

IN THE SUPREME COURT OF OHIO

09-2054

LANCE A. GILDNER, et al. :
Appellants, : On Appeal from the Franklin County Court of
Appeals, Tenth Appellate District
v. : Court of Appeals
Case No. 09AP-167
ACCENTURE, LLP :
Appellee. :

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS LANCE A. GILDNER, et al.

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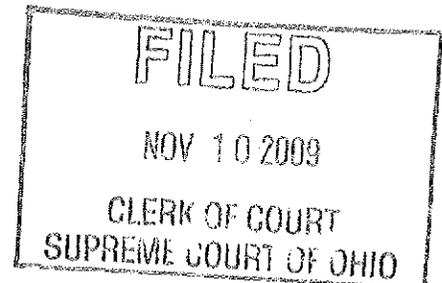


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The doors of Ohio courthouses are closed to the rights and interests of Ohio taxpayers. The doors of the Ohio treasury are open to greed, self-serving, overreaching and fraud. Before a plaintiff can sue the perpetrator of the fraud which caused his injury, he should pay a substantial sum to that wrongdoer.

The idea that any of these three statements could be enshrined in the law of Ohio raises questions that could hardly be characterized as anything other than questions of public and great general interest. Yet each of those statements is a fair summary of the legal principles which emerge from the lower court decisions in this case. Those decisions are also disturbing in their condonation of forum-shopping.

Two lines of developing law on different subjects converge in this appeal. Each presents festering and far-reaching legal questions that cry for clarification.

The first question of great public interest concerns the standing of a taxpayer who has contributed to the State's general revenue fund to bring a taxpayers' suit on behalf of similarly situated taxpayers and the State. The path to this appeal begins with the special interest requirement set forth in this Court's decision in State ex rel. Masterson The Ohio State Racing Commission (1954) 162 Ohio St. 366. It leads through a long series of appellate decisions holding that a taxpayer who contributes to the general revenue fund has a special interest in that fund which satisfies the Masterson requirement. It ends, at least temporarily, with the overruling of those decisions by the appellate court decision in this case. What should be the general rule on this subject? What exceptions, if any, to the general rule should be recognized and articulated?

The second question concerns the "tender-back" requirement in cases involving

claims of fraud. The confusion generated in Ohio courts by the definitional difficulties in parsing concepts of fraud in the inducement and fraud in the *factum* triggered the error in the Court of Claims that led to the appeal to the Franklin County Court of Appeals. Once the issue of standing is resolved in favor of the Taxpayers, this confusion is squarely presented for clarification by this Court.

Each of the critical questions presented, we respectfully submit, has significant constitutional implications.

Article I § 16 of the Ohio Constitution mandates that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Does not the Court of Appeals' answer to the legal questions presented close those doors to taxpayers who have been injured by frauds which have diverted from the State's general revenue fund the monies those taxpayers have paid into that fund? Where the State's Attorney General has refused to seek redress for the wrong to the State and its taxpayers and has expressly declined to approve the purported "settlement" of that wrong, it is difficult to square the Decision of the Court of Appeals with the Ohio Constitution or with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Article I § 2 of the Ohio Constitution mandates that "all political power is inherent in the people. Government is instituted for their equal protection" Does not the Court of Claims' answer to the legal questions presented place a taxpayer who contributes his hard-earned money to the State's general revenue fund in a dramatically different position from a taxpayer who contributes his money to a special tax fund? How can such disparate treatment of similarly situated taxpayers be squared with the Ohio Constitution or with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE AND FACTS

The facts of this case - as substantiated by affidavits, exhibits and deposition testimony and required to be accepted by this Court under the summary judgment standard applicable to this appeal - may be summarized by a simple statement that Accenture, with the active and passive complicity of State employees, stole approximately \$60,000,000.00 from the State of Ohio and its taxpayers. The capstone of its fraudulent scheme was a purported settlement agreement with state employees which contained misrepresentations, which omitted material facts, which was based on illusory consideration, and which was intended as a document to conceal from the public the fraudulent conduct.

This case was filed on October 6, 2005 in the Common Pleas Court of Montgomery County, Ohio. Accenture was the sole defendant. The Honorable John W. Kessler denied Accenture's motion to dismiss the case and its subsequent motion for summary judgment. In a Decision, Order and Entry filed on October 8, 2006 he upheld the Taxpayers' standing to pursue the claims presented and ruled that the purported settlement agreement was invalid as a result of the lack of substantive approval from the Ohio Attorney General. When its appeal to the Second District Court of Appeals was dismissed for lack of a final appealable order, Accenture added the State of Ohio as a third-party defendant and removed the case from Judge Kessler's Court to the Court of Claims. Nineteen months of successive and repetitive motions in the Common Pleas Court were then followed by twenty months of successive and repetitive motions in the Court of Claims.

Two days after the case was removed to the Court of Claims the Taxpayers filed a motion to remand on the ground that Accenture had failed to present claims within the exclusive jurisdiction of the Court of Claims upon which relief could be granted. In a decision rendered on October 2, 2007 the Court of Claims noted that most of the claims

asserted were equitable claims and therefore within the jurisdiction of the Common Pleas Court. It nonetheless retained jurisdiction by finding a claim for monetary relief against the State in Accenture's alternative claim that, in the event its "settlement agreement" were to be held void, it planned to pursue a claim for rescission and restitution against the state agency which was the other party to that "settlement agreement." The Taxpayers contended and still contend that Accenture's alternative claim for relief failed to state a valid claim for relief for the reasons that (1) such a claim could not be ripe for assertion until Accenture had been determined to be liable on the Taxpayers' claims and (2) even after a Taxpayers' judgment against Accenture is rendered there would be no basis for rescission since Accenture's misconduct would bar that remedy and since, in any event, the stated "consideration" for the release would not be any part of the damages caused to the State and its taxpayers as a proximate result of Accenture's wrongdoing. In a decision rendered on September 2, 2008, the Court found that certain other claims asserted by Accenture failed as a matter of law, but reconfirmed its jurisdiction-saving conclusion that the alternative claim for rescission and restitution stated a claim upon which relief could be granted.

In a decision rendered on June 9, 2008, the Court of Claims agreed with the common pleas rulings that the Taxpayers' suit was timely filed, that the Taxpayers had standing to pursue their claims for the benefit of the State, and that jury questions of material fact exist with respect to those claims. Since the fraud issue would in any event have to be resolved at trial, however, it found it unnecessary to reassess the Common Pleas Court's determination that the refusal of the Ohio Attorney General to give approval to the substance of the "settlement agreement" rendered the "agreement" void. Its

subsequent decision on September 2, 2008 reconfirmed its conclusion that the Taxpayers are entitled to a jury trial on the disputed issues of fact regarding fraud.

On January 20, 2009, a decision revisiting the same issues was rendered. The Court of Claims reconfirmed its finding that the Taxpayers have standing to pursue this taxpayers' suit and that the evidence submitted clearly permits the inference of fraud committed by Accenture. It held, however, that Accenture's fraud should be categorized as fraud in the inducement rather than fraud in the *factum* and that a tender-back of the stated consideration was a condition precedent to pursuit of the fraud claims. Acknowledging that "strict application of the tender rule in this case may seem harsh," the decision granted summary judgment to Accenture. It did not revisit the Common Pleas Court's finding that the "settlement agreement" was void for lack of approval from the Ohio Attorney General.

A timely appeal was filed, briefed and argued in the Court of Appeals for the Tenth Appellate District. On October 6, 2009, without any consideration of the Taxpayers' three assignments of error which were overruled as moot, the Court of Appeals found that "the taxpayers in this case lack standing to pursue this action" and therefore affirmed the summary judgment in favor of Accenture.

A timely notice of appeal has been filed to bring the issues presented before this Court for resolution.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: In the narrow situation where a government contractor, with the active and passive complicity of government employees, defrauds Ohio taxpayers and the Attorney General of Ohio expressly refuses to pursue the taxpayers' resulting claim, Ohio courts will not permit a wrong without a remedy and will open their doors to a general taxpayers suit.

Over half a century ago this Court held that a taxpayer has the legal capacity to bring a taxpayers' suit where the taxpayer has a "special interest" in the public funds which are the subject of such a suit. State ex rel. Masterson v. Ohio State Racing Comm. (1954), 162 Ohio St. 366. Twenty-five years ago the Tenth Circuit Court of Appeals interpreted Masterson as authorizing a taxpayer who contributes to the State's general revenue fund to challenge a general revenue expenditure, just as a contributor to a special fund has standing to challenge an expenditure from that special fund. State ex rel. United McGill Corp. v. Hamilton (1983), 11 Ohio App. 3d 102, 103. That case has been followed, without demurrer from this Court, in a long succession of reenforcing precedents.

The Appellate decision from which this appeal is taken expressly overrules United McGill and its progeny. It cites five cases in arriving at that law-changing result. In order of chronology the first case is its own decision in a case where a general revenue taxpayer sought to challenge a contract that was funded from a special fund rather from the general revenue fund of Ohio. Andrews v. Ohio Bldg. Authority (September 11, 1975), 10th Dist. No. 75AP-121, 1975 W.L. 181708. That case was decided eight years before United McGill and is readily distinguishable from it. Despite that clear distinction the same court rejected the Andrews decision as erroneous. See, United McGill, 11 Ohio App. 3d at 103.

The second citation is to the dissent in Racing Guild of Ohio v. Ohio State Racing Comm. (1986), 28 Ohio St. 3d 317, 324. The majority opinion in that case held that the Common Pleas Court had correctly assumed subject matter jurisdiction since the plaintiff taxpayers had paid license fees to the fund which supported the Racing Commission which was allegedly failing to require relevant participants in the industry to be licensed and to pay license fees. The plaintiff's situation was no different from the situation of general

taxpayers who pay money into a general fund that has been diverted or reduced by a defendant's wrongful conduct.

The third decision in the chronology of citations is really not a decision. It is *dicta* in a case before this Court which, as the Court of Claims noted in its decision on January 20, 2009, is "legally and factually distinguishable from the instant case." Appendix C, p. 5. That was a public records case which turned on whether the relator had demonstrated a particularized need for governmental records claimed to be protected by a qualified gubernatorial privilege. State ex rel. Dann v. Taft (2006), 110 Ohio St. 3d 252, 254 (2006-Ohio-3677). The relator had indicated that as a result of his standing as a contributor to a special fund - not to the general revenue fund - he might in the future consider filing a taxpayer suit alleging unspecified misconduct on the part of government officials. The *dicta* on which the appellate decision in this case relies states that "Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes, including the gasoline tax." Ibid.; Appendix A, p. 7. Here, the Taxpayers are not acting individually. They are not suing government officials. The taxpayers they represent have lost some \$60,000,000.00 from the general revenue fund to which those taxpayers have contributed. Ohio's Attorney General has refused to pursue this claim and has also refused to approve the substance of the settlement that was Accenture's endgame in its fraudulent scheme.

The fourth decision in the chronology of citations did not present a taxpayers' suit involving a general fund, a special fund, or any other fund. It involved private money going to a university in which the plaintiff taxpayer had no direct interest. Brinkman v. Miami University, 12th Dist. No. CA2006-12-313, 207-Ohio-4372.

The fifth and last case cited by the Court of Appeals as justification for overruling a quarter century of its own caselaw was decided shortly before it heard the oral arguments in this case. Brown v. Columbus City Schools Bd. of Educ., 209-Ohio-3230. That case involved constitutional issues and government defendants. It did not involve a third party who through fraud had taken millions of dollars from the general revenue fund to which the taxpayers of Ohio had contributed their hard-earned dollars. It cited the Brinkman case for the proposition that "Ohio law does not permit a taxpayer who contributes to the State's general revenue fund to challenge any and all general revenue expenditures." Id. at ¶ 10 (emphasis supplied). It recognized that "when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties." Id. at ¶ 8. It neither cited its seminal ruling in United McGill nor purported to limit or overrule that decision and its progeny.

The appellate decision in this case, nevertheless, places squarely before this Court the legal, policy and constitutional implications of granting or withholding standing in taxpayers' actions. In its discussion of the dissent in its 1975 decision in the Andrews case, it cited the competing principles that are at play.

"First is the 'principle that government is operated for the benefit of all its citizens, and that any citizen has an interest in compelling public officials to perform their duties properly.' . . . the opposing principle is 'that public officials should not be subjected to constant judicial interference.'"

The first principle has the ring of justice. The second principle has the drone of "slippery slope" rhetoric. Will a rule permitting standing open the floodgates to unwanted and undesirable litigation? The short answer is that such a rule did not create such a problem during the quarter century in which it was accepted by the courts of Ohio as the applicable

rule. The longer answer is that the competing principle is of paramount importance in a democratic society. Closing the doors of Ohio courts to taxpayers' suits has to rest upon the unsupportable assumption that citizens can always rely on public officials to protect their interests. Without casting any aspersions on any public officials other than those who were convicted of crimes in connection with Accenture's fraudulent conduct, no rational adult acquainted with human nature or American history could maintain such an assumption.

What is the "special interest" that would allow a general taxpayer to pursue a taxpayer suit against a non-governmental defendant which has through fraud taken millions of dollars of taxpayer money from the State's general revenue fund? One of the taxpayers bringing this case has not only paid taxes into that fund, although United McGill said that such payment gives him a special interest in the fund which in turn gives him standing in this suit. If his payment of taxes doesn't qualify, how much tax money does it take to confer standing? If dollars are not "special" what is? Mr. Gildner is a tax lawyer. Doesn't that make his interest "special"? He was also a shareholder in a business entity that was a potential beneficiary of the Ohio Works Program that was the target of Accenture's fraudulent conduct. Doesn't that make his interest "special"? If not, what would make his interest "special" in the language of the rule the Court of Appeals would have this Court accept?

We submit that this case has a special circumstance that, under any rule of standing, justifies the efforts of the Taxpayers to pursue this case. It is unique in that it represents the only situation in the lengthy tenure of Betty Montgomery as Ohio's Attorney General where a settlement between a state department and an outside contractor was not approved as to its substance by the Attorney General's Office. It is unique in that the

Assistant Attorney General assigned to the matter has testified that he did not know and that he would like to have known the relevant facts concerning the myriad problems with the system supplied by Accenture and the pre-settlement decision that the system was not salvageable. It is unique in that the Ohio Inspector General recommended that Accenture's conduct be pursued civilly. It is unique in that the Governor of Ohio wrote a note expressing the opinion that "this is unbelievably bad" and that Accenture should be sued. It is unique in that Taxpayers prior to filing their suit requested that such a suit be filed by the then Ohio Attorney General.

If a restrictive general rule is to be adopted on the subject of standing, the articulation of an exception to that rule that fits these special circumstances will promote justice without triggering a slippery slope or offending the constitutional rights of Ohio citizens.

Proposition of Law No. II: Where a purported release contains fraudulent misrepresentations and fraudulently omits material facts, fraud in the *factum* of the release is presented, no tender-back of the stated consideration for the purported release is required, and any such consideration would be outside the scope of any damages awarded as a proximate result of the fraud.

It is not difficult to lose your grip on common sense when wandering in the labyrinth of semantics. In its attempt to fit the facts of this case into the pigeonhole of "fraud in the inducement" or of "fraud in the *factum*" the Court of Claims' decision focused on the parties to the purported settlement agreement instead of on the document itself. Yet the fraud inhered in the *factum* of the document, in the misrepresentations it contained and in the material facts it omitted.

The error in attempting to squeeze a document fraudulent on its face into the procrustean bed of "fraud in the inducement" was precipitated by a failure to consider a

third variety of fraud in the analysis of the facts. The law in Ohio is clear that parties cannot agree to commit a fraud and that such an agreement is void. See, e.g., The Northern Ohio Power & Light Co. v. Smith (1933) 126 Ohio St. 601-611; Cody v. Landis (1941) 68 Ohio App. 225, 231-32. The execution of the fraudulent agreement in this case can only be explained by one of two possible alternatives: (1) Accenture and the individual signing on behalf of the other party agreed to commit a fraud, in which case the agreement is void; (2) the individual signing on behalf of the other party lacked the intent to commit a fraud, in which case the "agreement" is void *ab initio* based on fraud in the *factum*.

The Court of Claims came to this doctrinal door, but failed to walk through it to the correct conclusion that the Taxpayers' claims present a jury case of fraud in the *factum*.

"A victim of fraud in the *factum* lacks the intention to sign any release whatsoever, or at least such a release as the one executed."

Appendix C, p. 6 (emphasis supplied). In this case, an objective reading of the facts is that Accenture executed the purported settlement agreement with intent to defraud the public and prospective customers while the signatory on behalf of the other party had no intent to sign such an agreement as the one executed. In a case of fraudulent inducement the agreement is innocuous on its face (e.g., A in consideration of \$X releases all claims against B) and the party seeking to set aside the document claims that some fraudulent conduct not inherent in the *factum* of the document justifies rescission of the agreement it accurately reflects. The lawyers and judges of Ohio and the public they serve will be benefitted by clarification from this Court of the doctrinal confusion presented by the Court of Claims' decision.

Even if this case were a fraudulent inducement case, it would present an important legal issue that cries for clarification. What exceptions to the "tender-back" rule should be

recognized in such cases? What rational justification would be presented for requiring a tender-back of purported consideration in the particular circumstances presented by this case? To leave unanswered the troubling questions presented would be especially unfortunate in view of the fact that the decisions from the Court of Appeals and the Court of Claims effectively eliminate the right of any Ohio taxpayers under any circumstances to challenge fraudulent acts which impacted monies paid by them in taxes.

Proposition of Law No. III: Ohio courts will not condone the use of meritless claims as a device for forum-shopping.

This litigation was derailed from its proper path to a jury trial in the Common Pleas Court of Montgomery County by a removal to the Court of Claims. Jurisdiction in the Court of Claims was promptly challenged. It is based on the slender thread of Accenture's Sixth Claim for Relief - a contingent claim that, in the event Accenture is found liable on the Taxpayers' fraud claims, it should be permitted to rescind the purported settlement agreement and obtain restitution of the purported consideration given for the release contained in that document.

Such a claim will only come into existence upon Accenture's payment of a judgment rendered in favor of the Taxpayers. Since such a judgment would only cover damages to the State and its taxpayers proximately caused by Accenture's fraud, such a judgment could not encompass any money already paid to the State by Accenture. On the other hand, a judgment in Accenture's favor would moot the contingent claim. The frolic and detour created by the removal is exacerbated by the fact that the contingent claim is an equitable claim which was within the jurisdiction of the Common Pleas Court.

Proposition of Law No. IV: To deny standing to pursue a taxpayers' suit under the circumstances presented by this case would violate the open courts and due process provisions of Article I, Section 16 of the Ohio Constitution, the equal

protection provisions of Article I, Section 2 of the Ohio Constitution, and the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

The substantial constitutional questions raised by the effect of the lower court decisions must be considered. The lower court decisions contravene constitutional safeguards by effectively barring taxpayers' suits in cases where losses to the state's general revenue fund are involved. There is no logical distinction between a taxpayer who pays money into a special tax fund and a taxpayer who pays money into the general revenue fund. The dollars are the same; the interests are the same; the rights should be the same. The closing of Ohio courts to legitimate claims without reasonable exceptions to fit the circumstances presented by this case cannot be squared with basic concepts of open courts, due process and equal protection.

The open courts doctrine set forth in Article I §16 of the Ohio Constitution provides that every person who is injured is entitled to a remedy by due course of law and is entitled to the administration of justice without denial. The general elimination of the right of a taxpayer who contributes to the general revenue fund the to seek redress for the wrongs committed against him and all other taxpayers to the general fund denies the taxpayer his constitutional right to a remedy and his constitutional right to the administration of justice. This is especially true under circumstances where no proper remedy has been sought by those officials charged with protecting the taxpayers. The preservation of all taxpayers' rights to a remedy is of great public interest. Additionally, the Court of Appeals did not address Mr. Gildner's argument in which he presented evidence that he had a special interest in the general revenue funds at issue by virtue of his role as an employer who was within the target audience of the Ohio Works program. By both failing to address the

argument and dismissing the case on standing grounds, the Court specifically denied a taxpayer with a special interest in the funds at issue his right to an open court where he was entitled to a remedy for wrongs committed against him as a taxpayer.

The Fourteenth Amendment to the United States Constitution states that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.” Article I § 2 of the Ohio Constitution similarly provides that government is instituted for the equal protection of all people. The basis of any equal protection claim is that the State has treated similarly situated individuals differently. See, McCrone v. Bank One Corp., 107 Ohio St.3d 272, 2005-Ohio-6505, ¶ 6 (“Simply stated, the Equal Protection Clauses require that individuals be treated in a manner similar to others in like circumstances.”). The ruling of the Court of Appeals has the effect of treating general taxpayers to the State’s general revenue fund differently from taxpayers who pay into special tax funds, without any rational basis for the disparate treatment. Why should a special taxpayer have greater rights than a general taxpayer when the actions complained of are the same, the interests are the same, and the injury is the same?

Proposition of Law No. V: To require a tender of “consideration” as a prerequisite to the right to pursue a taxpayers’ suit under the circumstances presented by this case would violate the open courts and due process provisions of Article I, Section 16 of the Ohio Constitution and the due process provisions of the Fourteenth Amendment to the United States Constitution.

To require a tender-back of purported consideration as a prerequisite to suit under the circumstances presented by this case is to strip Ohio taxpayers of basic rights without

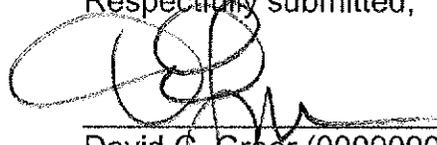
rational justification. It would therefore be a violation of open courts and due process provisions of state and federal constitutions.

CONCLUSION

However this Court articulates the rules of standing to bring a general taxpayers' suit, it should not bar such suits where, as here, the Office of the Ohio Attorney General has abnegated its role as the public's watchdog and declined to approve the substance of a wrongdoer's exit strategy. It should not require a defrauded party, as a prerequisite to filing suit, to pay the wrongdoer money that is no part of the damages for which relief is sought. It should not bless forum-shopping tactics.

In short, this Court, as the lighthouse of justice for the citizens of Ohio, should not condone the wrongs that this lawsuit was designed to right. It should clarify the significant legal and constitutional questions raised, reverse the decision of the Court of Appeals, return this case to the Court of Claims, instruct that court to remand the case to the Common Pleas Court of Montgomery County, and instruct that court in turn to schedule the case for the jury trial to which the taxpayers of this state are entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellants Lance A. Gildner, et al. was sent by First Class United States mail to the following this ____ day of November, 2009:

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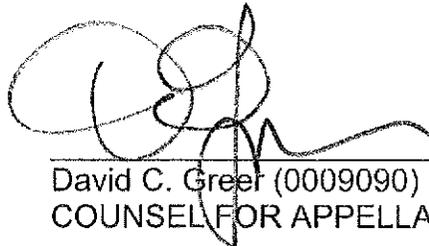
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IN THE COURT OF APPEALS OF OHIO

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TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Lance A. Gildner et al.,
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Plaintiffs-Appellants/
[Cross-Appellees],
:
v.
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Accenture, L.L.P.,
:
Defendant-Appellee/
[Cross-Appellant],
:
Ohio Department of Job & Family
Services,
:
Defendant-Appellee.
:

No. 09AP-167
(C.C. No. 2007-05067-PR)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on October 6, 2009

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APPEAL from the Ohio Court of Claims

A-1

TYACK, J.

{¶1} Ohio taxpayers, Lance and Joanne Gildner et al. ("the Gildners"), filed suit seeking to invalidate a settlement agreement between defendant-appellee, Ohio Department of Job and Family Services ("ODJFS"), and defendant-appellee, Accenture L.L.P. ("Accenture"). The Ohio Court of Claims rendered summary judgment in favor of Accenture and ODJFS.

{¶2} The procedural and factual background of this case is complex. However, resolution of this appeal turns on a narrow question of law, and therefore an abbreviated history will suffice.

{¶3} Accenture obtained a series of unbid contracts from ODJFS to create and implement a statewide computerized information system known as "Ohio Works." Improprieties in the contract process resulted in the director of what was then known as the Ohio Department of Human Services pleading guilty to having an illegal interest in a public contract. Ultimately, the system itself was completely unworkable and had to be scrapped. Subsequently, Accenture entered into a settlement and release of claims with ODJFS in which Accenture agreed to pay back \$3 million for reimbursement of leased office space and to forego \$2,446,483 for unpaid invoices.

{¶4} The Gildners, as Ohio citizens and taxpayers, filed suit against Accenture in the Montgomery County Court of Common Pleas claiming that the original contracts were entered into as part of a fraudulent conspiracy. The Gildners contended that Accenture had obtained \$60 million for a completely unworkable and unusable disaster. They claimed that the settlement agreement was also the product of fraud. Accenture filed a

counterclaim that included claims against ODJFS. The case was removed to the Ohio Court of Claims.

{¶5} The Ohio Court of Claims determined that the Gildners had standing as taxpayers pursuant to this court's ruling in *State ex rel. United McGill Corp. v. Hamilton* (1983), 11 Ohio App.3d 102. In *United McGill*, this court held that a taxpayer who contributed to the state's general revenue fund had standing to challenge expenditures from that fund. The Court of Claims then dismissed some of the counterclaims, and, after discovery, granted summary judgment to Accenture and the state of Ohio. The basis for the Court of Claims' ruling was that the Gildners could not produce evidence on the issue of fraud in the inducement because there had been no tender back of the consideration to Accenture. The Court of Claims also found that the Gildners could not produce a genuine issue of material fact as to fraud in the factum.

{¶6} This appeal followed with the Gildners assigning the following as error:

[I.] The trial court erred in granting summary judgment in favor of defendant Accenture, LLP by determining as a matter of law that a previous settlement entered into by the defendant Accenture LLP and the Ohio Department of Jobs and Family Services precluded the Plaintiff Taxpayers' claims.

[II.] The Court of Claims erred in failing to remand the case to the Court of Common Pleas for Montgomery County, Ohio because it lacked jurisdiction pursuant to O.R.C. § 2743.03(E)[.]

[III.] The trial court erred in failing to dismiss the defendant Accenture, LLP's counterclaim in its entirety.

{¶7} In the event this court overruled the Court of Claims, Accenture filed a contingent cross-appeal assigning as error the following:

[I.] The Court of Claims erred in dismissing Accenture's fourth counterclaim seeking damages from the State for failure of consideration where Accenture did not receive the benefit of its bargain in the form of freedom from litigation.

[II.] The Court of Claims erred in dismissing Accenture's contingent fifth counterclaim seeking damages from the State based on negligent misrepresentations regarding the State's authority to enter into the Settlement Agreement.

{¶8} We must begin by addressing the taxpayer standing issue. "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183. For purposes of appellate review, a standing question is generally a question of law reviewed under a de novo standard. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶9.

{¶9} The Gildners have argued that Accenture waived the standing issue by not assigning it as error in a cross-appeal. However, standing is an element of the court's jurisdiction and thus cannot be waived. *Rickard v. Trumbull Twp. Zoning Bd. of Appeals*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶35. It can be raised at any time. *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St.3d 216, 218.

{¶10} The leading case regarding taxpayer standing is *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366. *Masterson* was a challenge to the expenditure of money from revenues collected by the Ohio State Racing Commission. No general fund moneys were involved as the revenues from taxes and fees were credited weekly into a special "state racing commission fund." *Id.* at 369. The taxpayers were not in any special class of taxpayers from whom those revenues were collected.

{¶11} The Supreme Court of Ohio held that, in the absence of statutory authority, a taxpayer lacks standing 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. *Id.* at paragraph one of the syllabus. In restating this principle, the court added, "[i]n other words, 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." *Id.* at 368. The narrow reading of *Masterson* is that no general fund monies were spent and therefore the taxpayer lacked standing because he did not contribute to the special fund.

{¶12} This court sought to apply that principle in *Andrews v. Ohio Bldg. Auth.* (Sept. 11, 1975), 10th Dist. No. 75AP-121, 1975 WL 181708. In *Andrews*, a taxpayer sought to enjoin the award of the electrical contracting bid on the construction of the State Office Tower in Columbus, Ohio as not being in the interests of Ohio's citizens. The funds for the building project were acquired by a loan from the workers' compensation insurance fund. Although ultimately rental payments by state agencies occupying the tower would come from general revenue funds, the court looked to the time the contract was entered into in deciding that the funds came from a special fund rather than from the general revenue fund of the state of Ohio. The court could find no special interest of the plaintiff that would place her own property rights in jeopardy, and therefore concluded that she lacked standing to bring a taxpayer suit.

{¶13} The dissent in *Andrews* recognized that competing principles were at work in such cases. First is the principle "that government is operated for the benefit of all its citizens, and that any citizen has an interest in compelling public officials to perform their

duties properly." *Id.* The opposing principle is "that public officials should not be subjected to constant judicial interference." *Id.* The compromise position is that "in the absence of a statute conferring such right, private citizens must possess something more than a common concern for obedience to laws before they will be permitted to maintain certain actions against public officials." *Id.*

{¶14} The dissent distinguished *Masterson* by virtue of the fact that there were others directly affected in *Masterson* who had an interest in the fund greater than that of an ordinary taxpayer who simply had an abstract desire to see the law enforced. The dissent would have found that Andrews, as a general taxpayer on behalf of her class, was the only person who had a special interest to raise such the challenge, and that she should not be precluded from maintaining an action because she could not show "a nonexistent special interest not possessed by anyone other than the general taxpayer." *Andrews*.

{¶15} Subsequently, this court rejected the view of the majority in *Andrews* and adopted the reasoning of the dissent in *United McGill Corp.* In *United McGill*, an unsuccessful bidder for the purchase and installation of a pollution control device brought an action to prevent the award of the contracts to the successful bidders. The trial court found standing on the basis of the relator being an unsuccessful bidder, but determined that the relator did not have standing as a taxpayer. Because the relator had standing as an unsuccessful bidder, this court found no prejudice in what it termed an incorrect application of the Supreme court's opinion in *Masterson*. *United McGill* at 103. The court reasoned that because there was no special fund involved, but, instead, only the state's general revenue fund to which the plaintiff had contributed, it met the special interest

requirements of *Masterson*. The court did not address whether the plaintiff had alleged damages different in character from that sustained by the public generally.

{¶16} Recently, this court has moved away from *McGill* in *Ohio Concrete Constr. Assoc.* The court found that the taxpayer had failed to allege any damage distinct from the harm the general public suffered and therefore, had not alleged a property right under *Masterson* to support a finding of standing. *Id.* at ¶22.

{¶17} In *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 324, the dissent took notice of the "damages different in character" requirement of *Masterson*. Justice Wright wrote that the appellees "failed to allege that their damage can be distinguished from the damage that will be sustained by all taxpayers who contribute to the General Revenue Fund. They have, therefore, failed to meet the test of standing imposed under *Masterson*." *Id.*

{¶18} The Supreme Court of Ohio discussed the issue of standing again in *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677. While serving as a state senator, Marc Dann filed an action in mandamus seeking records from the Taft administration. Governor Taft asserted executive privilege over a portion of the records. Dann indicated that he was contemplating filing a taxpayer suit alleging unspecified misconduct. In discussing whether Dann had shown a particularized need for the records sufficient to overcome the privilege, the court stated that "Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes, including the gasoline tax." *Id.* at ¶9. The court then discussed the fact that Dann, as an employer, had contributed to the Workers' Compensation Fund and

thereby, arguably, had a special interest in the management of that fund. The court acquiesced to Dann's standing on the basis of his contribution to a special fund, but did not on his claim of general taxpayer status.

{¶19} In *State ex rel. Dann v. Taft*, 110 Ohio St. 1, 2006-Ohio-2947, an earlier case involving the same parties, the Supreme Court of Ohio reiterated the holding of *Masterson*. In that case, at ¶13, the court cited *Masterson* for the proposition that in the absence of statutory authority, a taxpayer lacks legal capacity to institute a taxpayer action unless he has some special interest in the public funds at issue.

{¶20} From these cases it is possible to infer that the Supreme Court of Ohio does not espouse the holding of *United McGill*, that allows a taxpayer who pays taxes into the general fund to have standing to prosecute misconduct or to challenge expenditures from that fund.

{¶21} The Twelfth District Court of Appeals has departed from the reasoning of *United McGill* and the line of cases that followed it. In *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, the plaintiff sought a declaratory judgment that Miami University's policy to provide health benefits to same-sex domestic partners violated the state constitutional ban on same-sex marriage. Section 11, Article XV, Ohio Constitution. The plaintiff argued that he possessed common law taxpayer standing because a portion of his tax dollars were used to pay for the health benefits.

{¶22} The court ruled that a taxpayer who contributes to the state's general revenue fund does not have standing to challenge any general revenue expenditure. *Id.* at ¶43. The court reasoned that such a broad common law standing rule would subject most government actions to taxpayer suits. This would violate the policy espoused by

Judge McCormac in *Andrews* that public officials should not be subjected to constant judicial interference.

{¶23} *Brinkman* was cited with approval in *Brown v. Cols. City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶13. The court rejected the taxpayers' claim of standing on the basis that they had not suffered and were not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general.

{¶24} Our review of the preceding cases has persuaded us that the well-reasoned decision in *Brinkman* has correctly interpreted the doctrine of common law taxpayer standing as espoused by the Supreme Court of Ohio in the *Masterson* and *Dann* cases. We overrule the holding in *United McGill* that states that when the only fund involved is the state's general revenue fund to which a plaintiff contributes as a taxpayer, the plaintiff has met the special interest requirements of *Masterson*.

{¶25} Based on the foregoing, we find that the taxpayers in this case lack standing to pursue this action. We affirm the judgment of the Ohio Court of Claims, albeit on separate grounds, and overrule appellants' three assignments of error as moot. The contingent cross-appeal is also rendered moot by this decision.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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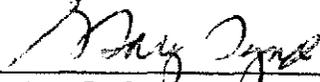
Lance A. Gildner et al.,
:
Plaintiffs-Appellants/
[Cross-Appellees],
:
v.
:
Accenture, L.L.P.,
:
Defendant-Appellee/
[Cross-Appellant],
:
Ohio Department of Job & Family
Services,
:
Defendant-Appellee.
:

No. 09AP-167
(C.C. No. 2007-05067-PR)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 6, 2009, the assignments of error are overruled as moot. The contingent cross-appeal is also rendered moot by this decision. It is the judgment and order of this court that the judgment of the Ohio Court of Claims is affirmed. Costs shall be assessed against appellants.

TYACK, McGRATH & CONNOR, JJ.

By 
Judge G. Gary Tyack

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Court of Claims of Ohio

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LANCE A. GILDNER, et al.

Plaintiffs/Counter Defendants

v.

ACCENTURE, LTD.

Defendant/Counter Plaintiff

v.

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES

Counter Defendant

Case No. 2007-05067-PR

Judge Clark B. Weaver Sr.

DECISION

On September 8, 2008, defendant/counter plaintiff, Accenture, LTD. (Accenture), and counter defendant, Ohio Department of Job and Family Services (ODJFS), filed separate motions for summary judgment. Accenture seeks summary judgment in its favor on the complaint filed by plaintiffs/counter defendants, Lance and Joanne Gildner (the Gildners). ODJFS seeks summary judgment in its favor on the Gildners' counterclaim.

On September 19, 2008, the Gildners filed a motion for leave to file a memorandum in opposition in excess of the page limitation. The memorandum was filed on September 25, 2008. The motion for leave is GRANTED instanter. On October 16, 2008, an oral hearing was conducted.

Civ.R. 56(c) states, in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A

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summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

In 1995, ODJFS set out to overhaul its welfare system by installing a new computer program to replace the outdated "Ohio Jobsnet." To that end, ODJFS hired Accenture to develop "Ohio Works." According to the complaint, Accenture received millions of dollars from ODJFS for consulting and technical services pursuant to a series of five, unbid contracts spanning several years. It is alleged that Ohio Works was a complete failure and that ODJFS had no choice but to abandon the project in 2001 and to re-employ the outdated Jobsnet system.

This case arises out of the 2001 settlement agreement by and between Accenture and ODJFS that purports to be a complete settlement, release, and waiver of all claims arising from the Ohio Works project. The complaint, filed by the Gildners in their capacity as representatives of a group of state taxpayers, alleges that the execution of the settlement agreement was the culmination of a five-year conspiracy between several ODJFS employees and Accenture.¹

In their complaint, the Gildners claim that ODJFS employees conspired with Accenture to defraud the state of Ohio by circumventing the competitive bidding procedures for public contracts, providing an unusable product, and then entering into a settlement agreement that permitted Accenture to escape liability without compensating the state. Accenture has filed a counterclaim against ODJFS seeking, in part, a declaration that the settlement agreement is valid and enforceable. In the alternative, Accenture

¹The Gildners also filed a direct action against ODJFS in this court. See *Lance A. Gildner, et al. v. Ohio Dept. of Job and Family Services*, Ct. of Cl. No. 2005-10241. That action was dismissed by plaintiffs without prejudice on November 16, 2005.

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alleges that it is entitled to additional compensation for the work it performed on the Ohio Works project.

In their capacity as representatives of Ohio taxpayers, the Gildners allege that the settlement agreement is the product of fraud. Accenture argues that the settlement agreement bars the Gildners' claims.²

Accenture and ODJFS seek summary judgment on the following grounds. First, Accenture and ODJFS argue that the Gildners do not have standing to bring this action. In the alternative, Accenture and ODJFS contend that the Gildners have failed to present any evidence to support an inference of fraud in the making of the settlement agreement.

The issue of taxpayer standing was first raised by Accenture in its November 6, 2007 motion for summary judgment, which was denied by the court on June 9, 2008. In the June 9, 2008 entry, the court found that the Gildners have standing as general fund taxpayers. In the pending motion, Accenture and ODJFS ask the court to reconsider its prior ruling.

The issue of taxpayer standing was addressed by the Supreme Court of Ohio in *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, paragraph one of the syllabus, which provides in relevant part:

"In the absence of statutory authority, a taxpayer lacks legal 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.

"It is equally fundamental that at common law and apart from statute, a taxpayer cannot bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official

²Throughout this case, ODJFS has generally agreed with Accenture's position regarding the validity of the settlement agreement.

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acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.* (Citation omitted.)

In *State ex rel. United McGill Corp. v. Hamilton* (1983), 11 Ohio App.3d 102, the Tenth District Court of Appeals interpreted *Masterson* as authorizing a taxpayer who contributes to the state's general revenue fund to challenge a general revenue expenditure, in the same manner as a contributor to a special fund has standing to challenge an expenditure from a special fund. *Id.* at 103. The general fund taxpayer standing rule announced in *United McGill*, *supra*, has been followed in a number of subsequent Tenth District opinions. See, e.g.; *State ex rel. Paul v. Ohio State Racing Comm.* (1989), 60 Ohio App.3d 112, 115; *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App.3d 44, 49; *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 321; *Griffin Indus., Inc. v. Ohio Dept. Of Admin. Servs.* (Aug. 2, 2001) Franklin App. No. 00AP-1139.

Accenture and ODJFS rely on a series of opinions issued by the Supreme Court of Ohio in support of their contention that *United McGill Corp.* and its progeny are no longer the law in Ohio. The most relevant of the cases cited by Accenture is *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 254, 2006-Ohio-3677 (*Dann III*). In *Dann III*, a state senator sought a writ of mandamus in order to gain access to various executive communications and reports held by then Governor Taft. In arguing that he had a particularized need for such documents, Dann asserted that he was contemplating the filing of a taxpayer action against Taft. *Id.*

In response to that assertion the court stated: "Dann's status as a taxpayer who paid taxes into the general fund and paid gasoline taxes is shared by nearly all adult Ohio citizens. There is nothing particularized about a need asserted on that basis. Nor would the fact that Dann may be contemplating the filing of a taxpayer suit alleging unspecified misconduct on the part of government officials demonstrate a particularized need, because, in the absence of statutory authority, a taxpayer in his position lacks standing to file a taxpayer suit. (Citation omitted.) *Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials*

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*suspected of misconduct based on the citizen's status as a taxpayer of general taxes ***.*"
Id. at ¶9. (Emphasis added.)

The court notes that the Tenth District Court of Appeals has not yet addressed the continued viability of *United McGill* in light of *Dann III*. However, this court does not believe that the above-cited dicta from *Dann III* was intended as an implied reversal of the general taxpayer-standing rule announced in *United McGill*. First, *Dann III* was a public records case, not a taxpayer-standing case. Second, the dispositive issue in *Dann III* was whether the relator had demonstrated a particularized need for government records in light of the respondent's claim that such records were protected by a qualified gubernatorial privilege. Third, in *Dann III*, the discussion of taxpayer standing focused on the relator's status as a contributor to a special fund. Relator did not contemplate the filing of a taxpayer action based upon his status as a general-fund taxpayer. In this case, as was the case in *United McGill*, the issue is general-fund, taxpayer standing.

Finally, the present action was not brought by the Gildners to "prosecute government officials suspected of misconduct." Rather, the complaint asserts a civil action in which the taxpayers look to recoup general revenue funds paid to Accenture pursuant to a settlement agreement that was allegedly procured by fraud. In short, *Dann III* is legally and factually distinguishable from the instant case.

In the event that this court were to find that *United McGill* is no longer the law and that the Gildners do not have taxpayer standing by virtue of their payment into the general fund, the Gildners argue, in the alternative, that Lance Gildner has a special interest in the fund at issue inasmuch as he has a partnership interest in one of the thousands of Ohio employers that Ohio Works was intended to benefit.

However, under *United McGill*, the focus of the inquiry for purposes of determining taxpayer standing is the source of the taxpayer funds, and not whether the taxpayer can draw some tenuous relationship to their usage. "In a situation that does not involve a special fund and which only involves the state's general revenue fund, the taxpayer will meet the special interest requirement of *Masterson* by demonstrating that he, as a

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taxpayer, has contributed to the general fund." *Paul* at 115. (Citation omitted.) Inasmuch as the money spent on Ohio Works originated from the general revenue fund, plaintiffs' standing arises from *United McGill* and its progeny. Thus, the Gildners' standing as taxpayers arises either from their status as general fund taxpayers under the rule of law set forth in *United McGill*, or not at all.³

The alternative basis for summary judgment raised by the motions is whether the settlement agreement bars the Gildners' claims for fraud and conspiracy to commit fraud.

On October 9, 2001, the parties executed a mutual release which provides in pertinent part:

"[Accenture] and [ODJFS] hereby mutually remise, release and discharge each other, * * * from all liabilities, obligations, claims, causes of action, appeals and demands of any kind whatsoever, administrative or judicial, legal or equitable, including claims for attorneys' fees and interest, which they now have or hereafter may have, whether known or unknown * * *." (Plaintiffs' Complaint, Exhibit 3.)

Ordinarily, a release of a cause of action for damages is an absolute bar to a later action on any claim within the release. *Perry v. M. O'Neil & Co.* (1908), 78 Ohio St. 200. However, upon a showing of fraud, a release of liability may be found to be either void or merely voidable depending on the nature of the fraud. *Haller v. Borrer Corp.* (1990), 50 Ohio St.3d 10, 13-14.

Fraud in the factum occurs when an "intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." *Id.* Under this theory of fraud, a party fails to understand the nature or consequence of his release. *Id.* A victim of fraud in the factum lacks the intention to sign any release whatsoever, or at least, such a release as the one executed. *Picklesimer v. Baltimore & Ohio R.R.* (1949), 151 Ohio St. 1, 5. The second type of fraud is fraud in the

³As the court noted in its June 9, 2008 decision, the Twelfth District Court of Appeals has reached a different conclusion regarding general taxpayer standing. See *Brinkman v. Miami Univ.* 12th Dist. No. CA2006-12-313, 2007-Ohio-4372. ¶46-48.

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inducement. Fraud in the inducement involves a plaintiff who, while admitting that he released his claim for damages and received a consideration therefore, asserts that he was induced to do so by defendant's fraud or misrepresentation. *Haller* at 14. This type of fraud may include, but is not limited to, misrepresentations about the economic value of the claim released. *Picklesimer* at 4.

A release obtained by fraud in the factum is void ab initio, while a release obtained by fraud in the inducement is merely voidable upon the plaintiff's return or "tender-back" of the consideration received. *Picklesimer* at 4-5. "In Ohio, the necessity of tender depends upon the character of fraud involved, that is, whether it renders the release void, or merely voidable. In the former case, a tender of the consideration is not necessary to maintain the action * * *; in the latter case it is. In other words, the releasor must offer to place the releasee in statu quo." 35 Ohio Jurisprudence, 288, Section 50.

Here, the distinction between fraud in the factum and fraud in the inducement is critical in that there has been no tender-back to Accenture of consideration.⁴ Consequently, in order to avoid summary judgment, the Gildners must produce evidence which permits the inference that the release was a product of fraud in the factum.

The settlement agreement was signed on behalf of ODJFS by Thomas Hayes who had been appointed director on September 4, 2001, shortly before the settlement agreement was executed. (Hayes Deposition, Page 9.) Hayes testified that he was not involved in the "strategy of the negotiations and the numbers that ultimately came out of the settlement agreement," but that he signed the agreement on the advice of counsel for ODJFS Bob Mullinax and Christopher Carlson, the former deputy director of ODJFS. (Hayes Deposition, Pages 97-104.) Although Hayes was not particularly knowledgeable about the myriad issues surrounding the Ohio Works project, he was fully aware that he

⁴Pursuant to the settlement agreement, Accenture returned \$3 million in contract payments and agreed to forego an additional \$2.5 million claimed to be due and owing.

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was executing a settlement agreement and that signature upon the agreement meant that the parties' dispute over the Ohio Works project would end.

Carlson was actively involved in drafting the settlement agreement and he testified that each party was adequately represented by counsel at the settlement discussions. (Carlson Deposition, Pages 340-341.) Carlson also confirmed that it was the parties' desire to resolve "any and all issues that related to the performance of Accenture under [the] contracts." (Carlson Deposition, Page 349.)

Assistant Attorney General Craig Mayton testified that when he signed the settlement agreement he included the notation "approved as to form." According to Mayton, this meant that he was signing off on the legal sufficiency of the settlement agreement as opposed to the wisdom of the settlement. Mayton explained that where the state is receiving monies pursuant to a written agreement, rather than paying them out, "full unqualified concurrence and approval" by the attorney general is not required. (Mayton Deposition, Pages 62, 80.) Nevertheless, Mayton's testimony establishes that he was well aware that he was signing a settlement agreement.

Former Assistant Attorney General Art Marziale was present during settlement negotiations. Marziale testified that the settlement agreement was the result of arms-length negotiations between Accenture and the state of Ohio. In addition, he testified that as far as he knew, the intent of the settlement agreement was to resolve "all issues arising from or relating to the performance of the contract that existed between Accenture and ODJFS." (Marziale Deposition, Pages 141-143.)

The Gildners rely on the conviction of Arnold Tompkins, former ODJFS director, who was found to have had an illegal interest in a public contract, and the conviction of Donna Givens, an Accenture consultant, who received improper compensation, as evidence of the fraudulent nature of the settlement agreement. However, there is no allegation in this case that any of the ODJFS or Accenture employees responsible for the award and implementation of the Ohio Works contracts either participated in settlement negotiations or executed the settlement agreement. Additionally, all employees who were identified as

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alleged conspirators in the underlying Ohio Works debacle were either prosecuted, removed from their positions or had simply moved on prior to the commencement of settlement negotiations. Although this evidence and other evidence submitted by the Gildners clearly permits the inference of fraud in the inducement as to both the execution and implementation of the Ohio Works contracts, such evidence does not permit an inference that the subsequent settlement agreement was the product of fraud in the factum.

The Gildners also produced evidence that calls into question the accuracy of certain recitals contained in the settlement agreement. For example, the Gildners dispute the language of "Attachment B" to the settlement agreement which contains the representation: "As of September 14, 2001, the OhioWorks system was available in all 88 Ohio counties for use by members of the public, county agencies and ODJFS." In "Attachment C" the parties represent that Accenture had "satisfactorily addressed the issues pertaining to its performance that were raised by the Inspector General's report * * *." Even if the court were to accept the Gildners' assertion that these and other representations in the settlement agreement were blatantly false and that they were intentionally made part of the settlement agreement in order to dupe taxpayers into believing that the settlement was fair and advisable, such evidence does not permit the inference of fraud in the factum. As noted above, fraudulent misrepresentations as to the economic value of the claim being released render the release merely voidable. See *Picklesimer*, supra. In short, such misrepresentations constitute fraud in the inducement rather than fraud in the factum. *Id.*

Even when construed most strongly in the Gildners' favor, the evidence is insufficient to permit an inference of fraud in the factum. Indeed, the only reasonable conclusion to be drawn from the evidence is that the state officers who signed the agreement did so with a full and complete understanding that they were executing a settlement agreement and that such agreement included a release of all possible claims against Accenture. Although the taxpayers produced evidence in support of their

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contention that the consideration received in return for the release was inadequate and that some of the factual representations made in the settlement were false, such evidence merely permits the inference of fraud in the inducement. Under Ohio law, where there has been no tender-back, proof of fraud in the inducement will not defeat a settlement and release.⁵

Although the strict application of the tender rule in this case may seem harsh in light of the fact that the specific settlement proceeds are not under the control of the taxpayers, the tender rule is the product of a long-standing public policy which favors the compromise and settlement of controversies. *Haller* at 14, citing *White v. Brocaw* (1863), 14 Ohio St. 339, 346. Indeed, counsel for ODJFS argued quite persuasively that the judicial deference shown to good faith settlements of disputed claims, is of vital importance where the government is a party. The policy underlying such deference is articulated in *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.* 150 Ohio App.3d 728, 2002-Ohio-7078, ¶¶37-39, wherein the First District Court of Appeals stated:

“[I]t is elementary that the mere fact that a [governmental entity] may sue and be sued confers upon it also the power to compromise and settle both threatened and pending suits.’

“The paramount public welfare demands that such settlement may not be hindered or thwarted by a single taxpayer, even though he be courageous in the cause of public

⁵Ohio's strict adherence to the tender rule is not universally accepted. See, e.g., *Slotkin v. Citizens Casualty Co. of New York* (C.A.2, 1979), 614 F.2d 301, 312 (applying New York law); *Bilotti v. Accurate Forming Corp.* (1963), 39 N.J. 184, 188 A.2d 24, 34-35; *Automotive Underwriters v. Rich* (1944), 222 Ind. 384, 53 N.E.2d 775, 777. Nonetheless, Ohio has been identified by other jurisdictions as a state that requires a party to return consideration received before challenging a release. See, e.g., *Matsuura v. Alston & Bird* (C.A.9, 1999), 166 F.3d 1006, FN 4; *DiSabatino v. United States Fid. & Guar. Co.* (D.Del. 1986), 635 F.Supp. 350, 352. But see, *Cundall v. U.S. Bank, N.A.*, 174 Ohio App.3d 421, 2007-Ohio-7067, ¶34. (Given the highly suspect nature of documents that purport to release the fiduciary from liability, a beneficiary of the relationship may challenge the transaction without first returning the consideration.)

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justice. The responsibility for action or nonaction in such matter must rest upon the public officials.” Id., quoting *Oakman v. Eveleth* (1925), 163 Minn. 100, 203 N.W. 514.

While *Ritter* was a statutory taxpayer action against a municipality and not a general fund taxpayer action against the state, the public welfare concerns underlying *Ritter* are also paramount to the state. Thus, under Ohio law, where a settlement agreement is the product of fraud in the factum, a taxpayer may intervene and set aside such agreement. Absent proof of fraud in the factum, however, the settlement and release may not be hindered or thwarted by the taxpayer.

In short, given the absence of any evidence to support an inference of fraud in the factum and given the undisputed fact that the consideration for the release has not been returned to Accenture, the Gildners' claims are barred by the settlement agreement and release of claims. Accordingly, Accenture and ODJFS are entitled to judgment as a matter of law and their respective motions for summary judgment shall be granted.

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Court of Claims of Ohio

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LANCE A. GILDNER, et al.

Plaintiffs/Counter Defendants

v.

ACCENTURE, LTD.

Defendant/Counter Plaintiff

v.

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES

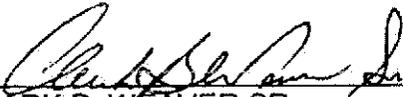
Counter Defendant

Case No. 2007-05067-PR

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

An oral hearing was conducted in this case upon defendant/counter plaintiff's and counter defendant's motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, the motions for summary judgment are GRANTED. Judgment is rendered in favor of defendant/counter plaintiff on the complaint and in favor of counter defendant on the counterclaim. The clerk is directed to return the original papers to the Montgomery County Court of Common Pleas. Court costs are assessed against plaintiffs/counter defendants. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.


CLARK B. WEAVER SR.
Judge

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JUDGMENT ENTRY

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