[Cite as *Heartland of Portsmouth, OH, L.L.C. v. McHugh Fuller Law Group, P.L.C.*, 2017-Ohio-666.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Heartland of Portsmouth, OH, LLC,	:	Case No. 16CA3741
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
McHugh Fuller Law Group, PLLC,	:	
Defendant-Appellee.	:	**RELEASED: 2/14/2017**

APPEARANCES:

Robert M. Anspach, J. Randall Engwert, and Joseph S. Center, Anspach Meeks Ellenberger LLP, Toledo, Ohio for appellant.

Thomas P. Mannion, Judd. R. Uhl, and Michelle L. Gorman, Lewis, Brisbois, Bisgaard & Smith, LLP, Cleveland, Ohio for appellee.

Harsha, J.

{¶1} Heartland of Portsmouth, OH, LLC appeals the trial court's entry finding that its claim for violation of the Ohio Deceptive Trade Practices Act ("DTPA"), injunctive relief and attorney fees were moot, and dismissing "this matter."

{¶2} Heartland sued McHugh Fuller Law Group, PLLC for injunctive relief because the law firm allegedly violated the Ohio Deceptive Trade Practices Act ("DTPA") in advertisements it circulated about Heartland. After McHugh Fuller published the advertisements, the Ohio General Assembly amended the statutory provisions that governed their content. McHugh Fuller moved for summary judgment on the ground that the law firm could not publish the advertisements in their current form because the amended statutes require the inclusion of additional information not in the original

advertisements. It argued that Heartland's claims were moot. Because McHugh Fuller stated in support of its motion for summary judgment that it has not run the advertisement since a temporary restraining order issued and that it cannot and will not run the advertisement in the future due to statutory amendments, it argued Heartland's request for injunctive relief was moot. The trial court agreed with McHugh Fuller's motion, "overruled" Heartland's request for injunctive relief and ordered "this matter is hereby dismissed with prejudice." Heartland appeals.

{¶3} Heartland's claim under the DPTA is not moot because it is still possible for the trial court to grant the requested relief, i.e. attorney fees. Even though McHugh Fuller made enforceable assurances that it would not publish the advertisement now or in the future, Heartland is entitled to have the trial court determine whether Heartland is entitled to attorney fees under the DPTA.

I. FACTS AND PROCEDURAL BACKGROUND

{¶4} McHugh Fuller is a Mississippi law firm; Heartland is a skilled nursing facility operating in Portsmouth, Ohio. In December 2014, McHugh Fuller published an advertisement in the Portsmouth Daily Times newspaper that contained a photograph of Heartland's facility in Portsmouth and stated:

ATTENTION!
The government has cited
HEARTLAND OF PORTSMOUTH
for failing to operate and provide services
according to Federal, State, and local
laws and professional standards.

If you suspect that a loved one was
NEGLECTED or **ABUSED**
at Heartland of Portsmouth,
call **McHugh Fuller** today!

Has your loved one suffered?
Bedsores
Broken Bones
Unexplained Injuries
Death

{¶5} The words “Attention,” “Neglected or Abused,” and “Death,” were in bold red type. “Cited” was also underlined in red. The advertisement contained contact information, including a phone number for McHugh, and a statement that the content was “advertising material.” Michael Fuller's name was also listed on the advertisement.

{¶6} In early January 2015 Heartland learned of the advertisement and filed a complaint along with a motion for a temporary restraining order. The trial court granted a temporary restraining order, which the parties extended by stipulation. The complaint contained claims for violation of the DTPA, as well as common law claims for defamation under two theories: libel and false light/invasion of privacy. Heartland sought a temporary, preliminary and permanent injunction against McHugh Fuller, as well as an award of attorney fees on all claims.

{¶7} According to Heartland’s complaint McHugh Fuller advertised its services across the country in newspaper and online advertisements that were false, fraudulent, deceptive, and misleading. Heartland cited several instances in other courts in which the law firm was enjoined from publishing substantially similar or identical advertisements. Given the alleged willful nature of McHugh Fuller’s false and deceptive advertising, Heartland sought an award of all reasonable attorney fees and costs associated with prosecuting its claims under R.C. 4165.03(B).

{¶8} McHugh Fuller filed a motion for summary judgment that argued the statutory provisions governing the use of inspections of nursing homes were amended effective March 23, 2015 and now prohibit the use of citations in advertisement without additional disclosures. As a result McHugh Fuller asserted that it cannot run the advertisements in their current form, but must include additional disclosures. McHugh Fuller argued that Heartland's claims are moot because the law firm concedes that it cannot run the advertisement in its current form and it has provided an affidavit of its member, Michael Fuller, who states that the law firm will not run advertisements that do not comply with the new statutory requirements.

{¶9} Heartland responded and filed its own motion for summary judgment. Heartland argued that the immediate proximity of two statements – that Heartland was cited by the government and that readers whose loved ones are patients may possess causes of action against Heartland – creates the necessary but incorrect implication that the citation was based on Heartland's neglect or abuse of patients and caused catastrophic physical injuries; and, the "government has cited" language creates the additional necessary implication that the government does not approve of Heartland's facility. Because this deception exists in the advertisement and would continue to exist even if the advertisement included the additional requirements in the amended statute, Heartland argued its claims are not rendered moot by the statutory amendments; i.e. full compliance with the statute, as amended, will not mitigate this necessary implication of falsity.

{¶10} Heartland also argued that its claims include a demand for attorney fees, which requires a finding that the advertisement was deceptive and that McHugh Fuller

willfully circulated it. Heartland argued that it is entitled to a determination of whether McHugh Fuller violated the DTPA in order to subsequently determine whether Heartland is entitled to an attorney fee award; thus statutory amendments do nothing to moot this aspect of Heartland's lawsuit.

{¶11} The trial court concluded that Heartland's claims have become moot by both the statutory amendments to R.C. 3721.02(F)/R.C. 5165.67 and by McHugh Fuller's assurances that it will not run the advertisement in the future. The trial court denied Heartland's motion for summary judgment but granted summary judgment to McHugh Fuller, stating "Therefore, this request for injunctive relief has become moot…." It also stated, "This matter is hereby dismissed with prejudice." But, it added "There being no just reason for delay, this is a final appealable order." The entry made no reference to Heartland's common law tort claims.

II. ASSIGNMENT OF ERROR

{¶12} Heartland designates one assignment of error for review:

> I. THE TRIAL COURT ERRED IN HOLDING APPELLANT'S REQUEST FOR INJUNCTIVE RELIEF IS MOOT. *SEE JUDGMENT ENTRY* (MARCH 2, 2016).

III. STANDARD OF REVIEW

{¶13} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-

Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26.

{¶14} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293.

IV. The Mootness Doctrine

{¶15} Dismissals on the basis of mootness present questions of law, which we review de novo. *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. Athens No. 06CA49, 2007–Ohio–6895, ¶ 45.

{¶16} A " 'case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). "It is not the duty of the court to answer moot questions, and when pending proceedings * * *, an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition * * *." *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910), syllabus; *see also Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991) ("Ohio courts have long exercised judicial restraint in cases which are not actual controversies. No actual controversy exists where a case has been

rendered moot by an outside event"). "Conversely, if an actual controversy exists because it is possible for a court to grant the requested relief, the case is not moot, and a consideration of the merits is warranted." *State ex rel. Gaylor v. Goodenow,* 125 Ohio St.3d 407, 2010–Ohio–1844, 928 N.E.2d 728, ¶ 11; *State v. Consilio*, 114 Ohio St.3d 295, 2007–Ohio–4163, 871 N .E.2d 1167, ¶ 7.

{¶17} An action for declaratory and/or injunctive relief may become moot if the defendant demonstrates that there is no reasonable expectation that the wrong will be repeated. *See Heartland of Urbana Oh, LLC, V. McHugh Fuller Law Group, PLLC,* 2d Dist. Champaign No. 2016-CA-3, 2016-Ohio-6959, ¶38 citing *Ohio Academy of Nursing Homes, Inc. v. Barry*, 10th Dist. Franklin No. 92AP–1266, 1993 WL 186656, *3 (May 25, 1993), quoting *United States v. W.T. Grant* Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). The defendant's burden of showing no reasonable expectation that the wrong would be repeated is a "heavy one." *W.T. Grant* at 633.

V. ANALYSIS

{¶18} Heartland argues that the advertisement was misleading because the only citation similar to the one referenced in the advertisement occurred more than one and a half years prior to the date of the advertisement. According to Heartland the advertisement deceptively leaves a reader with the perception that the citation was very recent and the government does not approve of Heartland's facility. Heartland notes that it is a five-star rated facility, which is the highest ranking for a nursing home operating in the United States.

{¶19} Heartland also argues that the advertisement was deceptive because it omitted a description of the citation, which led readers to believe that the violation was

far more serious than it actually was because the violation would not have caused the type of injury referenced in the advertisement and no resident was harmed as a result of the violation.

A. Statutory Amendments

{¶20} Heartland argues that the statutory amendments governing McHugh Fuller's advertisement do not change the fundamental deceptive nature of the advertisement, i.e. the advertisement is deceptive with or without the additional disclosures now required by the statue. Therefore, Heartland argues its DTPA claim, including its claim for attorney fees, is not moot and must be addressed.

{¶21} The use of results of a nursing home inspection or investigation and a nursing facility survey are governed by R.C. 3721.02 and R.C. 5165.67. The General Assembly amended R.C. 3721.02 and R.C. 5165.67 effective March 23, 2015. *See* Am.Sub.H.B. No. 290. The trial court's decision references R.C. 3721.02. However, Heartland states that R.C. 5165.67, which applies to skilled nursing facilities, is the applicable statute, rather than R.C. 3721.02, which applies to residential facilities that provide "accommodations supervision, and personal care services for three to sixteen unrelated adults." *See* R.C. 3721.02(A). As a result Heartland refers to R.C. 5165.67 in its brief, while McHugh Fuller cites R.C. 3721.02. Both parties agree that these statutes were both amended by H.B. 290, and that they contain the similar provisions applicable to this case. For accuracy we refer to R.C. 5165.67.

{¶22} Prior to the H.B. 290 amendments, R.C. 5165.67 read:

> The results of a survey of a nursing facility that is conducted under section 5165.64 of the Revised Code, including any statement of deficiencies and all findings and deficiencies cited in the statement on the basis of the survey, shall be used solely to determine the nursing facility's compliance with certification

> requirements or with this chapter or another chapter of the Revised Code. Those results of a survey, that statement of deficiencies, and the findings and deficiencies cited in that statement shall not be used in any court or in any action or proceeding that is pending in any court and are not admissible in evidence in any action or proceeding unless that action or proceeding is an appeal of an action by the department of medicaid or contracting agency under this chapter or is an action by any department or agency of the state to enforce this chapter or another chapter of the Revised Code.
>
> Nothing in this section prohibits the results of a survey, a statement of deficiencies, or the findings and deficiencies cited in that statement on the basis of the survey under this section from being used in a criminal investigation or prosecution.

{¶23} Nothing in the prior statute prohibited the use of survey results in advertising or other matters; the statute simply restricted the use of these survey results in court proceedings.

{¶24} After the amendments, R.C. 5165.67 reads:

> The results of a survey of a nursing facility that is conducted under section 5165.64 of the Revised Code, including any statement of deficiencies and all findings and deficiencies cited in the statement on the basis of the survey, shall be used solely to determine the nursing facility's compliance with certification requirements or with this chapter or another chapter of the Revised Code. Those results of a survey, that statement of deficiencies, and the findings and deficiencies cited in that statement shall not be used in either of the following:
>
> (A) Any court or in any action or proceeding that is pending in any court and are not admissible in evidence in any action or proceeding unless that action or proceeding is an appeal of an administrative action by the department of medicaid or contracting agency under this chapter or is an action by any department or agency of the state to enforce this chapter or another chapter of the Revised Code;
>
> (B) An advertisement, unless the advertisement includes all of the following:
> (1) The date the survey was conducted;
> (2) A statement that the director of health inspects all homes at least once every fifteen months;
> (3) If a finding or deficiency cited in the statement of deficiencies has been substantially corrected, a statement that the finding or deficiency has been substantially corrected and the date that the finding or deficiency was substantially corrected;

> (4) The number of findings and deficiencies cited in the statement of deficiencies on the basis of the survey;
> (5) The average number of findings and deficiencies cited in a statement of deficiencies on the basis of a survey conducted under section 5165.64 of the Revised Code during the same calendar year as the survey used in the advertisement;
> (6) A statement that the advertisement is neither authorized nor endorsed by the department of health or any other government agency.
>
> Nothing in this section prohibits the results of a survey, a statement of deficiencies, or the findings and deficiencies cited in that statement on the basis of the survey under this section from being used in a criminal investigation or prosecution.

{¶25} The trial court concluded that the changes in the law had rendered the matter moot and dismissed "the matter" with prejudice. Nonetheless, it did not expressly address Heartland's common law claims but added Civ.R.54(B) language.

B. Heartland of Urbana

{¶26} The mootness issue here is almost identical to the one considered recently by the Second District Court of Appeals in *Heartland of Urbana, supra*. In that case Heartland brought a similar lawsuit against McHugh Fuller for an advertisement like the one here, but involving Heartland's Urbana facility. The trial court dismissed Heartland's case on the ground that changes in R.C. 3721.02(F)/R.C. 5165.67 had rendered the matter moot. Because McHugh Fuller voluntarily agreed to stop publishing the advertisement during the litigation and made a judicial admission that the law firm would not and could not publish the same advertisement in Ohio in the future under the amended statute, the trial court found "relief from publication was obtained." *Heartland of Urbana* at ¶44.

{¶27} However, the appellate court nevertheless reversed. It found that Heartland sought two forms of relief: an injunction preventing the publication of the

advertisement and attorney fees. The probative issue was whether there was other relief the trial court could order that would prevent the case from being moot. *Heartland of Urbana* at ¶35-44.

{¶28} The Second District Court of Appeals noted that under the DTPA, R.C. 4165.02 and R.C. 4165.03 provide two types of action: (1) an action where a person is likely to be damaged and seeks injunctive relief and (2) an action where a person has been injured and seeks damages. Heartland brought the first – an action for injunctive relief based on the likelihood of damage. A key provision in the DTPA allows an award of attorney fees for either of the two types of action. *See* R.C. 4165.03(B)("* * * in either type of civil action * * * [a]n award of attorney fees may be assessed against a defendant if the court finds that the defendant has willfully engaged in a trade practice listed in [R.C. 4165.02(A)] knowing it to be deceptive."). Because Heartland sought attorney fees, the case was not moot and the trial court should have considered McHugh Fuller's past conduct, determined whether the law firm willfully violated the DTPA, and decided whether to award Heartland attorney fees. *Heartland of Urbana* at ¶45-48.

{¶29} We agree with the Second District's analysis and find that the relevant facts in our case are indistinguishable from those. As in *Heartland of Urbana*, Heartland of Portsmouth brought an action under R.C. 4165.02(A)(1) seeking injunctive relief and attorney fees. McHugh Fuller has voluntarily agreed to stop publishing the advertisement during the litigation and, through the affidavit of Michael Fuller, has made a judicial admission that the law firm would not and could not publish the same advertisement in Ohio in the future under the amended statute. Thus, we conclude

Heartland's claim for injunctive relief was moot. However, the trial court erred in concluding the entire DTPA claim was moot. The trial court should have determined whether McHugh Fuller's advertisement was deceptive, whether the law firm acted willfully, and whether Heartland is entitled to attorney fees under R.C. 4165.03(B).

{¶30} Accordingly, we sustain Heartland's first and only assignment of error.

IV. CONCLUSION

{¶31} Heartland's DPTA claim is not moot because it is still possible for the trial court to grant some of the requested relief; i.e. the court must still determine whether the advertisement violated the DTPA, and whether McHugh Fuller acted willfully in doing so, in order to decide whether Heartland is entitled to attorney fees under DTPA. We sustain Heartland's first assignment of error, reverse the judgment of the trial court, and remand for further proceedings.[1]

JUDGMENT REVERSED AND
CAUSE REMANDED.

[1] McHugh Fuller's motion for summary judgment also sought the dismissal of Heartland's defamation claims. The trial court's entry does not specifically address these claims, nor does it expressly "grant" McHugh Fuller's motion. Thus, the dismissal of "this matter" refers only to Heartland's DTPA claim. The addition of Civ.R. 54(B) language to the entry indicates the defamation claims are still pending. The Civ.R. 54(B) language also confers jurisdiction to decide this appeal even though outstanding claims exist.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and CAUSE REMANDED and that Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

J. Abele & J. McFarland: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.