evading mandatory civil service requirements. We find this argument unpersuasive. This case is limited to the issue of whether a municipal civil service rule conflicts with the city charter. While a city charter may be like a constitution, it is not the Ohio or United States Constitution and the issue is not the type of "constitutional" issue for which the exception to the mootness doctrine was created.

{¶ 27} Finally, McBee also argues that the trial court erred when it held that this was not a matter of public interest. He contends that the trial court erred by requiring that there be a "great public interest" rather than "a public or great general interest." While the trial court, and even the Ohio Supreme Court, do not use precisely the same language as Section 2(B)(2)(e), Article IV of the Ohio Constitution, the courts are clear in their analysis that the public interest at issue must be significant to be deemed worthy of asserting jurisdiction where the court would otherwise have none. The use of the term "great public interest" rather than "public interest" was not reversible error.

{¶ 28} Furthermore, he argues the impact of this case is widespread because: 1) every municipal government in Ohio operates under civil service rules and many have charter forms of government; 2) there are aspiring firefighters statewide listed on eligibility lists that could be impacted by the passing of a rule like rule 60.19; and 3) the rule is not limited to contracts about firefighting services.

{¶ 29} We do not find these arguments persuasive. The likelihood of this type of merger agreement is rare, the impact on the public is limited, and the public has the opportunity to block the process. Therefore, we agree with the trial court that this case does not involve a matter of public interest.

{¶ 30} We conclude that the trial court did not err in finding that the issues raised in this case were moot. Appellant's third assignment of error is not well-taken.

{¶ 31} In his first assignment of error, appellant argues that the trial court erred in granting summary judgment to appellee and denying summary judgment to McBee. In light of our determination of appellant's second and third assignments of error, we also find appellant's first assignment of error not well-taken.

{¶ 32} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE