

IN THE SUPREME COURT OF OHIO

09-1466

STATE EX. REL., NORTHERN OHIO)
CHAPTER OF ASSOCIATED BUILDERS &)
CONTRACTORS, INC., et al.)

Case No.:

Plaintiffs/Appellants,

v.

THE BARBERTON CITY SCHOOLS)
BOARD OF EDUCATION, et al.)

On Appeal from the Summit County)
Court of Appeals, Ninth Appellate)
District Case No. CA-24898)

Defendants/Appellees.

APPELLANTS MEMORANDUM OF LAW REGARDING BOND REQUIREMENTS

Alan G. Ross (0011478)
(COUNSEL OF RECORD)
Nick A. Nykulak (0075961)
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd. South, Suite 350
Cleveland, Ohio 44131
Tel: 216-447-1551
Fax: (216) 447-1554
E-mail: alanr@rbslaw.com
Counsel for Plaintiffs-Appellants

Tamzin O'Neil (0071883)
(COUNSEL OF RECORD)
Patrick Vrobel (0082832)
McGown, Markling & Whalen, Co. LPA
1894 North Cleveland-Massillon Road
Akron, Ohio 44333
Counsel for Defendant-Appellees
Barberton City Schools Board of Education

Jon C. Walden (0063889)
(COUNSEL OF RECORD)
William Becker (0013476)
James E. Rook (0061671)
Assistant Attorney General
150 E. Gay Street, Floor 18
Columbus, Ohio 43215
Counsel for Defendant-Appellees
The Ohio School Facilities Commission

Mr. James T. Dixon (0077547)
(COUNSEL OF RECORD)
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114
Counsel for Defendant-Appellee
Mr. Excavator, Inc.

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SUPREME COURT OF OHIO

The purpose of this memorandum is to address the issue of the amount of bond to be required in this action. It is submitted that a suitable bond in this instance would be either no bond at all or a bond set at a nominal amount given the facts of this case.

Rule 65(C) of the Ohio Rules of Civil Procedure states, in pertinent part:

No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.

Although at first glance Rule 65(C) appears to require the fixing and posting of a bond, it has been held that it is within the court's discretion to issue a temporary restraining order and a preliminary injunction without requiring the moving party to post bond. *Beasley v. City of East Cleveland* (1984), 20 Ohio App. 3d 370, 486 N.E.2d 859; *Colquett v. Byrd* (1979), 59 Ohio Misc. 45, 392 N.E.2d 1329. Indeed, the discretion of the court as to the amount of the bond includes the discretion to require no bond at all. *Beasley v. City of East Cleveland*, supra; *Metzger-Gleisinger Mech., Inc. v. Mansfield City Sch. Dist.*, 2005-Ohio-2727, P23 (Richland County, May 27, 2005).

Courts following Ohio R. Civ. P. 65(C), have issued injunctions without a requirement of a bond in many cases. *Vanguard Transportation Systems, Inc. v. Edwards Transfer & Storage Co.* (1996), 109 Ohio App. 3d 786; 673 N.E.2d 182. See also, *Bivens v. Board of Public Education and Orphanage for Bibb County* (M.D. Ga. 1967), 284 F. Supp. 888. A court is vested with wide discretion in the matter of deciding whether or not a bond is required. *Id.* Where there is no likelihood of harm or a showing of probable loss to defendant, no bond is required. *Ibid.* Moreover, it has been held that taxpayers bringing a legal action for the benefit of their community and not their own personal gain are not required to file a bond in connection

with the granting of a temporary restraining order. See *Schulman v. City of Shaker Heights* (1964), 29 Ohio Op.2d 373, 196 N.E.2d 102.

In the instant case, Plaintiffs/Appellants are seeking to temporarily and permanently restrain the Barberton Board of Education (“Board”) and the Ohio School Facilities Commission (“OSFC”) from awarding any construction contracts for work on the New Barberton Middle School Project (“Project”) because: (1) the contract and bid specifications contain a void and unlawful provision adopted by the Board requiring contractors to pay prevailing wages and/or otherwise comply with R.C. § 4115 *et. seq.*, Ohio’s Prevailing Wage Law; (2) the Board and the OSFC are violating R.C. 4115.04(B)(3) and R.C. 3313.46(A)(6), and misappropriating taxpayer funds by mandating a prevailing wage requirement on the Project; (3) it is impossible for any contractor bidding on the Project to comply with Chapter 4115 on the Project since the law specifically exempts board of education construction projects, the Ohio Department of Commerce lacks jurisdiction over the enforcement and application of Chapter 4115 to the Project, subjecting every contractor to nebulous and unannounced bidding performance criteria; and (4) if prevailing wage law could apply to the Project, the Board and/or the OSFC did not comply with the requirements of R.C. 4115.03 *et seq.* before letting the Project for bid.

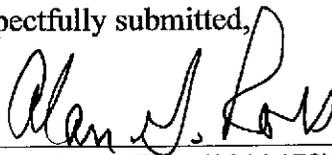
Work on the second phase of the Project pursuant to the bid advertisement has not yet begun. The Board has not yet awarded, or otherwise entered into, any contracts for work on the second phase Project. For the reasons stated in Plaintiffs’ Motion for Stay of Execution and Request for Injunction, Plaintiffs/Appellants have a likelihood of success on appeal, a likelihood of success on the merits of this case and there is no likelihood of harm or a showing of probable loss to the Board or the OSFC by the granting an injunction to maintain the status quo of the

parties pending appeal. The Board and the OSFC can simply re-bid the Project without the unlawful Chapter 4115 requirement without incurring any damage or cost.

If, however, the Court should decide that a bond is required in the instant case, such bond (or cash deposited with the Court in lieu of a bond) Plaintiffs/Appellants request the amount be limited to an amount of money which would secure the party enjoined the damages it may sustain. See generally, 56 O Jur3d, Injunctions, Section 180. Because the damages which Defendants/Appellees herein may sustain if the temporary restraining order is granted are likely to be minimal, if any, the bond should be set at a nominal sum. In *Beasley supra*, a bond of \$100.00 was set in a case where the actions of a municipal corporation were challenged as exceeding their authority under the law. On appeal, the court of appeals held that the amount of the bond was wholly within the discretion of the trial court and refused to reverse the lower court's decision regarding the amount of the bond.

Accordingly, Plaintiffs' submit that the circumstances in this case warrant that if a bond be set at all, it be set in a nominal amount.

Respectfully submitted,



Alan G. Ross, Esq. (0011478)

Nick A. Nykulak, Esq. (0075961)

Ross, Brittain & Schonberg Co., L.P.A.

6480 Rockside Woods Blvd. South, Suite 350

Cleveland, Ohio 44131

Tel: 216-447-1551 ~ Fax: 216-447-1554

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that a copy of the Memorandum of Law Regarding Bond Requirements and all Motions and Briefs filed in the above-captioned matter were sent via UPS Ground Delivery upon:

Ms. Tamzin O'Neil, Esq.
McGown, Markling & Whalen, Co. LPA
1894 North Cleveland-Massillon Road
Akron, Ohio 44333
toneil@servingyourschools.com
pvrobel@servingyourschools.com

Counsel for Barberton City Schools Board of Education

-and-

Mr. Jon C. Walden, Esq.
Mr. William Becker, Esq.
Assistant Attorney General
150 E. Gay Street, Floor 18
Columbus, Ohio 43215
jon.walden@ohioattorneygeneral.gov
william.becker@ohioattorneygeneral.gov

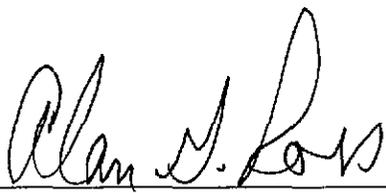
Counsel for the Ohio School Facilities Commission

-and-

Mr. James T. Dixon, Esq.
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114
jdixon@frantzward.com

Counsel for Mr. Excavator

This 12th day of August 2009.



Attorney for Appellants