

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL., NORTHERN OHIO	)	
CHAPTER OF ASSOCIATED BUILDERS	)	Case No. 2009-1466
& CONTRACTORS, INC., et al.,	)	
	)	Appeal from the Ninth District
Plaintiffs-Appellants,	)	Court of Appeals, Summit County
	)	Case No. CA 24898
v.	)	
	)	
BARBERTON CITY SCHOOLS BOARD	)	
OF EDUCATION, et al.,	)	
	)	
Defendants-Appellees.	)	

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**RESPONSE OF APPELLEE BARBERTON CITY SCHOOLS BOARD OF EDUCATION  
TO APPELLANTS' MOTION TO STAY EXECUTION OF JUDGMENT PENDING  
APPEAL AND REQUEST FOR INJUNCTION**

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Alan G. Ross (0011478)  
 Nick A. Nykulak (0075961)  
 Ross, Brittain & Schonberg Co., L.P.A.  
 6480 Rockside Woods Blvd. Suite 350  
 Cleveland, Ohio 44131  
 Telephone: 1.216.447.1551  
 Facsimile: 1.216.447.1554  
 E-Mail: aross@rbslaw.com  
 nnykulak@rbslaw.com

Tamzin Kelley O'Neil (0071883) \*Counsel of Record\*  
 Patrick S. Vrobel (0082832)  
 McGOWN, MARKLING & WHALEN CO., L.P.A.  
 1894 North Cleveland-Massillon Road  
 Akron, Ohio 44333  
 Telephone: 1.330.670.0005  
 Facsimile: 1.330.670.0002  
 E-Mail: toneil@servingyourschools.com  
 pvrobel@servingyourschools.com

*Counsel for Appellants*

*Counsel for Appellee  
Barberton City Schools Board of Education*

James T. Dixon (0077547)  
 Frantz Ward LLP  
 2500 Key Center  
 127 Public Square  
 Cleveland, Ohio 44114  
 Telephone: 1.216.515.1660  
 Facsimile: 1.216.515.1650  
 E-Mail: jdixon@frantzward.com

William C. Becker (0013476)  
 Jon C. Walden (0063889)  
 James E. Rook (0061671)  
 Assistant Attorneys General  
 Court of Claims Defense  
 150 E. Gay Street, 18<sup>th</sup> Floor  
 Columbus, Ohio 43215  
 Telephone: 1.614.466.7447  
 Facsimile 1.614.644.9185  
 E-Mail: william.becker@ohioattorneygeneral.gov  
 jon.walden@ohioattorneygeneral.gov  
 james.rook@ohioattorneygeneral.gov

*Counsel for Appellee Mr. Excavator*

*Counsel for Appellee Ohio School Facilities  
Commission*

**FILED**  
 AUG 21 2009  
 CLERK OF COURT  
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**RECEIVED**  
 AUG 21 2009  
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## I. INTRODUCTION

Appellants, Northern Ohio Chapter of Associated Builders & Contractors, Inc., Fechko Excavating, Inc., Dan Villers, and Jason Antill (collectively, “Appellants”) make a convoluted attempt to have this Court review a Ninth District Court of Appeal’s *Decision and Order* dated July 31, 2009. In connection with this action, Appellants filed a forty-two-page document, not in support of its argument that this Court has jurisdiction over the question of whether the court of appeals abused its discretion in denying them injunctive relief, but rather, asking this Court to stay the decision of the appellate court and request new injunctive relief.

As an initial matter, Appellants requested both the Summit County Court of Common Pleas and the Ninth District Court of Appeals to enjoin the Board of Education of the Barberton City School District (the “Board”) and the Ohio School Facilities Commission’s (the “OSFC”) lawful discretion to award a contract for the early site work for the Barberton New Middle School Project (“Project”). Both courts denied Appellants’ requests. Appellants now seek another “bite at the apple,” and request this Court to provide the injunctive relief they so desperately desire without first obtaining this Court’s jurisdiction over the matter. In doing so, Appellants ask this Court to ignore the fact that the power to issue an injunction comes only after this Court has accepted jurisdiction of the action, that the matters presented by Appellants in their motion to stay and request for injunctive relief are not properly a part of the instant appeal and there is an appeal of the trial court’s decision on the merits currently pending in the court of appeals. See Appellants *Notice of Appeal to the Ninth District Court of Appeals*, attached hereto as Exhibit A. See, also, *Notice of the Filing of the Record from the Summit County Common Pleas Court and Docketing Statement*, attached hereto at Exhibit B.

Furthermore, in July 2009, the early site work package for the Project, which was the exclusive subject of Appellants' complaint and request for injunctive relief at the trial court, was completed. See Exhibit A to *Appellees Board's and OSFC's Joint Response to Appellants' Motion for Stay and Injunctive Relief*, attached hereto at Exhibit C. As a result, Appellants' appeal to the Ninth District Court of Appeals, as well as to this Court, is moot. See *Defendants-Appellees Barberton City Schools Board of Education, Ohio School Facilities Commission and Mr. Excavator's Motion to Dismiss*, attached hereto at Exhibit D.

As set forth more fully below, Appellants are not properly before this Court, and further cannot show by clear and convincing evidence that an injunction should issue. As a result, this Court should deny Appellants' *Motion to Stay Execution of Judgment Pending Appeal and Request for Injunction*.

## II. LAW AND ARGUMENT

### A. Appellants' Request for Relief Is Not Properly Before This Court

Revised Code 2727.05 provides in part: "an injunction \*\*\* may be allowed by the supreme court \*\*\* as a temporary remedy, during the pendency of a case on appeal in such courts." Here, Appellants filed a notice of appeal seeking a discretionary appeal from the August 11, 2009 *Journal Entry* of the court of appeals. Jurisdiction of the appeal has not been accepted by this Court. Appellants also seek a stay of the court of appeals' decision and request new injunctive relief from this Court for entirely new matters in connection with the remaining construction of the Project. Appellants mistakenly believe that this Court can grant their request for an injunction without having jurisdiction of the underlying cause of action. This belief is wrong and such relief is not available. See *City of Norwood v. Horney*, 110 Ohio St.3d 353,

2006-Ohio-3799, at ¶61 (finding once a court obtains jurisdiction of a cause of action it may grant or issue an injunction).

At the trial court, Appellants sought to enjoin the Board and the OSFC from allowing the excavator contractor, Mr. Excavator, to proceed with its early site work portion of the Project. Appellants' amended complaint asserted that the Board's inclusion of a requirement that contractors comply with R.C. Chapter 4115 in its bid specifications for the early site work for the Project was illegal, rendered the contract with Mr. Excavator void and constituted an abuse of discretion by the Board. The Appellants also asserted in the complaint that the prevailing wage requirement within the bid specifications as established by OSFC was vague and ambiguous. The trial court denied the temporary restraining order and injunction filed by the Appellants. Later, the trial court, on motions to dismiss filed by the Board, OSFC and Mr. Excavator, dismissed Appellants' claims in their entirety, finding that Appellants lacked standing and that their claims were otherwise without merit.<sup>1</sup> On July 24, 2009, Mr. Excavator completed the early site work package contract for the Project.

Having failed to enjoin the Board, OSFC and Mr. Excavator from proceeding with the early site work package, Appellants requested that the court of appeals enjoin the Board, OSFC and other non-parties from proceeding with completely new matters, including: (1) the August 11, 2009 bid opening and award of approximately \$22 million of an estimated \$30 million total for construction of the Project, and (2) any other school construction project, regardless of location, that requires bidders to pay prevailing wages as a term of the construction contract.<sup>2</sup>

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<sup>1</sup> Appellants moved the trial court for leave to file a second amended complaint prior to the court's decision on the Appellees' motions to dismiss. The Appellees objected. In its July 31, 2009 *Judgment Entry*, the trial court sustained Appellees' motions to dismiss and also denied Appellants' motion for leave to file a second amended complaint.

<sup>2</sup> Appellants did not request a stay, in the first instance, with the trial court as required by Appellate Rule 7(A).

Appellants' request for injunctive relief was clearly beyond the scope of litigation at the trial level, which was limited solely to the early site work package. Therefore inclusion of these "new matters" as part of Appellants' appeal and request for injunctive relief was inappropriate. As a result, the court of appeals did not abuse its discretion in denying Appellants' request for a stay of the trial court's decision and for new injunctive relief. It is this decision which Appellants now seek this Court to review. Here, as at the court of appeals, Appellants seek relief well beyond that which was sought at the trial court and request that this Court review and consider matters that were not before the trial court.<sup>3</sup> Appellants completely disregard the fact that this Court has not accepted jurisdiction of their appeal, that the matters raised were never before the trial court and their appeal of the trial court's decision is before the court of appeals, not before this Court. Appellants cavalierly request this Court's for review and consideration of injunctive relief regarding matters that are not properly a part of the instant appeal and fail to demonstrate that this case warrants the jurisdiction of this Court.

**B. Appellants Are Not Entitled To An Injunction In The Instant Matter**

Even if this appeal were somehow properly before this Court, Appellants are nonetheless not entitled to injunctive relief. "In deciding whether to grant an injunction pending appeal, the court must balance the same factors as in evaluating a motion for a preliminary injunction."

*Lehnert v. Ferris Faculty Assn.* (W.D. Mich. 1989), 707 F.Supp. 1490, 1492 (citing the federal rules of appellate procedure). See, also, *American Standard, Inc. v. Meehan* (N.D. Ohio 2007), 614 F.Supp. 2d 844, 846. In a motion for a preliminary injunction, the party seeking equitable relief must establish, "by clear and convincing evidence, that (1) there is a substantial likelihood

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<sup>3</sup> Following the trial court's issuance of the *Judgment Entry* on July 31, 2009, Appellants filed with the court transcripts obtained during the limited discovery allowed by the trial court in the matter, before discovery was stayed. Appellants' filing is a nullity and is not properly included in the record of the trial court.

that the [party] will prevail on the merits; (2) the [party] will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction.” *Trumbull Ind. Inc. v. Miller*, 2005-Ohio-5120, at ¶10. Further, the decision to grant or deny an injunction “is solely within the trial court’s discretion and, therefore, a reviewing court should not disturb the judgment of the trial court absent a showing of a clear abuse of discretion.” *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496. Application of this standard demonstrates that injunctive relief should not be granted in the instant matter.

1. **Appellants cannot demonstrate a substantial likelihood of success on the merits**

a. **Appellants lack standing to assert claims against the Board**

Appellants Villers and Antill do not have standing, as they cannot demonstrate a special interest in the subject matter of the complaint. See *Brown v. Columbus City Schools Bd. of Edn.*, 2009-Ohio-3230, at ¶13 (finding appellants’ status as taxpayers of the school district insufficient to confer standing). See, also, *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, 368, 123 N.E.2d 1 (finding 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).

Likewise, Appellant Fechko lacks standing because it was not a disappointed bidder for the early site work package and did not submit a bid for any of the remaining bid packages of the Project that were opened on August 11, 2009. See *Meccon, Inc. v. Univ. of Akron*, 2009-Ohio-1700, at ¶26 (finding that an unsuccessful bidder has standing to recover damages). See, also, *State ex rel. Associated Builders and Contr. Cent. Ohio Chapter v. Jefferson Cty. Bd. of Commrs.* (1995), 106 Ohio App.3d 176, 665 N.E.2d 723 (finding that in order to have standing

to challenge the award of a construction contract, a contractor must have submitted a bid for the contract at issue). Similarly, Appellant Northern Ohio Chapter of Associated Builders and Contractors, Inc. (“ABC”) lacks standing because its right to bring this suit is derived from Fechko. As explained by the Tenth District Court of Appeals in *Tiemann v. Univ. of Cincinnati*, “while an association may bring an action on behalf of its members, the association must establish that its members have suffered actual injury.” 127 Ohio App.3d 312, 325, 712 N.E.2d 1258. “[W]here no bid was submitted and there was consequently no concrete injury suffered by any private contractor \*\*\* [an association] does not have the standing to challenge the legality of the bidding procedure.” *Id.*

**b. The Board did not exceed its authority or abuse its discretion by mandating compliance with prevailing wage requirements on the New Middle School Project**

The heart of Appellants’ claim is that R.C. 4115.04(B)(3) provides an exemption to the statutorily mandated rule that prevailing wages must be paid by school boards and, as a result, the Board is prohibited from contractually requiring the payment of a prevailing wage for the Project. Appellants’ argument has no valid basis in the law. Appellants provide no statutory or case law to support their claim. Moreover, Appellants’ insinuation that the legislature “deliberately” considered the school exemption side-by-side with the hospital exemption and created a prohibition by failing to insert similar “election” language is not supported by the legislative histories of the two exemptions. The legislature did not create the hospital exemption at the same time it created the school exemption. Rather, it created the hospital exemption two years later, as part of an omnibus hospital reform bill. See Am.Sub.S.B. No. 55 (123<sup>rd</sup> General Assembly).

Appellants also inexplicitly recite the subsequent history of Senate Bill No. 102, which included the issuance of a report in 2002 by the Ohio Legislative Service Commission (the “Report”).<sup>4</sup> In addition to mischaracterizing the findings of the Report, Appellants’ argument is irrelevant to the Board’s exercise of its discretion to make the payment of prevailing wages a part of the Project. See *Monarch Constr. Co. v. Ohio School Facilities Comm.*, 150 Ohio App.3d 134, 2002-Ohio-6281 (finding that to invite evidence that was not before the Board when it made its decision regarding a matter makes the discretion of a school board virtually non-existent).

Revised Code Section 4115.04(B)(3) provides, in part, that Sections 4115.03 to 4115.16, which govern prevailing wages, do not apply to: “Public improvements undertaken by, or under contract for, the board of education of any school district or the governing board of any educational service center.” This plain language merely exempts school boards from the statutory prevailing wage requirements on construction projects for public improvements paid for in part or in whole by public funds. See R.C. 4115.10(A). However, such exemption does not mean that the OSFC or the Board is prohibited from requiring the payment of prevailing wages as a term of contract for the Project.

Further, the Board has discretion in carrying out its duties with respect to the Project, including the discretion to determine which contractor is the lowest responsible bidder. See R.C. 3317.17, 3313.46 (stating the same). Ohio courts have long upheld such discretion, finding that public owners necessarily enjoy great latitude in determining the parameters of their projects. *Enertech Electrical, Inc., v. Mahoning Cty. Commrs.* (C.A.6, 1996), 85 F.3d 257, 260 (finding Commissioners’ requirement that contractors ratify a project labor agreement, as a condition to

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<sup>4</sup> The Report, which was not attached to Plaintiffs’ *Amended Complaint*, but rather to its *Memorandum in Support of Plaintiffs’ Motion for a Temporary Restraining Order*, acknowledges at page 49 that there was no direct and conclusive evidence that would allow it to attribute the savings on construction projects costs since the enactment of S.B. 102 to the prevailing wage exemption.

determining the “lowest and best bidder” for a construction project, not inconsistent with Ohio’s competitive bidding policy). Moreover, in the absence of evidence to the contrary, the presumption is that government entities act within the limits of the jurisdiction conferred upon them by law. See *Cedar Bay Constr. Inc. v. Fremont*, 50 Ohio St.3d 19, 21, 552, N.E.2d 202 (stating the same). Clearly, the Board has broad discretion in the exercise of its authority, which should not be interfered with by a court of law in the absence of fraud or other abuse of discretion.<sup>5</sup> *Id.* Here, Appellants offer absolutely no facts to support their claim that the Board abused its discretion by requiring that bidders pay prevailing wages on the Project. See *Danis Clarkco Landfill Co., v. Clark Cty. Solid Waste Dist.* (1995), 73 Ohio St.3d 590, 1995-Ohio-301 (stating that when an award is based upon criteria expressly set forth in a bidding proposal, no abuse of discretion occurs).

Here, the Board lawfully exercised its discretion in awarding the early site work contract for the Project to the lowest responsible bidder as required by R.C. 3313.46, and the Appellants have failed to offer any evidence, clear, convincing or otherwise, that the Board abused its discretion in the matter.<sup>6</sup>

**c. The prevailing wage requirement was not vague and did not subject bidders to unannounced criteria**

Appellants mistakenly claim that because the Board did not provide specific procedures on how it would address compliance with the payment of prevailing wages on the Project, the

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<sup>5</sup> The term “abuse of discretion” in this context connotes more than just an error of law; rather it exists where a decision is unreasonable, arbitrary or unconscionable. An abuse of discretion must be shown by clear and convincing evidence. *Monarch Constr. Co. v. Ohio School Facilities Comm.*, 150 Ohio App.3d 134, 2002-Ohio-6281, citing *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 423 N.E.2d 1095.

<sup>6</sup> Revised Code 3313.46(A) provides, in part, the following: “[w]hen any such board [of education] determines to build, repair, enlarge, improve, or demolish any school building, the cost of which will exceed twenty-five thousand dollars,” it shall cause to be prepared plans and specifications, advertise for bids for a period of not less than two consecutive weeks, open bids at the time and place specified by the board in the advertisement for the bids, and accept none but the lowest responsible bid.”

bid specifications were vague and subjected the bidders to unannounced criteria. However, it is undisputed by the Appellants that: (1) Appellant Fechko received the bid specifications for the Project, (2) the legal bid advertisement issued by the Board for the Project stated that bidders would be required to comply with R.C. Chapter 4115 and pay prevailing wage on the Project, and (3) Appellant Fechko submitted a bid based on the prevailing wage rates included in the bid specifications to calculate their labor costs for the early site work package for the Project. *Amended Complaint* at ¶¶6, 15, 20-23, 43 (stating the same). As a result, the bid specifications did not subject bidders to vague and unannounced criteria. See *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 423 N.E.2d 1095 (standing for the proposition that reliance on unannounced criteria in awarding a contract will constitute an abuse of discretion).

**d. The claims addressed in the trial court are moot**

An injunction should not be granted unless a clear case of irreparable injury can be made. *Hydofarm, Inc. v. Orendorff* (2008), 180 Ohio App.3d 339, 2008-Ohio-6819. Here, Appellants are simply too late to argue that they will suffer an irreparable injury, as the early site work package for the Project that was the subject of Appellants' amended complaint at the trial court was completed in July 2009. The role of Ohio courts is to decide actual controversies; the courts will not give opinions upon moot questions. See *Nat. Electrical Contractors Assn. v. City of Painesville* (1973), 36 Ohio St.2d 60, 303 N.E.2d 870. Therefore, Appellants have no basis to proceed on this appeal. Appellants would have this Court stop work on the remaining portions of the Project for an undetermined period, and then have the Board re-advertise and re-bid for the same work. This is not preservation of the status quo. Rather, such action would result in unmanageable and costly delays to the Board.

2. **Appellants are not entitled to injunctive relief because it would cause great harm to the Board, OSFC, and the public interest**

An injunction on a construction project should be granted with great caution, “especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government.” *Cementech, Inc. v. City of Fairlawn* (2006), 109 Ohio St.3d 475, 2006-Ohio-299, at ¶ 10, citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 1995-Ohio-301. If this Court issues an injunction, OSFC and the Board will be forced to rescind, re-advertise and re-bid more than approximately \$22 million dollars worth of construction contracts for the next phase of the Project. Those bid packages that are now inexplicitly part of Appellants’ requested scope of injunctive relief were scheduled to directly follow completion of the early site work package, which is the only true subject of the current litigation.

It is undisputed that if the Project’s construction is delayed, existing site conditions will deteriorate and require additional costs to correct when construction is finally commenced. See Exhibit C (Exhibit A to *Appellees Board’s and OSFC’s Joint Response to Appellants’ Motion for Stay and Injunctive Relief*). Additionally, the Project’s schedule contemplates commencement of specific construction work directly. Any delay will push the work back further into the year, resulting in increased costs due to winter weather conditions. *Id.* Further, delays in the Project will likely subject the Board to additional costs to pay for acceleration of the work in order to ensure the Project is completed on time. *Id.* While the costs associated with such delays are not easily quantifiable, one method of doing so is to utilize the amount of liquidated damages identified in the contract and apply that figure to each day of anticipated delay. In this instance, each day of delay would cost approximately \$9,000. *Id.*

In stark contrast, Appellants' proffered harm is minimal. Appellant Fechko did not bid on this phase of the Project. Appellants' suggestion that they will suffer lost business opportunities is unfounded, and falls far short of irreparable harm. The public interest is best served by allowing the Project to move forward without delay. Should this Court deem an injunction appropriate, it should not only consider the balancing of harm, but should set a bond amount that is commensurate with the harm caused by the delay of enjoining the Project. See Civ.R65 (requiring a bond to secure the party enjoined for damages sustained if it is determined the injunction should not have been granted). Appellants seek to enjoin a \$30 million dollar project. *Id.* For Appellants to claim that no bond or a *de minimus* bond is appropriate is erroneous. Using the per diem liquidated damages above, the Board requests that if injunctive relief is granted, a bond in the amount of at least \$900,000 be required, in order to secure the Board against the harm caused by the delay of enjoining the Project.

### III. CONCLUSION

Based upon the foregoing reasons, Appellants' *Motion to Stay Execution Pending Appeal and Request For Injunction* should be denied.

Respectfully submitted,

  
\_\_\_\_\_  
Tamzin Kelley O'Neil (0071883)

Patrick S. Vrobel (0082832)

McGOWN, MARKLING & WHALEN CO., L.P.A.

1894 North Cleveland-Massillon Road

Akron, Ohio 44333

Telephone: 1.330.670.0005

Facsimile: 1.330.670.0002

E-Mail: [toneil@servingyourschools.com](mailto:toneil@servingyourschools.com)

[pvrobel@servingyourschools.com](mailto:pvrobel@servingyourschools.com)

*Attorneys for Appellee Barberton City Schools  
Board of Education*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Response of Appellee Barberton City Schools Board of Education* was sent by email and Regular U.S. Mail on August 20, 2009, to the following:

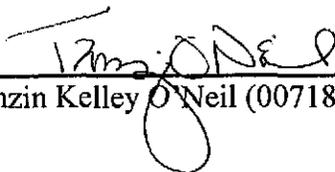
Alan G. Ross  
Nick A. Nykulak  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd. South, Suite 350  
Cleveland, Ohio 44131  
*Counsel for Plaintiffs*

William C. Becker  
James E. Rooks  
Jon C. Walden  
Assistant Attorney General  
150 E. Gay Street, Floor 18  
Columbus, Ohio 43215

*Counsel for Ohio School Facilities Commission*

James T. Dixon  
Frantz Ward, L.L.P.  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114

*Counsel for Mr. Excavator*

  
\_\_\_\_\_  
Tamzin Kelley O'Neil (0071883)

DANIEL M. HERRIGAN

2009 AUG -5 PM 3:55

SUMMIT COUNTY  
CLERK OF COURTS  
IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

24898

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

Plaintiffs

v.

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

Defendants.

) Common Pleas Case No.: CV 2009 04 2636

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JUDGE LYNNE S. CALLAHAN

NOTICE OF APPEAL

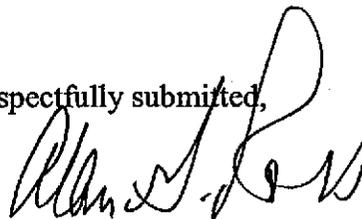
SUMMIT COUNTY  
CLERK OF COURTS

2009 AUG -5 PM 4:06

COURT OF APPEALS  
DANIEL M. HERRIGAN

NOW COMES the Plaintiffs, The Northern Ohio Chapter of Associated Builders & Contractors, Inc., Fechko Excavating, Inc. and Barberton Taxpayers Dan Villers and Jason Antill, and hereby give notice that they are appealing to the Ninth District Court of Appeals, Summit County, Ohio, from the final judgment in favor of the Defendants, which was entered on July 31, 2009.

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 PLAINTIFFS



**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Notice of Appeal was served via U.S. Mail, postage prepaid upon the following:

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

*Counsel for Barberton City Schools Board of Education*

-and-

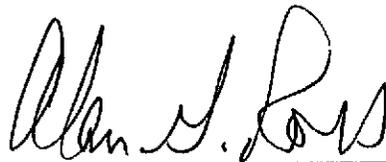
Mr. Jon C. Walden, Esq.  
Mr. William Becker, Esq.  
Assistant Attorney General  
150 E. Gay Street, Floor 18  
Columbus, Ohio 43215

*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

*Counsel for Mr. Excavator*



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Counsel for Plaintiffs

COURT OF APPEALS OF OHIO  
NINTH APPELLATE DISTRICT

24898

Docketing Statement

Appeal No. \_\_\_\_\_

DANIEL M. HERRIGAN

**A time-stamped copy of the final judgment being appealed must be attached to this statement.**

2009 AUG -5 PM 3:56

Trial Court Name Summit County Court of Common Pleas

SUMMIT COUNTY  
CLERK OF COURTS

Trial Court Case Number: CV 2009 04 2636

Trial Court Caption:  
State Ex. Rel., Northern Ohio Chapter of Associated Builders & Contractors, Inc., et al.

Trial Court Judge: Lynne S. Callahan

versus

App.R. 11.2 Expedited Appeal  YES  NO  
(circle one)

The Barberton City Schools Board of Education, et al.

**THE RECORD**

**Mark the paragraph that applies.**

**TO THE CLERK OF COURTS:** Please immediately assemble and transmit the record in this case. I certify that the paragraph I marked accurately describes the complete record to be filed:

2009 AUG -5 PM 4:00  
SUMMIT COUNTY  
CLERK OF COURTS  
DANIEL M. HERRIGAN  
COURT OF APPEALS

1.  **The record will consist of ONLY the original papers, exhibits, a certified copy of the docket and journal entries, and any transcripts of proceedings that were filed in the trial court prior to final judgment.**

2.  **The record will include the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries, and a full or partial transcript of proceedings prepared for this appeal by an official court reporter, who I served with a praecipe that I also filed with this court.**

3.  **The record will include the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries, and a statement of the evidence or proceedings pursuant to App.R. 9(C) or an agreed statement of the case pursuant to App.R. 9(D).**

4.  **The record will include the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries, and both a transcript of proceedings prepared by an official court reporter and a statement of the evidence or case pursuant to App.R. 9(C) or (D).**

If you intend to rely upon a transcript of proceedings filed in an earlier appeal, you must seek permission from the court to supplement the record in this appeal with the transcript filed in the earlier appeal.

**A time-stamped copy of the final judgment being appealed must be attached to this statement.  
If the order from which this appeal is taken is not final and appealable under R.C. 2505.02, the Court must dismiss the appeal.**

## THE PARTIES

Please provide the following information for all parties to the proceedings in the trial court.

A party who files a notice of appeal is an appellant. A party who would be adversely affected if the judgment below is reversed should be designated as an appellee. All other parties to the action below should retain their trial court designation (plaintiff, defendant, third-party plaintiff, third-party defendant, petitioner, respondent, etc). See Local Rule 3.

If a party was not represented by counsel in the proceedings below, please provide the address and phone number of the party. If there are additional parties and/or attorneys, please copy this page, complete the information for the additional parties, and attach it to this statement. Appellant must attach a copy of any order that resolved a claim against any of the parties.

<p>Party's name <u>Northern Ohio Chapter of Associated Builders &amp; Contractors, Inc.</u></p> <p>Party's designation <u>Appellant</u></p> <p>Attorney's name <u>Alan G. Ross – Ross, Brittain &amp; Schonberg</u></p> <p>Attorney's registration number <u>0011478</u></p> <p>Address of counsel or party <u>6480 Rockside Woods Blvd. South Suite 350 Cleveland, Ohio 44131</u></p> <p>Phone number of counsel or party <u>216-447-1551</u></p> <p>Email <u>alanr@rbslaw.com</u></p>	<p>Party's name <u>Jason Antill</u></p> <p>Party's designation <u>Appellant</u></p> <p>Attorney's name <u>Alan G. Ross – Ross, Brittain &amp; Schonberg</u></p> <p>Attorney's registration number <u>0011478</u></p> <p>Address of counsel or party <u>6480 Rockside Woods Blvd. South Suite 350 Cleveland, Ohio 44131</u></p> <p>Phone number of counsel or party <u>216-447-1551</u></p> <p>Email <u>alanr@rbslaw.com</u></p>
<p>Party's name <u>Fechko Excavating, Inc.</u></p> <p>Party's designation <u>Appellant</u></p> <p>Attorney's name <u>Alan G. Ross – Ross, Brittain &amp; Schonberg</u></p> <p>Attorney's registration number <u>0011478</u></p> <p>Address of counsel or party <u>6480 Rockside Woods Blvd. South Suite 350 Cleveland, Ohio 44131</u></p> <p>Phone number of counsel or party <u>216-447-1551</u></p> <p>Email <u>alanr@rbslaw.com</u></p>	<p>Party's name <u>The Barberton City Schools Board of Education</u></p> <p>Party's designation <u>Appellee</u></p> <p>Attorney's name <u>Tamzin O'Neil – McGowan, Markling &amp; Whalen</u></p> <p>Attorney's registration number <u>0071883</u></p> <p>Address of counsel or party <u>1894 N. Cleveland-Massillon Road Akron, Ohio 44333</u></p> <p>Phone number of counsel or party <u>330-670-0005</u></p> <p>Email <u>toneil@servingyourschools.com</u></p>
<p>Party's name <u>Dan Villers</u></p> <p>Party's designation <u>Appellant</u></p> <p>Attorney's name <u>Alan G. Ross – Ross, Brittain &amp; Schonberg</u></p> <p>Attorney's registration number <u>0011478</u></p> <p>Address of counsel or party <u>6480 Rockside Woods Blvd. South Suite 350 Cleveland, Ohio 44131</u></p> <p>Phone number of counsel or party <u>216-447-1551</u></p> <p>Email <u>alanr@rbslaw.com</u></p>	<p>Party's name <u>Ohio Schools Facilities Commission</u></p> <p>Party's designation <u>Appellee</u></p> <p>Attorney's name <u>Jon C. Walden</u></p> <p>Attorney's registration number <u>0013476</u></p> <p>Address of counsel or party <u>150 East Gay Street, Floor 18 Columbus, Ohio 43215</u></p> <p>Phone number of counsel or party <u>614-466-7447</u></p> <p>Email <u>jon.walden@ohioattorneygeneral.gov</u></p>

Party's name Mr. Excavator

Party's designation Appellee

Attorney's name James T. Dixon – Frantz Ward LLP

Attorney's registration number 0077457

Address of counsel or party 127 Public Square, 2500 Key  
Center Cleveland, Ohio 44114

Phone number of counsel or party 216-515-1660

Email jdixon@frantzward.com

**GENERAL INFORMATION**

Was a stay requested in the trial court?  No  
If a stay was requested, how did the trial court rule?  Granted  Denied  Pending  
Is oral argument anticipated?  Yes  
List case names and numbers of cases pending in this court that involve the same transaction or controversy involved in this appeal:

**CRIMINAL CASE**

Misdemeanor  Felony  
 Trial  Guilty/No contest plea

Charges \_\_\_\_\_  
Sentence \_\_\_\_\_

Type of Appeal:  Defendant's Appeal as of Right  State's Appeal as of Right (R.C. 2945.67(A))  
 Defendant's Appeal by Leave of Court  State's Appeal by Leave of Court

Is this an appeal of postconviction relief pursuant to R.C. 2953.21?  Yes  No  
What was the original charge and sentence? \_\_\_\_\_  
Was a hearing held in the trial court?  Yes  No  
Is there a direct appeal from the conviction pending?  Yes  No  
If there is an appeal pending, what is the case name and number? \_\_\_\_\_

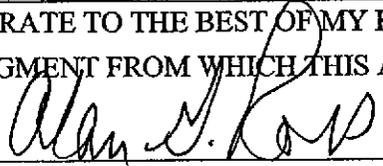
Is this an appeal for review of sentencing pursuant to R.C. 2953.08?  Yes  No  
Was counsel appointed for trial?  Yes  No  
Was counsel appointed for appeal?  Yes  No

**CIVIL CASE**

Type of action in trial court Verified Complaint for Injunctive, Declaratory and Other Relief

Would a prehearing conference or mediation assist in the resolution of this matter?  No  
Must this case be expedited as being one of the following types of cases?  Yes  No  
 App.R. 11.2(B) or (C) appeals (abortion without parental consent, adoption, and parental rights)  
 App.R. 11.2(D) appeals (dependent, abused, neglected, unruly, or delinquent child appeals)  
 Appeal under determination of local fiscal emergency brought by municipal corporation under R.C. 118.04(C)  
 Election contests as provided in R.C. 3515.08

I CERTIFY THAT THE ABOVE INFORMATION IS ACCURATE TO THE BEST OF MY KNOWLEDGE AND THAT I HAVE ATTACHED A COPY OF THE FINAL JUDGMENT FROM WHICH THIS APPEAL IS TAKEN.

  
\_\_\_\_\_  
Signature of Counsel (or party if not represented by counsel)

DANIEL M. HERRIGAN  
 2009 JUL 31 PM 2:36  
 SUMMIT COUNTY  
 CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
 COUNTY OF SUMMIT

STATE EX. REL., NORTHERN OHIO	)	CASE NO. CV 2009 04 2636
CHAPTER OF ASSOCIATED BUILDERS	)	
& CONTRACTORS, INC., et al,	)	
Plaintiffs,	)	JUDGE CALLAHAN
	)	MAGISTRATE SHOEMAKER
-vs-	)	
	)	
BARBERTON CITY SCHOOL BOARD OF	)	<u>JUDGMENT ENTRY</u>
EDUCATION, et al,	)	(FINAL AND APPEALABLE)
Defendant	)	

- - -

This matter comes on before the Court upon Motions to Dismiss pursuant to Civil Rule 12(B) filed by Defendants, the Barberton City School Board of Education (Board), the Defendant, Mr. Excavator and the Defendant, the Ohio School Facilities Commission, (OSFC). The Plaintiffs, Northern Ohio Chapter of the Association of Builders & Contractors, Inc., (ABC), FECHKO Excavating (FECHKO), Dan Villers, (Villers), Jason Antill, (Antill) filed replies to the same.

The Court finds this is in reference to the Magistrate. The Court however, will proceed to consider these Motions and rule on the same in the interest of judicial efficiency, judicial economy and to assist all the parties to a speedy and just resolution of the issues in this case.

Briefly put, the focus of this lawsuit centers upon the Plaintiffs' April 24, 2009 Amended Complaint whereby it seeks to enjoin the Board and OSFC from allowing the excavating contractor, Mr. Excavator, from proceeding or otherwise going forward with its

portion of the new Barberton Middle School project. Plaintiffs' five-count complaint asserts as a general proposition that the Board's inclusion of what's known as the Prevailing Wage Law as otherwise established by Ohio Revised Code 4115 within the project's bid specifications provided to prospective bidders, such as FECHKO and Mr. Excavating, was illegal and also renders the ultimate contract which was awarded to Mr. Excavator illegal, or in the alternative constitutes an abuse of discretion by the Board as such contract will result in misappropriation and misuse of public monies. The Plaintiffs also assert within the body of the amended complaint that that prevailing wage requirement within the bid specifications, and as established by OSFC, which is a partner in this school project, is vague and ambiguous.

It is further found by the Court in reviewing the documents in regard to these Motions and response thereto that it is beyond dispute or argument that the Board and OSFC can best be described as a co-venturers in this new school construction project inasmuch as approximately 40% of the cost of such project is derived from a Levy passed in 2008 by Barberton taxpayers, and the other approximate 60% being funded, or otherwise supplied, by the OSFC. OSFC is a statutorily-created governmental agency of the State of Ohio created by the legislature with the statutory purpose to assist in funding school construction projects across the State of Ohio.

Likewise, there can be found no dispute that on or about March 3, 2009 the Board published by public advertisement notice that it would be accepting sealed bids with reference here to the specific excavating work, and that such notice unambiguously stated within the body of the information presented to prospective bidders that, "prevailing wage rates apply: bidders shall comply with Chapter 4115 of the Ohio Revised Code." As such, all prospective bidders who sought to obtain the excavating work, such as Mr. Excavator and FECHKO, were required when constructing the monetary amounts as a bid for the excavation portion of the work, to

incorporate prevailing wage calculations within their bid. In fact, this is exactly what both parties did, that is, Mr. Excavator and FECHKO, inasmuch presented their bids to the Board for review on March 25, 2009, included within the body of their bids the necessary monetary calculations taking into consideration the labor costs for the excavation portion of the project as otherwise required by the RC 4115.04 (A). When the bids were opened and presented to the Board for review, such review taking place on or about April 1, 2009 at a special session, the Board awarded the contract for the excavation site work to the Defendant, Mr. Excavator.

A further review of these matters establishes that at no point can it be disputed that any of the bidders for the excavation portion of the project, which includes Mr. Excavator and FECHKO, ever offered any objections to the bid language or otherwise offered any complaint or objections to the bidding language requiring them to incorporate the prevailing wage law prior to submission of their respective bids. Additionally, there can be found no dispute by any of the parties in this matter that when OSFC is a partner in such school construction projects, and pursuant to Ohio Revised Code 3318.10 that the School Board was obligated because of this relationship to accept the "lowest, responsible bids." Thus, the criteria for acceptance is the lowest monetary amount, and coupled with that, the prospective bidder has to be responsible.

The Plaintiffs in their claim in this lawsuit have not argued, or otherwise asserted, that Mr. Excavator's bid was not the lowest, nor that it was not a responsible bidder. Further, there has been no argument or showing by the Plaintiffs in their complaint and amended complaint that the procedures in regard to the bidding matters, to include the advertisement, the acceptance of such bid, the opening of such bid, the calling of the meeting to evaluate such bid, and the awarding of such bid to Mr. Excavator, were tainted by fraud, corruption or favoritism or any other blatant legal error on the face of such procedures. Plaintiffs have narrowed their

objection to the process upon the sole argument that the Board and OSFC erred when they required, within the body of the bid specifications, that all bidders must submit bids including wage calculations based on the prevailing wage law, as it was illegal to do, and that such requirement, should not have been used within the bid submitted by interested parties and any bid submitted that included the prevailing wage cannot be accepted. However, if it was in violation of the law, as FECHKO now argues, then FECHKO willfully ignored that problem and knowingly submitted its bid in violation of the law which included the prevailing wage conditions.

The Court finds that it was noteworthy that FECHKO, when it submitted its bid, did not object in any form to the Defendant's use of the prevailing wage law in the bid specification, nor did FECHKO offer any caveat or other contingency that if its bid was accepted, it would then be able to decide not to pay its workers under the prevailing wage law concept as set out by the aforementioned Revised Code and as it had committed to do when it submitted its bid but could have the contract less any requirement to abide by the prevailing wage law. Nor, in its response to the Motions in this matter, FECHKO never addressed the fact as to what it would do if the Board would have awarded the contract for excavation to FECHKO when it had in fact incorporated within the body of its bid the calculations as related to the duty of complying with the prevailing wage law.

In brief procedural history, on May 28, 2009 the Board filed its Motion seeking to dismiss the Plaintiffs' Amended Complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Plaintiffs replied to the Board's Motion on June 5, 2009 in a joint response to OSFC's Motion to Dismiss which it filed on May 28, 2009 asserting Civ.R. 12(B)(6). Thereafter, on June 17, 2009 Mr.

Excavator filed its own Civ.R. 12(B)(1) and (B)(6) Motion to Dismiss the Amended Complaint. On June 5, 2009 Plaintiffs collectively filed their reply to the Motions of the Board and OSFC.

Though the claims for dismissal by the OSFC, Board and Mr. Excavator are substantially similar, the Court will address the claims of each separately within the body of this Judgment Entry.

**1. Ohio School Facilities Commission's Motion to Dismiss and Barberton City Schools Board of Education's Motion to Dismiss.**

The Motion to Dismiss filed by OSFC contains an assertion that itself and the Board had the lawful discretion to require the payment of prevailing wages in school contracts such as the instant matter. A review of RC 4115.04(B)(1) does in fact provide an exemption to the statutorily mandated rule that prevailing wages must be paid except in regard to school districts. Plaintiffs' argument in regard to this matter is that since RC 4115.04 exempts school boards from complying with the prevailing wage law, the bidding instructions were illegal, as was letting the contract as to Mr. Excavator. It was also the intent of the legislature that the law was to be construed as meaning that a school board, or a school board in partnership with OSFC, cannot at their discretion choose to require bidders to pay prevailing wages in contracts let out for bid. However, as argued by OSFC, being exempted from a statutory requirement, does not then by means of some matter of transmutation or as otherwise argued by the Plaintiffs that OSFC and the Board should now be prohibited from including the use of the prevailing wage law as a term within a contract or the bid specifications upon subcontract. Plaintiffs' arguments are just that, arguments, and are without any valid basis. Plaintiffs provide no credible statutory or case law to support such a claim.

Additionally, the argument offered by OSFC is that the Plaintiffs, Villers and Antill, as taxpayers seeking to enjoin further work on this project with specific reference to the excavation matters, should not be allowed under existing law to seek relief by the lawsuit filed in their name in the Amended Complaint. Again without reciting the foregoing analysis of the Court, the Court concludes that both Mr. Villers and Mr. Antill are situated no differently than any other landowner taxpayer within the City of Barberton who, as property owners, had their property burdened with the levy referred to above. In short, Mr. Antill and Mr. Villers are, along with everyone else living within such levy area who is a property owner and taxpayer, all subject to their tax dollars utilized as provided for in the levy to build this new school. In short, neither Mr. Villers nor Mr. Antill can demonstrate that they individually have any unique or special interest separate, apart, or different in character from all other landowners taxpayers in the district such that they may sustain is different in character from all harm to all of the general taxpayers in the area of the Barberton City School District affected by the levy. It is specifically concluded that any economic harm they claim to assert as taxpayers is no different than any of the other landowner taxpayers. Under Ohio law, it does not allow them separate standing to complain as they have done in this lawsuit. *Brinkman, Jr. v. Miami Univ.*, 12 Dist. No. CA2006-12-313, 2007-Ohio-4372; *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677, at p9.

Additionally, the Court concludes that the Plaintiff FECHKO has not asserted any claim for injury or any right which would entitle it under existing Ohio law to recover any of its monetary expenditures in its bidding activities as damages as an unsuccessful bidder as it was in this matter. It is found that FECHKO knowingly and intentionally, through its officers, agents or employees, prepared a bid to do the excavation work in this area, and included within such bid

was FECHKO's computation of the prevailing wage law for its laborers which would have to be paid per the prevailing wage rates, if it were awarded the contract. When FECHKO now says it was illegal to require such of bidders, that argument is disingenuous. Noteworthy is the fact that it never, at any point until such suit was filed, objected to such matter, as it well could have. Nor did it, within its bid, reserve any right to any later objection to the prevailing wage law requirement after the bid was let to a bidder. However, now that FECHKO is unhappy with the fact that it was not awarded the bid, it makes the sniveling complaint that the law was violated. All of these arguments are without merit.

This Court specifically concludes the monetary amount specified in the FECHKO bid incorporated the prevailing wage law. As it did as such, FECHKO has waived any right to now complain that Mr. Excavator was the successful bidder or that the process was legally flawed. With no evidence showing that either one was not a responsible bidder, the contract would have in all likelihood been awarded to FECHKO, had its monetary amount been the lesser. FECHKO would then have been required, pursuant to its bid, to comply with the prevailing wage law. It cannot, as it seeks to do in this matter, submit a bid including a requirement of the prevailing wage law within its calculations, stand silent to that matter, and wait and see if its bid was accepted and then, if not, act as an unsuccessful bidder, complaining about the matter. If FECHKO's logic is accepted, it would allow a bidder to knowingly violate the contract like the one at issue here; but if unsuccessful, to then turn around and say the process was fatally defective. If such a practice were to be adopted in Ohio, it would create chaos in public contract bidding and encourage dishonest bidding practices.

The Court further concludes that, if for argument sake, FECHKO's actions offering as it did its bid to the Board, knowing that it contained computation of the prevailing wage, and

which it now says was illegal, shows at the very least the Plaintiff FECHKO was acting illegally seeking to be awarded a contract obtained in contravention of the law it claims was inappropriate. Had FECHKO's bid been accepted, it would likely never have raised the prevailing wage issue. The alternative conclusion is that if FECHKO, knowing the illegal nature of the contract specifications, nevertheless proceeded to then bid, it has an ulterior motivation such that if it were successful, it would then claim it had been awarded the contract but would have then repudiated that portion relating to the prevailing wage as being illegal. In either case, FECHKO, in its perfidious action presented to the Board a bid that the Board had no reason to believe was other than honest, and that the bidder here, FECHKO, had no problem with the terms and would stand behind it if awarded the bid. In short, the Board justifiably relied on bids as presented to it, including FECHKO's, as it had no reason to know about what the Court concludes was the hidden agenda of FECHKO. As such, the Court concludes that FECHKO has waived any right to assert and any illegality in the bid specifications and it is to be estopped from now asserting same.

Further, the Court goes on to address the Board's claim that the Northern Ohio Chapter of Associated Builders & Contractors, Inc. ("ABC") lack of standing in this matter. It is first of all concluded that such Plaintiff has not been demonstrated to have one of its members named in this case as a party Plaintiff. Nowhere in Plaintiffs' Amended Complaint of April 24, 2009 is there any assertion that Plaintiff FECHKO is a member of Plaintiff ABC. And further, even if for argument sake, had FECHKO been shown to be a member, Plaintiff ABC cannot demonstrate that its member, for discussion purposes, FECHKO, suffered the type of injury which would otherwise allow Plaintiff ABC, as an independent body in trade association, to participate in a claim such as this. As such, the Court concludes that the Northern Ohio Chapter

of Associated Builders & Contractors, Inc.'s claims are without merit as to all designated Plaintiffs. Plaintiff ABC must successfully demonstrate that it meets the triport test for standing long recognized in Ohio. Plaintiff ABC absolutely fails in this regard. *Warth v. Seldin* (1975), 422 U.S. 490; *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44; *Ohio Academy of Nursing Homes, Inc. v. Barry* (1987), 37 Ohio App.3d 46; *Tiemann v Univ. of Cincinnati* (1998), 127 Ohio App.3d 312.

Additionally, the Court concludes that FECHKO has not demonstrated under any existing Ohio law that as an unsuccessful and disappointed bidder it is entitled to any monetary relief for any damages that it incurred as a result of preparing its bid and submitting the same.

As such, this Court concludes that the Barberton City School Board's assertion that the Plaintiffs' Amended Complaint be dismissed pursuant to 12(B)(1) and 12(B)(6) is well taken. Additionally, the Court finds that the claims against the OSFC fail and are dismissed pursuant to Civ.R.12(B)(6). As such, the Amended Complaint is dismissed against the Barberton City Schools and Ohio School Facility Commission at the cost to all the Plaintiffs.

## **2. Mr. Excavator's Motion to Dismiss.**

The Court next turns to the arguments asserted by Mr. Excavator, the demonstrated successful bidder on the contract in this matter. Mr. Excavator filed its Motion to Dismiss June 17, 2009. Plaintiffs' brief in opposition filed on June 26, 2009, with a reply to such filed by Mr. Excavator on July 7, 2009. Mr. Excavator likewise moves to dismiss this matter and in conjunction, thereto asserts a Motion based upon Civ.R. 12(B)(1) addressing jurisdiction and Civ.R. 12(B)(6) as upon a failure to state a claim.

Mr. Excavator makes an argument which is similar to arguments made by the other party Defendants in this matter. That is the two taxpayers, Mr. Antill and Mr. Villers, are simply

members of the overall landowner taxpayers category within the tax levying district of the City of Barberton, and their complaint fails to allege any special interest in a special fund, and any special damage they will suffer which is separate and distinct from all other taxpayers in the district, or that they have any independent right that is unique to them as opposed to all other taxpayers who live within the district and who are property owners that have their property subject to such levy. In short, neither has a special interest upon which they are placed in jeopardy unique to them and under Ohio law have no standing to assert their claim in this lawsuit. These two Plaintiffs provided no evidence that they are participants in any "special fund" or have any equitable ownership in any such fund. As such, these Plaintiffs' arguments are fully unpersuasive and the Court finds that both lack standing to pursue their claims.

*Brinkman, supra.*

Also correctly asserted by Mr. Excavator is the position that both FECHKO and ABC lack standing. FECHKO does not assert any known legal injury under Ohio law as a result of its being an unsuccessful bidder. FECHKO also fails to address the fact that it, along with Mr. Excavator, submitted its bid for consideration by the Board, incorporating therein the prevailing wage law calculations into the bid and otherwise complied with the requirements in the bidding instructions. Further, neither FECHKO nor ABC have been shown to have challenged the bidding procedure prior to FECHKO'S bid submission.

Also correctly presented by Mr. Excavator is that ABC is simply an association without any valid assertion to make such a claim. ABC could only assert such claim where it had a member and that such member would have standing in their own right to make a claim. Mr. Excavator correctly concludes that FECHKO does not have such standing. This Court

restates its conclusion that there is no evidence that FECHKO was ever a member of the trade association known as ABC at all times material.

Further Mr. Excavator also correctly asserts, under the existing law, that just because the Board is exempt from utilizing prevailing wages pursuant to RC 4115, in its contracts for construction work, that does not therefore stand for the proposition that it could not elect to choose to include such prevailing wage requirements within its bid requirements should it choose to do so. Simply put, the exclusion of the Board from compliance with the mandatory prevailing wage language, does not create the opposite effect, meaning it cannot use such. Arguments by the Plaintiffs in regard to this can only be accomplished by tortured and otherwise unreasonable logic. A plain reading of the statute and the case law precludes such application as the Plaintiffs seek in this matter. The Plaintiffs' interpretation of this Statute is clearly misplaced.

As such, the Court concludes that Mr. Excavator's motion, based upon Civ.R. 12(B)(1) and 12(B)(6) is to be granted in that not only do parties such as Mr. Antill and Mr. Villers, as well as ABC and FECHKO lack standing, but even if the standing argument were accepted, none of the Plaintiffs have demonstrated that under any existing law that they have any right to relief. It is concluded beyond doubt from Plaintiffs' Amended Complaint that none of the Plaintiffs can prove any set of entitlement by any of the Plaintiffs to recover.

Ohio law is well settled as to the standards Court must apply in reviewing Motions pursuant to 12(B)(1) and 12(B)(6). In general, Motions to Dismiss pursuant to Civ.R. 12(B)(6) are designed to test the sufficiency of the party's complaint. In any ruling upon such Civ.R. 12(B)(6) Motions, the evaluating tribunal is required to take all allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. The trial court can only dismiss a complaint made upon a Civ.R. 12(B)(6) motion after it has been shown plaintiff

can show no set of facts which would entitle it to relief. It is concluded beyond doubt from Plaintiffs' Amended Complaint that they can prove no set of facts entitling any of the Plaintiffs to recover.

In the instant matter, the Court has considered such guidance in evaluating the Motion for 12(B)(6) as filed by the parties in this matter. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242; *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192; *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, at p.9.

The Court has also considered the guidance trial courts must utilize when ruling upon a Civ.R. 12(B)(1) motion. The standard review for dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *State ex rel. Bush v Spurlock* (1980), 42 Ohio St.3d 80; *Avco Fin. Services, Inc. v. Hale* (1987), 36 Ohio App.3d 65.

Plaintiffs, collectively, have by this Judgment Entry all of their respective claims against all designated Defendants dismissed with prejudice at Plaintiffs' cost.

The Court further concludes that in light of the foregoing ruling, Plaintiffs' Motion to file a Second Amended Complaint is denied.

**NOTICE  
OF THE FILING OF THE  
RECORD**

COURT OF APPEALS  
DANIEL M. HERRIGAN

2009 AUG 11 AM 9:21

SUMMIT COUNTY  
CLERK OF COURTS

State of Ohio )  
Summit County )  
)

SUMMIT COUNTY COMMON PLEAS COURT  
CV2009-04-2636

NORTHERN OHIO CHAPTER OF ASSOCIATE  
BUILDERS & CONTRACTORS

vs.

BARBERTON CITY SCHOOLS BOARD OF ED.

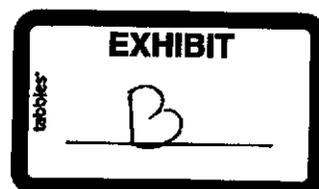
Pending in the Court of Appeals  
CA-24898

You are hereby notified that on August 11, 2009 , the RECORD was filed in the Ninth  
District Court of Appeals:

The following items were filed:

- Transcript of Docket and Journal Entries.
- Transcript of Proceedings.  Volumes
- Exhibits

DANIEL M. HERRIGAN, CLERK  
SUMMIT COUNTY CLERK OF COURTS  
By:   
Deputy Clerk



COURT OF APPEALS  
DANIEL M. HOFFIGAN

IN THE NINTH DISTRICT COURT OF APPEALS  
2009 AUG 10 PM 4:26 SUMMIT COUNTY, OHIO

SUMMIT COUNTY  
CLERK OF COURTS  
STATE EX REL, NORTHERN OHIO  
CHAPTER OF ASSOCIATED BUILDERS  
& CONTRACTORS, INC., et al,  
  
Plaintiffs-Appellants,  
  
v.  
  
BARBERTON CITY SCHOOLS BOARD  
OF EDUCATION, et al.,  
  
Defendants-Appellees.

C.A. No. CA-24898

Appeal from Summit County  
Court of Common Pleas  
Case No. CV-2009-04-2636

**JOINT RESPONSE OF DEFENDANTS/APPELLEES OHIO SCHOOL  
FACILITIES COMMISSION AND BARBERTON CITY SCHOOLS BOARD OF  
EDUCATION TO PLAINTIFFS/APPELLANTS' REQUEST FOR INJUNCTIVE  
RELIEF PENDING APPEAL**

Alan G. Ross (0011478)  
Nick A. Nykulak (0075961)  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd. S  
Suite 350  
Cleveland, OH 44131  
Telephone: 1.216.447.1551  
Facsimile: 1.216.447.1554  
E-Mail: alanr@rbslaw.com

*Attorneys for Plaintiffs-Appellants*

Tamzin Kelley O'Neil (0071883)  
Patrick S. Vrobel (0082832)  
McGOWN, MARKLING & WHALEN CO., L.P.A.  
Corporate Office  
1894 North Cleveland-Massillon Road  
Akron, Ohio 44333  
Telephone: 1.330.670.0005  
Facsimile: 1.330.670.0002  
E-Mail: toneil@servingyourschools.com  
pvrobel@servingyourschools.com  
*Attorneys for Defendants-Appellees  
Barberton City Schools Board of Education*

William C. Becker (0013476)  
Jon C. Walden (0063889)  
James E. Rook (0061671)  
Assistant Attorneys General  
Court of Claims Defense  
150 E. Gay Street  
18<sup>th</sup> Floor  
Columbus, Ohio 43215  
Tele: (614) 466-7447  
*Counsel for Defendant/Appellee Ohio School Facilities  
Commission*



## I. INTRODUCTION

Plaintiffs-Appellants Northern Ohio Chapter of Associated Builders & Contractors, Inc., Fechko Excavating, Inc., Dan Viller, and Jason Antill (collectively "Appellants") are not entitled to an injunction pending appeal from this Court for the following reasons:

- Appellants request for injunction inappropriately concerns issues not raised in the trial court;
- Appellants lack standing to enjoin the future bid awards for Barberton or "other school construction projects" across the state;
- Appellants cannot demonstrate a likelihood of success on the merits, as the public owners did not abuse their discretion when awarding the contract to the lowest responsible bidder;
- The subject matter for the litigation below is now *moot*.
- The grant of an injunction would cause Barberton and OSFC great harm where any potential harm to Appellants is purely speculative;
- The Appellants did not seek a stay in the first instance from the trial court pursuant to App. R 7(A).

This case began as an effort by Appellants to enjoin Barberton City Schools Board of Education's ("Board") and the Ohio School Facilities Commission's ("OSFC") lawful exercise of discretion to award a construction contract to the lowest responsible bidder for an early site work package for the construction of a new school in Barberton. In the operative complaint before the trial court, Appellants claimed that the Board and OSFC had no authority to require the payment of prevailing wage as a term for that contract. Finding that plaintiffs lacked standing and their claims were otherwise without merit, the trial court dismissed Appellants' complaint.

Appellants now seek an injunction pending appeal of that decision. But rather than ask this Court to address the subject matter of the case below, Appellants seek to turn this

appellate proceeding into an inappropriate original action. Appellants' motion, casually suggesting it is merely an effort to keep the status quo, steps well outside the trial court record to request much more than that. Indeed, Appellants move that the Court enjoin OSFC, the Board and a plethora of others from proceeding with completely new matters including: (a) the August 11, 2009 bid opening and award for approximately \$22 million of the estimated \$30 million total for construction of the New Barberton Middle School Project ("Project") and (b) "any other school construction project" regardless of location that requires bidders to pay prevailing wages as a contractual term. Appellants' request is beyond the scope of the litigation at the trial court below and therefore inappropriate.

Not only are Appellants barred from seeking review of issues not raised in the trial court but even if Appellants were not precluded from an original appellate action, Appellants are clearly without standing to seek the relief requested. And even if standing were not an issue, Appellants still fail to demonstrate by clear and convincing evidence that an injunction should issue. In short, this Court should deny Appellants' motion and dismiss its appeal.

## II. STATEMENT OF THE CASE

As set forth above, Appellants' motion is effectively an original appellate action seeking to enjoin potential construction contracts for the New Barberton Middle School, as well as other potential contracts for unnamed school construction projects throughout the state.

By contrast, the matter at the trial court concerned only the Board and OSFC's award for the early site work bid package to Mr. Excavator, as the lowest responsible bidder. With respect to the trial court action, the facts are relatively simple.

In July 2007, OSFC issued a resolution that acknowledged local school boards discretion to determine whether to require the payment of prevailing wages by contract.

Here, the Board exercised that discretion and chose to require contractors to pay prevailing wages on the Project, including the early site work package. Thereafter, the bid advertisement and specifications notified the bidders that the early site package required the payment of prevailing wages by contract.

All bidders for the early site work package, including Appellant Fechko, submitted bids based on the prevailing wage rate information included in the bid specifications. The Board awarded the contract to Mr. Excavator as the lowest responsible bid<sup>1</sup> and the OSFC approved that contract. Work on the early site work is now complete and Mr. Excavator is off the project. Affidavit of Gavin Smith attached hereto as Exhibit A.

Shortly after bids were received, Appellants filed their injunction action, including post bid complaints from Fechko, that the bid specifications inappropriately included a prevailing wage requirement. The trial court denied Appellants' motion for TRO. Thereafter, OSFC, the Board, and Mr. Excavator filed motions to dismiss Appellants' verified amended complaint. Subsequent to the trial court advising the parties that a decision was imminent, Appellants moved to file a second amended complaint, to which all defendants objected. In its July 31, 2009 Judgment Entry, the trial court sustained Appellees' motions to dismiss and also denied Appellants' motion to amend their second complaint. As such, the operative complaint and relevant record is what was contained in the Verified Amended Complaint ("VAC"), and the referenced Second Amended Complaint has no relevance to this motion.<sup>2</sup>

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<sup>1</sup> No bids were received that were lower than the Mr. Excavator's bid. Appellants speculate that had the bid specifications been different, Fechko would have submitted a lower bid. But there is no factual basis for Appellants' assertion. Moreover, Appellants ignore the fact that all bids, not just Fechko's, might have been lower had the bid specifications contained different requirements.

<sup>2</sup> After the trial court's entering of judgment on July 31, 2009, Appellants attempted to file transcripts obtained during limited discovery allowed by the Court before it stayed discovery. Appellants' filing post-judgment is a nullity and is not properly in the record before the Court below.

### **III. STANDARD OF REVIEW FOR INJUNCTIVE RELIEF**

An appellate court will issue injunctive relief will only when the plaintiff has carried the burden of demonstrating the existence of the following four well-established prerequisites:

1. Whether the petitioner made a strong showing that he is likely to prevail on the merits;
2. Whether the petitioner has shown that in the absence of preliminary injunctive relief petitioner, or those on whose behalf he is acting, will suffer irreparable harm;
3. Whether issuance of the preliminary injunction will substantially harm other parties; and
4. That the injunction is in the public interest.

*Today's Headlines, Inc. v Abel* (1984), 473 N.E.2d 1224, citing *United States v School District*, 577 F.2d 1339, 1351 (6th Cir.1978). This standard is particularly stringent "in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Morarch Constr. Co. v Ohio School Facilities Comm.*, 2002-Ohio-6281, at ¶35, citing *Cleveland Constr., Inc. v Ohio Dept. of Adm Serv* (1997), 121 Ohio App.3d 372, 383, 700 N.E.2d 54. Appellants cannot meet their burden with respect to any one of these requirements, let alone all of them.

### **IV. LAW AND ARGUMENT**

#### **A. Appellants Inappropriate Original Action is Not Due Relief**

First and foremost, this Court should deny Appellants' motion for an injunction pending appeal because they inappropriately ask that this Court consider issues not before

the trial court.<sup>3</sup> Issues not raised in the trial court cannot be raised for the first time on appeal. *Fifth Third Bank v Ducru Ltd. Partnership*, 157 Ohio App.3d 463, 468 citing *Holman v Grandview Hosp. & Med. Ctr.* (1987), 37 Ohio App.3d 151, 524 N.E.2d 903, citing *Republic Steel Corp. v Cuyahoga Cty. Bd. of Revision* (1963), 175 Ohio St. 179, 23 O.O.2d 462, 192 N.E.2d 47. Appellants' motion seeks more than the mere maintenance of the status quo. Rather, Appellants ask this court to enjoin potential contracts not addressed in the trial court below.

Likewise, Appellants' motion contains inappropriate references to matters outside the record considered by the trial court, including references to matters Appellants noticed as filing after the trial court entered final judgment and other documents that were never considered by the trial court. In addition, Appellants' motion includes reference to a second amended complaint, but such complaint was never properly before the trial court and is

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<sup>3</sup> To the extent this Court does consider the attempt by Appellants to blur what should be at issue on appeal, the Court should understand that Appellants cite and rely heavily on the report generated by the Legislative Service Commission ("LSC") in arguing their case. Exhibit A to Plaintiffs Motion to Stay, S.B. 102 Report ("Report"). (In the trial court, the Report was unauthenticated.) The LSC criticized its own methodology and raised doubts about any conclusions from the results presented. Report at pp. 17-22. Most importantly for this case, the LSC said:

Not all districts will experience savings. A district may have chosen to continue to require the payment of prevailing wages.

*Id.* at p. 21. According to plaintiffs, this could never happen.

The Report from the LSC is facially unreliable to prove any savings from the R.C. 4115.04(B)(3) exemption. The Report addressed the savings referred to by Appellants and said, "While it may be reasonable to conclude that these savings are at least partially attributable to the prevailing wage exemption, the extent to which this is the case cannot confidently be stated." Report at p. 5. In fact the conclusion of the Report states, "Evidence was not available as to the portion of the estimated savings, if any, that could be directly and conclusively attributed to the prevailing wage exemption." Report at p. 49. Thus, the Report is facially deficient as proof of savings from not paying prevailing wages. This is not even a preponderance of proof and must fail as clear and convincing evidence.

inappropriate for first consideration on this matter. The inclusion and reliance on matter outside the record is inappropriate. See *Fifth Third Bank, supra*.

**B. Appellants are Without Standing to Pursue the Claims Set Forth in the Motion for Injunction Pending Appeal**

Even if it were appropriate for Appellants to seek an original action injunction, this Court should still deny Appellants' motion due to lack of standing. To have standing, a party must demonstrate an immediate pecuniary interest in the subject matter. A future, contingent or speculative interest is not enough. *Tiemann v Univ of Cincinnati* (1999), 127 Ohio App. 3d 312, 325, 712 N.E.2d 1258. As Appellants acknowledge at page 18 of their memorandum in support, for a contractor to have standing to challenge the award of a contract on a public construction project in Ohio, a contractor must have submitted a bid for the contract at issue. *State ex rel. Associated Builders and Contractors Cent. Ohio Chapter v Jefferson County Bd. of Commrs* (Ohio Ct. App., Jefferson County 1995), 106 Ohio App. 3d 176. Likewise, since ABC merely maintains associational standing, to have standing on behalf of its members, the association, among other things, must establish that its members have suffered actual injury. *Ohio Contractors Assn. v Bidding* (1994), 71 Ohio St. 3d 318, 643 N.E.2d 1088, rehearing denied 71 Ohio St. 3d 1459, 644 N.E.2d 1031. Such actual injury cannot be established unless one of its members has been denied the award of a contract upon which the member submitted a bid. *Id.*

Here, Appellants merely suggest that Fechko or other ABC members intend to bid on the upcoming second phase of the New Barberton Middle School Project or perhaps "any other school project." But that suggestion does not provide Fechko or ABC standing necessary to proceed with the injunction pending appeal. Fechko has not submitted a bid for the New Barberton Middle School bid packages due on August 11, 2009 and that failure is fatal to any potential ability to challenge that bid opening. And since ABC merely asserts

associational standing tied to Fechko, Fechko's lack of standing is likewise fatal to ABC.

*Tiennam, supra.*

Messrs. Antill and Villers, purported taxpayers, fare no better on the standing issue. Ohio law is clear that a "taxpayer lacks capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy." *Racing Guild of Ohio Local 304 v Ohio State Racing Com* (1986), 28 Ohio St. 3d 317, 321; see also, *Brown Columbus Schs. Bd. of Educ.*, 2009-Ohio-3230, at ¶13 (Appellant status as taxpayers of the school district insufficient to confer standing).

As noted by the trial court, Messrs. Antill and Villers are situated no differently than any other taxpayer in the Barberton City School District and cannot demonstrate a special interest that would vest them with a right to sue. *Brown, supra.* Villers and Antill merely allege that the inclusion of the prevailing wage requirement in the contract will result in economic harm to the Barberton taxpayers as a whole. Verified Amended Complaint, P 440. The failure to allege an injury "distinct from the general injury experienced by everyone when the government spends taxpayer money unlawfully" is fatal to their taxpayer standing claim. See *Brinkman v Miami Univ* (12<sup>th</sup> Dist. 2007), 2007 Ohio 4372, *quoting State, exl re. Masterson, a Taxpayer v Ohio State Racing Commission* (1955) 162 Ohio St.2d 366. Likewise, Villers and Antill clearly cannot suggest that they have a special interest in the funds for "any other school construction" project or with respect to the funding coming from OSFC for the second phase of the New Barberton Middle School Project.

**C. Appellants Cannot Prevail on the Merits because OSFC and the Board Exercised Lawful Discretion in Requiring the Payment of Prevailing Wages By Contract**

In order to succeed on the merits, Appellants must demonstrate that OSFC and the Board abused their discretion in requiring the payment of prevailing wage as a contract specification requirement. To do so, Appellants must demonstrate by clear and convincing evidence that they have a right to the relief they seek. *Southern Ohio Bank v Southern Ohio Savings Assn* (Hamilton 1976), 51 Ohio App.2d 67, 366 NE.2d 296. Because government actions are presumed to be lawful, this necessarily means the bidder must show that the government body committed an “abuse of discretion.” *State ex rel. Shafer v Ohio Turnpike Comm'n* (1953), 159 Ohio St. 581. An “abuse of discretion” involves more than an error of law or judgment; it implies an unreasonable, arbitrary, or unconscionable attitude. *Dayton ex rel. Scandrick v McGee* (1981), 67 Ohio St. 2d 356.

In this context, the word “unreasonable” has been held to mean “irrational.” *Id.* Appellants cannot make this showing.

The lynchpin of Appellants claims is their assertion that because R.C. 4115.04(B)(3) provides an exemption to the statutorily mandated prevailing wage for school districts’ construction projects, OSFC and the Board are somehow prohibited from requiring the payment of prevailing wage by contract. Such contention lacks support from either the plain reading of the statute or any legal authority. R.C. 4115.04(B)(3) provides, in relevant part, that R.C. Sections 4115.03 to 4115.16, which govern prevailing wage, do not apply to:

Public improvements undertaken by, or under contract for, the board of education of any school district or the governing board of any educational center.

By its plain language, R.C. 4115.04(B)(3) (the “(B)(3) language”) merely creates an exemption for school boards from the statutorily mandated prevailing wage rate

requirements generally found on construction projects for public improvements paid for in part or in whole by public funds. See R.C. 4115.10(A). Indeed, both OSFC and the Board agree that school district construction projects are not statutorily mandated to require payment of prevailing wages pursuant to R.C. 4115.03 to 4115.16. They also agree that the Department of Commerce has no statutory jurisdiction or authority to enforce or apply what is merely a contractual requirement. But being exempted from a statutory mandate does not translate into OSFC or the Board being prohibited from requiring the payment of prevailing wage as a term of contract. Because the Board and OSFC are not prohibited from requiring the successful bidder to pay prevailing wage as term of its contract, the Barberton Board and OSFC retain discretion whether to include a contractual term requiring the payment of prevailing wage.

Using that discretion, R.C. 3313.46 then merely requires school boards to select the lowest responsible bidder conforming to the plans and specifications put out to bid. See R.C. 3313.46(A)(1)-(6). Appellants, however, distort the lowest responsible bidder requirement to remove a school board's discretion to determine the labor and material parameters for the bid specifications. Instead, Appellants suggest a mandate, which if followed, would convert the lowest responsible bidder requirement into one requiring that public owners must always choose the lowest cost building option.

Indeed, Appellants' proposition means that school boards would have no discretion to select any project requirement where a lower cost option existed. Taken to its illogical conclusion, plaintiffs' proposition would require school boards to educate children in windowless warehouses because walls without windows cost less than walls with windows. So, according to plaintiffs, requiring windows – something for which school boards also have no specific statutory authority to provide – would be prohibited as it results in a misuse

of taxpayer funds. Appellants' proposition would produce absurd results and is not what the law demands.

Instead, under R.C. 3313.46, a school board's only legal requirement is to award contracts to the lowest responsible bidder for whatever system it chooses, even if there is a lower cost alternative. See, e.g., *L&M Properties, Inc. v Burke* (1949), 152 Ohio St. 28 (city may accept bid for concrete runway even though asphalt bids were lower).

Analyzing the facts from the trial court below, it is clear that OSFC and the Board lawfully exercised their discretion and awarded the contract for the early site work package to the lowest responsible bidder:<sup>4</sup>

- (1) The bid invitation and Project specifications included the prevailing wage contractual requirement;
- (2) All bidders, including Fechko, knew of the prevailing wage requirement;
- (3) All bidders, including Fechko, who submitted bids used the prevailing wage information included within the Project's specifications to prepare their bids; and
- (4) The Board awarded the contract to Mr. Excavator as the lowest responsible bid submitted under the announced bid criteria.

Because OSFC and the Board acted lawfully in requiring payment of prevailing wages as a contractual term, it is not within the province of Appellants or this Court to substitute their judgment for the judgment of OSFC and the Board, which are invested by law with the duty and responsibility of determining the terms of the Project. See *Hancock Cty. Bd. of Edn.*, 105 Ohio St. at 245. Because Appellants are unable demonstrate by clear and convincing

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<sup>4</sup> It is undisputed that Appellant Fechko received the bid specifications for the Project. The legal bid advertisement issued by the Board for the Project stated that bidders would be required to comply with R.C. Chapter 4115 and pay prevailing wage on the Project. Fechko, as well as all the other contractors that submitted bids for the Project, used the wage rates supplied by the Board to calculate their labor costs for the Project. *Amended Complaint* at ¶¶6, 15, 20-23, 43. It is clear, then, that any argument by Appellants that the bid specifications subjected bidders to vague and unannounced criteria is without merit. See *Dayton ex rel. Semtrick v McGee* (1981), 67 Ohio St. 2d 356.

evidence that OSFC and the Board abused their discretion in contractually requiring the payment of prevailing wages on the Project, Appellants motion for injunction pending appeal must fail.

**D. Appellant's Claims Addressed In the Trial Court Are Moot**

An injunction should not be granted unless a clear case of irreparable injury can be made. *Goodall v Crofton* (1877), 33 Ohio St. 271. Appellants are simply too late to argue that they will suffer an irreparable injury. The role of Ohio courts is to decide actual controversies; the courts will not give opinions upon moot questions. See, *National Electrical Contractors Assn. v City of Painesville* 1973), 36 Ohio St. 2d 60.

As noted above, the early site work is complete. Thus there is no basis to proceed on this appeal. Appellants would have this Court halt work on the Project for an undetermined period and then have the Barberton Board re-advertise and rebid for the same work. This is hardly preservation the status quo. This would result in the new middle school being built for a much higher price and a delayed opening of school.

Appellants make an effort to persuade the Court that its action is not moot and that it wants only to "preserve the status quo" pending appeal. A disruption of ongoing construction delaying this project and costing the Barberton Board and OSFC significantly more money is not preserving the "status quo".

**E. Appellants Are Not Entitled to Injunctive Relief Because it Would Cause Great Harm to the Board, OSFC, and the Public Interest**

When evaluating the appropriateness of injunctive relief for a public construction project, an injunction should be granted with great caution, "especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Cemented, Inc. v City of Fairlawn* (2006), 109 Ohio St. 3d 475, 477, citing *Danis Clarkeco Landfill Co. v*

*Clark Cty. Solid Waste Mgt. Dist.* (1995), 73 Ohio St. 3d 590. In balancing the potential harm to Appellants against the potential harm to OSFC, the Barberton Board, and the public, it is clear that the greater potential harm results to the public owners. If an injunction issues, OSFC and the Board will be forced to suspend the bid opening for approximately \$22 million dollars of construction in the next phase of this part of Barberton's school construction program.

These bids were planned to follow sequentially to the completion of the early site work package that is the only true subject of this litigation. Appellants ignore the consequences of delaying the Project. Mr. Excavator has completed its work on the site and responsibility for the site needs to be handed off to a new contractor to manage storm water runoff. Smith Affidavit. Failing to do so will allow for deteriorating site conditions. *Id.* In preparation for continuing the Project, part of the site was compacted and a delay means that compaction may be lost. *Id.* The building pad and parking lot will begin to deteriorate if there is a delay. *Id.* This early site work cost approximately \$1.184 million (including change orders) and the length of delay would affect how much of that work would have to be redone. *Id.*

In addition, the current bid schedule allows for work to begin before the start of inclement weather. *Id.* Any delay in the front end of the project is compounded by the additional costs of having to do early construction work in winter work conditions. *Id.* Likewise, to maintain the project schedule to have school buildings opened at the appropriate time of the school year would likely require acceleration of contracts and the payment of additional costs. *Id.* While such costs are not easily quantifiable, one method of doing so is to examine the project from the daily liquidated damages incurring for each day

of delay. In that case, each day of delay costs approximately \$9,000.00. *Id.* Every day of delay represents real costs to the owners and the public.

And the costs above represent only one project. Since Appellants have requested an injunction of all school construction projects regardless of location that incorporate a prevailing wage component, any lost days are compoundable by the number of projects enjoined.

By contrast, Appellants proffered harm is minimal. Appellants suggest that they will suffer lost business opportunities if the bids are opened, but since no bid results are known and it is unknown whether Appellants are bidding on the remaining New Barberton Middle School Project, any suggestion of potential losses to Appellants is merely speculation.

The public interest is best served in allowing this phase and all other projects to move forward without injunction.

Should this Court deem an injunction appropriate, it should not only consider the balancing of harm, but should set a bond amount commensurate with the harm caused by the delay of enjoining this project. On the first page of Appellants' Motion to Stay, Appellants say they want to stop a \$30,000,000.00 project.<sup>5</sup> For a contractor and an association of contractors to claim that no bond or a *de minimus* bond is somehow appropriate because "there is no likelihood of harm or showing of probable harm" to the owners from a delay caused by Appellants injunction is disingenuous. There is no way to accurately predict the exact impact of delay, but to say there would be little or no impact strains credulity on a \$30,000,000.00 building project. Because of such uncertainty, the

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<sup>5</sup> The estimate for the early site work was approximately \$2.6 million and was performed for approximately \$1.184 million. Smith Affidavit. The Notice to Bidders for the remaining work contained contract estimates for approximately \$22 million. *Id.* This does not include soft costs, the technology package or furniture, fixtures and equipment. *Id.*

contracts used by OSFC require the payment of liquidated damages on a per diem basis, which in this case would be approximately \$9,000.00.<sup>6</sup>

Finally, if the Project is pushed back, then the next project, a renovation and addition to the existing middle school will get delayed because it is being occupied by the students for this new middle school. *Id* The point of building and renovating these schools is to provide students with an up to date learning environment. That opportunity is delayed for these students and for the future students wanting to take advantage of the to-be-renovated existing school.

#### E. Conclusion

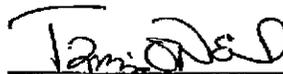
Simply put, Appellants are not entitled to an injunction. Appellants' motion for injunction pending appeal inappropriately requests this Court consider an original appellate action based on claims and issues outside the record below. Likewise, Appellants lack standing to pursue not only the claims presented to the trial court, but the newly requested injunctive relief. Moreover, even if those issues did not bar Appellants from bringing the claims, Appellants have no likelihood of success on the merits because OSFC and the Barberton Board exercised lawful discretion when including a contractual requirement for the payment of prevailing wage on the early site work package for the New Barberton Middle School Construction Project. And finally, Appellants produce only speculative harm to it, whereas issuing an injunction against OSFC and Barberton equate to real taxpayer costs and untimely delays.

For all these reasons, Appellants motion for injunction pending appeal should be denied.

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<sup>6</sup> To the extent this Court considers granting any injunctive relief, a bond based upon the per diem amount of \$9,000.00 would be between \$540,000.00 and \$810,000.00 for a 60 to 90 day delay.

Respectfully submitted,



Tamzin Kelley O'Neil (0071883)

Patrick S. Vrobel (0082832)

McGOWN, MARKLING & WHALEN CO.,  
L.P.A.

1894 North Cleveland-Massillon Road

Akron, Ohio 44333

Telephone: 1.330.670.0005

Facsimile: 1.330.670.0002

E-Mail: [toneil@servinyourschools.com](mailto:toneil@servinyourschools.com)

[pvrobel@servinyourschools.com](mailto:pvrobel@servinyourschools.com)

*Attorneys for Defendant/Appellee Barberton City Schools  
Board of Education*

RICHARD CORDRAY

Ohio Attorney General

Per phone consent 8/10/2009

WILLIAM C. BECKER (0013476)

JON C. WALDEN (0063889)

JAMES E. ROOK (0061671)

Assistant Attorneys General

Court of Claims Defense

150 East Gay Street, 18th Floor

Columbus, OH 43215-3130

(614) 466-7447

*Counsel for Defendant/Appellee Ohio School Facilities  
Commission*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Response of Defendants Ohio School Facilities Commission and Barberton City Schools Board of Education to Plaintiffs/Appellants Request for Injunctive Relief Pending Appeal was sent by e-mail and regular mail, postage prepaid, this 10 day of August, 2009 to:

Alan G. Ross  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd., South, Suite 350  
Cleveland, Ohio 44131  
*Counsel for Plaintiffs*

James T. Dixon  
Frantz Ward LLP  
2500 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
*Counsel for Defendant Mr. Excavator*

  
\_\_\_\_\_  
Tamzin Kelley O'Neil (0071883)

**AFFIDAVIT OF GAVIN J. SMITH**

STATE OF OHIO               :  
  :  
  :  
COUNTY OF SUMMIT        :

I, Gavin J. Smith, first being sworn, deposes and states that:

1. The following statements are made based on my personal knowledge.
2. I am employed by RICHARD L. BOWEN + ASSOCIATES INC.
3. RICHARD L. BOWEN + ASSOCIATES INC. is the construction manager for the Ohio School Facilities Commission and Barberton City Schools Board of Education (the "School District") for the New Barberton Middle School construction project (the "Project").
4. I am currently the Project Manger for the Project.
5. On behalf of the construction manager, I have been involved with the bidding and award of construction contracts for the Project.
6. The bid opening scheduled for August 11, 2009 is for approximately \$22 million dollars of construction in the next phase of this part of Barberton's school construction program.
7. The estimate for the early site work was approximately \$2.6 million and was performed for approximately \$1.184 million, including change orders.
8. Work on the early site work is now complete and Mr. Excavator, the winning bidder for that work, is off the project.
9. The Notice to Bidders for the remaining work contained contract estimates for approximately \$22 million. This does not include soft costs, the technology package or furniture, fixtures and equipment

10. These bids were planned to follow sequentially to the completion of the early site work package that is the only true subject of this litigation.
11. Because Mr. Excavator has completed its work on the site, responsibility for the site needs to be handed off to a new contractor to manage storm water runoff. Failing to do so will allow for deteriorating site conditions.
12. In preparation for continuing the Project, part of the site was compacted and a delay means that compaction may be lost.
13. The building pad and parking lot will begin to deteriorate if there is a delay.
14. This early site work cost approximately \$1.184 million (including change orders) and the length of delay would affect how much of that work would have to be redone.
15. The current bid schedule allows for work to begin before the start of inclement weather. Any delay in the front end of the project is compounded by the additional costs of having to do early construction work in winter work conditions.
16. If there is a delay at the front end of the project, then to maintain the project schedule to have school buildings opened at the appropriate time of the school year would likely require acceleration of contracts and the payment of additional costs.
17. The form contract for this project will be used on the contracts that are scheduled to be opened August 11, 2009. Section 3.3 of that form contract provides for liquidated damages to be paid on a daily basis in an amount based on the size of the contract. The table from Section 3.3 of the form contract is as follows:

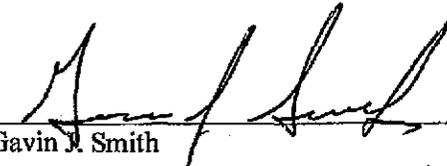
<u>Contract Amount</u>	<u>Dollars Per Day</u>
\$1 to \$50,000	\$150
More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000
More than \$2,000,000 to \$5,000,000	\$2,000
More than \$5,000,000 to \$10,000,000	\$2,500
More than \$10,000,000	\$3,000

18. The Notice to Bidders identifies the bid packages and contains an estimate of the size of the contract. It contains the following information:

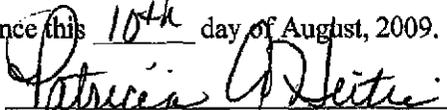
Sealed bids will be received for:	Contract Cost Estimated*
Bid Package 2 – General Trades	\$ 13,362,851
Bid Package 3 – Fire Protection	\$ 402,328
Bid Package 4 – Plumbing	\$ 1,219,142
Bid Package 5 – HVAC	\$ 3,304,316
Bid Package 6 – Electrical	\$ 2,930,868
Bid Package 7 – Instrumentation and Controls	\$ 450,000
TOTAL:	\$ 21,669,505

19. Applying the liquidated damages amount for the estimated contracts means that , each day of delay costs approximately \$9,000.00.
20. If the Project is pushed back, then the next project, a renovation and addition to the existing middle school will get delayed because it is being occupied by the students for this new middle school.

FURTHER, AFFIANT SAYETH NAUGHT.

  
 \_\_\_\_\_  
 Gavin M. Smith

Sworn to and subscribed in my presence this 10<sup>th</sup> day of August, 2009.

  
 \_\_\_\_\_  
 Notary Public

Expiration:

PATRICIA A. HEITIC  
 RESIDENT SUMMIT COUNTY  
 NOTARY PUBLIC, STATE OF OHIO  
 MY COMMISSION EXPIRES 3-2-2013

IN THE COURT OF APPEALS  
NINTH DISTRICT  
SUMMIT COUNTY, OHIO

COURT OF APPEALS  
DANIEL M. HERRIGAN

2009 AUG 19 AM 11:21

SUMMIT COUNTY  
CLERK OF COURTS

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

Plaintiffs-Appellants,

v.

BARBERTON CITY SCHOOLS BOARD  
OF EDUCATION, et al.,

Defendants-Appellees.

C.A. No. CA-24898

Appeal from Summit County  
Court of Common Pleas  
Case No. CV-2009-04-2636

**DEFENDANTS-APPELLEES BARBERTON CITY SCHOOLS BOARD OF  
EDUCATION, OHIO SCHOOL FACILITIES COMMISSION AND MR.EXCAVATOR'S  
MOTION TO DISMISS**

Pursuant to Rule 15 of the Ohio Rules of Appellate Procedure, Defendants-Appellees Barberton City Schools Board of Education ("Board"), the Ohio School Facilities Commission ("OSFC"), and Mr. Excavator (collectively, "Appellees"), by and through the undersigned counsel, hereby move the Court to dismiss the instant appeal on the ground of mootness. The basis for this motion is set forth below.

**I. INTRODUCTION**

This case arises from the filing of a complaint and motions for a temporary restraining order and preliminary injunction in the Summit County Court of Common Pleas. These filings sought to enjoin the Board and the OSFC's lawful discretion to award a construction contract for the early site work package for the New Barberton Middle School Project. In the complaint before the trial court, Plaintiffs-Appellants Northern Ohio Chapter of Associated Builders & Contractors, Inc., Fechko Excavating, Inc., Dan Villers, and Jason Antill (collectively,



“Appellants”) claimed that the Board and the OSFC had no authority to require the payment of prevailing wages as a term for that contract and challenged the validity of the contract ultimately entered into between the Board and Mr. Excavator for the early site work package.

On April 1, 2009, the Board awarded the early site work package to Mr. Excavator, the lowest responsible bidder determined through a statutory competitive bidding process. On April 3, 2009, Appellants filed a complaint seeking declaratory judgment and a preliminary and permanent injunction against the Board. The trial court denied Plaintiffs’ motion for a preliminary injunction. On July 31, 2009, the trial court issued a decision dismissing Appellants’ complaint finding that Appellants lacked standing and their claims were otherwise without merit.

Because there was no court order against the Board to enjoin construction, the Board, through its contract with Mr. Excavator, proceeded to complete the early site work package for the New Barberton Middle School. See *Affidavit of Gavin Smith*, attached as Exhibit A to the *Joint Response of Defendants/Appellees to Request for Injunctive Relief (“Joint Response”)*. The early site work package was completed in July 2009. *Id.* The total costs expended by the Board in completing the early site work package totaled \$1.184 million. *Id.* Thus, the instant appeal is moot and should be dismissed by this Court.

## II. LAW AND ARGUMENT

It is well-established “[t]hat an appellate court need not consider an issue, and will dismiss the appeal, when the court becomes aware of an event that has rendered the issue moot.” *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d, 2004-Ohio-5466, at ¶ 15 (citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21). “[T]he courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question.” *James A. Keller, Inc.*

v. *Flaherty* (10th Dist. 1991), 74 Ohio App.3d 788, 791. In *Miner*, the Supreme Court explained that mootness can be proved by extrinsic evidence. 82 Ohio St. at 238.

Indeed, it is a well-established practice in this and other Ohio appellate courts that a party may present an affidavit, such as the Affidavit of Gavin Smith presented in the *Joint Response*, in order to establish that an appeal is moot. See *Pinkney v. Southwick Invests., L.L.C.* (8th Dist. 2005), 2005-Ohio-4167, at ¶16 (reviewing an affidavit stating that construction had commenced when determining whether the mootness doctrine barred the appeal). See, also, *Nextel W. Corp. v. Franklin Cty. Bd. Of Zoning Appeals*, 10<sup>th</sup> Dist No. 03AP-625, 2004-Ohio-2942 (considering an affidavit in deciding to dismiss appeal on ground that the issue was moot).

The Ninth District Court of Appeals has repeatedly held that an appeal can be rendered moot if the appellant “fails to obtain a stay” pending appeal and the building or structure at issue is constructed. *Neighbors For Responsible Land Use v. City of Akron* (9th Dist. 2006), 2006-Ohio-6966, at ¶12; *Poulson v. Wooster City Planning Commission* (9th Dist. 2005), 2005-Ohio-2976, at ¶7. *Shuster v. City of Avon Lake* (9th Dist 2003), 2003-Ohio 6587, at ¶8. Indeed, this Ninth District precedent is consistent with the case law of other appellate districts throughout the State of Ohio. See *Pinkney*, supra, *Nextel West*, supra, *Redmon v. City Council of the City of Columbus, Ohio* (10th Dist. 2006), 2006-Ohio-2199. In particular, this Court and the above-referenced courts have all adopted and followed the rule that: “[w]here an appeal involves the construction of a building or buildings and the appellant fails to obtain a stay of execution of the trial court’s ruling and construction commences, the appeal is rendered moot.” *Neighbors For Responsible Land Use* (“*Neighbors*”), supra.

Here, as in *Neighbors* and the other cases cited above, it is undisputed that Appellants failed to obtain a stay of construction for the early site work package for the New Barberton

Middle School Project and that early site work package is complete. In this regard, the case is not distinguishable from *Neighbors* where: 1) the trial court denied appellant's motions for injunctive relief, 2) construction began and was subsequently completed, and 3) the trial court ultimately ruled against Appellant on the merits. As in *Neighbors*, *Schuster* and the other cited precedents, this Court should similarly conclude that Appellants' appeal is moot and should be dismissed.

Further, there is no available exception to the mootness doctrine that might be applicable to this case. While an appellate court may address a moot question when the appeal presents issues that are "capable of repetition, yet evading review," this exception only applies in "exceptional circumstances where the following two factors are present: 1) the challenged action is too short in its 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. See *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231 (holding the same). Neither of these factors is present in this case. The issue was fully litigated at the trial court level and the early site work, which was the basis of Appellants' complaint, has been completed. There is no reasonable expectation that these Appellants will ever be required to address the issues raised in their complaint again and therefore this limited exception to the mootness doctrine clearly does not apply.

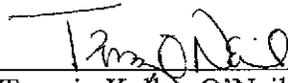
Similarly, the exception for a "debatable constitutional question" or a "matter of great public or general interest" does not apply. See *Nextel West*, 2004-Ohio-2942, at ¶15 (noting it is only the highest court of the state that can retain an otherwise moot action for determination when this exception applies). See, also, *Keller*, 74 Ohio App.3d at 791 (finding the fact that the

case involves a public contract involving a large sum of money does not, by itself, permit the court to disregard the fact that the case is moot). Thus the second exception does not apply.

### III. CONCLUSION

For the foregoing reasons, the Defendants-Appellees Barberton City Schools Board of Education, the Ohio School Facilities Commission, and Mr. Excavator respectfully request that this Honorable Court dismiss this appeal as moot.

Respectfully submitted,

  
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Tamzin Kelley O'Neil (0071883)  
Patrick S. Vrobel (0082832)  
McGown, Markling & Whalen Co., L.P.A.  
Corporate Office  
1894 North Cleveland-Massillon Road  
Akron, OH 44333  
Telephone: 1.330.670.0005  
Facsimile: 1.330.670.002  
E-Mail: toneil@servingyourschools.com  
pvrobel@servingyourschools.com

*Attorneys for Defendant-Appellee Barberton  
City School Board of Education*

RICHARD CORDRAY  
Ohio Attorney General

Per Telephone Consent 8/18/2009  
\_\_\_\_\_  
William C. Becker (0013476)  
Jon C. Walden (0063889)  
James E. Rook (0061671)  
Assistant Attorneys General  
Court of Claim Defense  
150 East Gay Street, 18<sup>th</sup> Floor  
Columbus, OH 43215-3130  
Telephone: 1.614.466-7447

*Counsel for Defendant-Appellee Ohio  
School Facilities Commission*

Per Telephone Consent 8/18/2009

James T. Dixon (0077547)

Frantz Ward, L.L.P.

2500 Key Center

127 Public Square

Cleveland, OH 44114-1230

Telephone: 1.216.515.1660

Facsimile: 1.216.515.1650

E-Mail: [jdixon@frantsward.com](mailto:jdixon@frantsward.com)

*Attorney for Defendant-Appellee Mr.  
Excavator*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Dismiss Plaintiffs Verified Amended Complaint was sent by email on August 19, 2009, to the following:

Alan G. Ross  
Nick A. Nykulak  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd. South, Suite 350  
Cleveland, OH 44131

*Attorneys for Plaintiffs-Appellants*

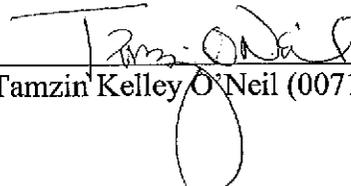
RICHARD CORDRAY  
Ohio Attorney General

William C. Becker  
James E. Rooks  
Jon C. Walden  
Assistant Attorney General  
150 E. Gay Street. Floor 18  
Columbus, OH 43215

*Counsel for Defendant-Appellee Ohio School Facilities Commission*

James T. Dixon  
Frantz Ward, L.L.P.  
2500 Key Center  
127 Public Square  
Cleveland, OH 44114

*Attorney for Defendant-Appellee Mr. Excavator*

  
\_\_\_\_\_  
Tamzin Kelley O'Neil (0071883)