

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

Supreme Court Case No:

10-0943

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

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

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS  
THE NORTHERN OHIO CHAPTER OF  
ASSOCIATED BUILDERS & CONTRACTORS, INC.  
DAN VILLERS, JASON ANTILL AND FECHKO EXCAVATING, INC.

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**APPENDIX**

Decision and Journal Entry of the Summit County Court of Appeals,  
Ninth Judicial District, April 28, 2010.

**I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves a matter of first impression regarding whether the Barberton City Schools Board of Education (“Board”) or the Ohio School Facilities Commission (“OSFC”) have the statutory authority to require compliance with Ohio’s Prevailing Wage Law (“PWL”), R.C. 4115.03 to R.C. 4115.16, on school construction projects. In 1997, the Legislature in S.B. No. 102 prohibited school boards from applying PWL to school construction projects through the enactment of R.C. 4115.04(B)(3), in order to reduce the cost of school construction and to maximize the number of school districts served with OSFC funding. The issue presented to this Court is of great general interest and public importance as it involves the manner in which billions of taxpayer dollars will be expended on school construction projects in the State of Ohio.

This appeal also presents important issues concerning standing. The Ninth District Court of Appeals held no one has standing in Ohio to challenge a school board or the OSFC in applying PWL to school construction contracts, including: (1) common law taxpayers who are paying a special bond levy to construct the school; (2) a contractor that submitted a bid for a contract on the project; and (3) an association representing the contractor that submitted a bid, as well as other contractors that intend to bid on multiple Board projects that incorporate the PWL requirement, and where the PWL application to a school project is alleged to be in violation of State law.

Specifically, the Ninth District held that Barberton taxpayers lacked common law taxpayer standing because they are no different than any “other Barberton taxpayer who is paying into a special fund,” completely eviscerating this Court’s common law taxpayer decisions in *State, ex rel. Masterson, v. Ohio Racing Commission* (1954), 162 Ohio St. 366 and *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St. 3d 317. Instead of comparing the

interests of Barberton taxpayers to that of other taxpayers generally in the State, the Ninth District compared the interests of Barberton taxpayers herein, with that of other Barberton taxpayers, erroneously concluding that they have no “special interest” or injury different from that of other Barberton property owners because they are all paying the levy to construct the school. In essence, the Ninth District’s decision eliminates common law taxpayer standing by pairing down the taxpayers until they are all part of the same group or class, and then concluding they all lack standing because they are all suffering the same injury, hence, in order to have standing, the taxpayer must be the only member of the class that contributed to a special fund. Had this Court subscribed to this reasoning in *Racing Guild*, the plaintiffs therein would not have had standing because they would be no different than other individuals who had contributed to same “special fund.”

If this result stands, all similarly situated Ohio taxpayers who are paying the same “special taxes” or paying into the same “special funds” would all lack standing to challenge governmental agencies alleged to be spending taxpayer funds unlawfully. This decision is the antithesis of this Court’ decisions in *Masterson* and *Racing Guild* and is also in direct conflict with decisions rendered by other Ohio Appellate Courts. See *East Liverpool City School Dist. ex rel. Bonnell v. East Liverpool Bd. of Educ.*, 7th Dist. No. 05CO32, 2006-Ohio-3482 and *State ex rel Connors v. Ohio Department of Transportation*, (1982), 8 Ohio App.3d 44.

The Ninth District decision also eviscerates the standing of bidders and trade associations to challenge unlawful bid specifications on public contracts. The Ninth District held that unless the bidder was the lowest bidder whose bid was rejected, it would lack standing to challenge the bid specifications as it would lack an “actual injury.” Then, because a bidder lacks an “actual injury,” a trade association representing that bidder also lacks standing, regardless of the fact that

the trade association represents other bidders who intend to bid on the Project subject to the same unlawful bid specifications.

No longer does a loss of business opportunities, an infringement upon a contractor's ability to submit a competitive bid, or the right to challenge unlawful bid specifications in public contracts constitute an "actual injury" sufficient to provide standing. Injunctive relief requesting that all bids be rejected or that the project be rebid without unlawful terms is no longer a remedy. Nor is a declaratory judgment available to plaintiffs to challenge contracts yet to be bid worth tens of millions of dollars which will also include an offensive PWL requirement. According to the Ninth District, a contractor must suffer a compensable injury in the form of bid cost damages in order to have standing.<sup>1</sup>

The Ninth District decision regarding contractor and trade association standing misapplies this Court's holding in *Ohio Contractors Association v. Bicking*, (1994), 71 Ohio St. 3d 318, and is conflict with several decisions from other Appellate Courts. See *State ex rel Connor, supra, Cedar Bay Constr., Inc. v. Fremont*, (Nov. 18, 1988) 6<sup>th</sup> Dist. App. No. CA S-87-36, 1988 Ohio App. LEXIS 4508, and *C. E. Angles, Inc. v. Evans*, (Dec. 14, 1982), 10<sup>th</sup> Dist. App. No. 82AP-635, 1982 Ohio App. LEXIS 13125.

If this decision stands, not only will school boards and the OSFC continue to unlawfully apply PWL requirements to school project, but it will prevent any legitimate challenges by taxpayers, companies and trade associations seeking to uphold State law and prevent the expenditure of public funds for unlawful purposes. This decision will preclude anyone in the State, but the lowest bidder for a project, from bringing a challenge claiming that the bid

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<sup>1</sup> Stated differently, unless the contractor has a Fourteenth Amendment due process/equal protection claim, or was the low bidder for the project that was rejected, no other bidder for a contract has standing to challenge unlawful bid awards or unlawful bid specifications.

specifications for the project are unlawful and/or the award and execution of a contract will result in the unlawful expenditure of public funds. By eliminating taxpayer, associational and bidder standing, governmental agencies like the OSFC, school boards or other like governmental agencies will be free to spend taxpayer funds as they wish with impunity and without recourse.

## **II. STATEMENT OF THE CASE AND FACTS**

In March of 2008, Barberton taxpayers passed a 5.2 mill bond levy to fund various school construction projects totaling approximately Seventy-Two Million Dollars in Barberton, including the New Barberton Middle School Project (“Project”). (AVC ¶18).<sup>2</sup> At least 40% of the construction costs for the Project are being paid for by the 5.2 mill bond and the remaining 60% is being funded by taxpayer monies received from the OSFC. (AVC ¶19). The Board and the OSFC are co-owners of the construction Project. (AVC ¶16). The Project is subject to Ohio’s competitive bidding laws and R.C. 3313.46(A)(6). (AVC ¶35).

On October 21, 2008, after the bond levy had been passed, the Board passed a Resolution requiring that all work on the Project be subject to PWL requirements, including the payment of prevailing wages to construction workers.<sup>3</sup> (SAVC ¶15). The Barberton taxpayers were not informed of this PWL requirement when the 5.2 mill levy to construct the school was passed. The Board adopted this PWL requirement based on the July 26, 2007 Resolution 07-98 enacted by the OSFC which provides school boards the “authority” to elect to apply PWL to a school

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<sup>2</sup> References to the Amended Verified Complaint are abbreviated “AVC” and the Second Verified Amended Complaint as “SAVC.”

<sup>3</sup> Although Defendants had repeatedly represented that the challenged PWL only applied to early site work contract for the Project, it was first discovered in depositions of the Board’s President and Vice President that the challenged PWL requirement would be applied to all contracts and phases of the Project, most of which has yet to be bid. This fact was discovered on June 22, 2009 when Appellants were finally allowed to conduct discovery, and Appellants attempted to file their SAVC 14 days later.

project. (AVC Exhibit “D”). The early site work contract was bid with this unlawful PWL requirement as a bid specification. (AVC ¶22). On April 1, 2009, the Board, over Appellants objections, opened the bid and awarded the early site work contract to Mr. Excavator.

On April 3, 2009, Appellants the Northern Ohio Chapter of Associated Builders & Contractors, Inc. (“ABC”), Fechko Excavating, Inc., (“Fechko”) and Barberton Taxpayers Dan Villers and Jason Antill (“Taxpayers”) filed a Verified Complaint against the Board seeking declaratory and injunctive relief claiming the Board and the OSFC exceeded their authority by unlawfully mandating compliance with PWL on a school construction project. (AVC ¶1). Taxpayers are property owners who reside in the City of Barberton and are paying the special bond levy to construct the school. (ACV ¶5). Fechko is a construction company that submitted a bid for the first phase of the Project and whose bid was increased by \$10,000 due to the unlawful PWL requirement. Id. ABC is a non-profit trade association that represents the interests of Fechko and other ABC bidders that are injured by the unlawful PWL requirement imposed by the Board and the OSFC on school construction projects. (AVC ¶7 and ¶8). On April 24, 2009, the AVC was filed adding claims against the OSFC and Mr. Excavator.

On July 31, 2009, the trial court dismissed the Appellants’ complaint holding that all Appellants lacked standing, and that Appellants otherwise failed to state a claim for which relief could be granted. The trial court also denied Appellants leave to file the SAVC with regard to admissions from the Board President and Vice President that the PWL requirement was not a factor in determining whether a bidder was “responsible,” but was done solely to please their “union constituents” and to prevent “Mexicans” from working on the Project, as well as admitting that the PWL requirement would be applied to every phase/contract for the Project yet to be bid.

On August 5, 2009, Appellants filed a Notice of Appeal with the Ninth District and also filed an App. R. 7 Motion for Stay and Request for Injunction. On August 11, 2009, the Ninth District denied Appellants Motion. On August 12, 2009, Appellants appealed the Ninth District decision denying Appellants' Motion for Stay and Request for Injunction to this Court, Case No. 2009-1466. On September 21, 2009, this Court denied Appellant's Motion for Stay and Request for Injunction with two Justices dissenting: Justice Lundburg Stratton stating she would grant Appellants Motion for Stay and Request for Injunction; and Justice Pfeifer stating he would grant Appellants Request for Injunction.

On April 28, 2010, the Ninth District affirmed the decision of the trial court holding that none of the Appellants had standing to challenge unlawful bids specifications on a school construction project, and further holding that Appellants claims regarding the Board and OSFC's authority to require PWL on the Project lacked merit, affirming the trial court's denial of Appellants request for leave to file the SAVC. This appeal followed.

### **III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1:** Taxpayers of a school district that pay into a special fund, or pay a special tax, [e.g. the 5.2 mill bond levy passed to construct the Barberton schools], have a special interest and possess common law taxpayer standing different than other taxpayers generally in the State of Ohio to bring a common law taxpayer lawsuit against a school board and the OSFC to enjoin the construction of the project when taxpayers allege the bid specifications for the project contain unlawful terms or when public funds are expended for unlawful purposes

Appellants present this Court with two propositions of law regarding common law taxpayer standing. The Ninth District has eviscerated this Court's holdings in *Masterson* and *Racing Guild*, finding “. . . Taxpayers in this case cannot allege that, as a result of the Board and OSFC's actions, they have sustained any damages different in kind than those sustained by any

other taxpayer in Barberton whose property taxes are burdened by the 2008 levy,” Id. ¶21, misconstruing what constitutes a “special interest” and injury to taxpayers.

The Ninth District’s decision regarding taxpayer standing is also in conflict with decisions rendered by the Seventh and Tenth Districts. In *East Liverpool City School Dist. ex rel. Bonnell*, the Seventh District found that a taxpayer has standing to enjoin a school board and the OSFC from constructing a school. Specifically, the Seventh District at ¶21 held:

Bonnell also did raise a common law taxpayer action. His Complaint states that he is a resident and taxpayer of the East Liverpool City School District. This fact creates his special interest in the action which is required to sustain a common law taxpayer cause of action.

Under the above quoted standard, Taxpayers both have standing in that: both are residents of and taxpayers in the Barberton School District; and given their aforementioned status as residents and taxpayers in the Barberton School District “. . . creates [their] special interest in the action to sustain a common law taxpayer cause of action.” The Ninth District ignored this holding, improperly speculating that taxpayer standing was not sufficiently scrutinized by the Seventh District in *Bonnell*.

Likewise, the Tenth District in *Connors*, held taxpayers, contractors, and a trade association all have standing to challenge invalid minority bid requirements included in construction contracts. The Tenth District held in accordance with this Court’s decision in *Masterson* that damages and injury to taxpayers are presumed “. . . in the execution of public contracts in violation of mandatory provisions of a statute respecting such contracts, or in the expenditure of funds for an unlawful or unconstitutional purpose.” *Connors* at pp. 47-48. The Ninth District ignored the Tenth District’s decision in holding that Taxpayers lacked standing to challenge the PWL specification by assuming that the PWL specification was lawful and the contract was properly awarded to Mr. Excavator. Id. at ¶22. In other words, by concluding that

Appellants claim regarding the application of PWL to the project had no merit, the Ninth District found Appellants had no standing.

Unlike the Ninth District, the Seventh and Tenth District decisions are in line with this Court's reasoning regarding taxpayer standing. This Court in *Masterson, Racing Guild*, and most recently, *State ex rel. Dann v. Taft*, Ohio St. 3d 252; 2006 Ohio 3677, has held taxpayer and individuals have standing and a "special interest" when they contribute to a "special fund" regardless of whether the contributions are in the form of taxes, fees or other monies, and differentiating the standing of taxpayers who are specifically injured from the public in general. *Racing Guild* p.321. Here, Taxpayers standing is established as both are residents and freeholders of Barberton, and both pay into a "special fund" for the construction of the Project, namely the 5.2 mill bond levy used to fund 40% of the Projects construction costs. Thus, the Taxpayers special interest and injury differs from that of other general taxpayers in the State, as both will suffer an injury caused through the increased cost of construction due to the unlawful PWL specification, which will adversely affect their property values, and increase the amount of property taxes paid over the life of the bond levy. It is respectfully submitted that the foregoing Propositions of Law be accepted for review.

**Proposition of Law No. 2:** A contractor that submitted a bid for a contract on a school construction project and a trade association representing that contractor and other contractors who intend to bid on the project, have standing to challenge unlawful bid specifications included on that school construction project by a school board and the OSFC.

Until the Ninth District's decision, a bidder and a trade association had standing to challenge unlawful specifications included in public contracts if they bid or intended to bid on a project. The Ninth District misconstrued this Court's holding in *Bicking, supra* and rendered a decision in conflict with three decisions from the Tenth District to deprive Fechko and ABC of

standing to challenge the unlawful use of PWL requirements on school projects.

It is well-settled a bidder has standing to challenge a bid award when the bidder submits, or intends to submit a bid on the Project. *See Bicking, supra*. Thus, in order to have standing to bring this lawsuit, Fechko was required, and did, submit a bid on the project. (AVC ¶10). The contractor must also suffer an “actual injury,” which was suffered by Fechko and other ABC members due to the unlawful imposition of PWL requirements on a school project, taking the form of lost business opportunities and an infringement upon a contractor’s ability to submit a competitive bid. These are recognized injuries suffered by contractors and trade associations in various state and federal courts. However, the Ninth District found that a contractor’s actual injury must be compensable in some way, limiting standing to only those bidders who are the apparent low bidders and were rejected, leaving no one but the apparent low bidder to challenge its own contract award and/or the lawfulness of the bid specifications. *Id.* at ¶15, ¶18 and ¶19.

The Ninth District’s erroneous holding regarding bidder/contractor standing and what constitutes an “actual injury” is in conflict with *Connors*, 8 Ohio App.3d 44, 47 (“ . . . [T]he members of the association are threatened with the loss of bids . . . The association seeks to protect its members from being deprived of an opportunity to fairly bid on such projects.”); *Cedar Bay Constr.*, 6<sup>th</sup> Dist. App. No. CA S-87-36 (where a contractor who submitted the second lowest bid has standing to challenge the bid award made to the lowest bidder, adopting the holding of *C.B. Transportation Inc. v. Butler Co. Bd. of Mental Retardation* (1979), 13 Ohio Ops. 3d 382, 384 and *Johnson Constr. Co. v. Bd. Of Edn.* (1968), 16 Ohio Misc. 99);<sup>4</sup> and *C. E. Angles*, 10<sup>th</sup> Dist. App. No. 82AP-635 (a contractor and ABC both had standing to challenge the

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<sup>4</sup> A bidder that submitted the highest bid and had standing to challenge a bid award to the lowest bidder noting “. . . plaintiff has a right to bring this action because nobody else does have the right. And for the law to provide no remedy to redress an illegal official act is the very antithesis of the law.”

application of PWL to a project because they are not normally subject to prevailing wage requirements, as prevailing wage increases the amount of their bids and as such, both would be entitled to enjoin the execution of the contract if PWL is declared unconstitutional). Fechko, like the plaintiff in *Cedar Bay*, submitted the second lowest bid for the project, its ability to submit a competitive bid was unlawfully impaired by the Board and the OSFC, and thus, Fechko has standing to file suit seeking injunctive and declaratory relief against the same because PWL “do[es] not apply to” school contracts.

These Tenth and Sixth District cases stand for the proposition that a contractor/bidder has standing regardless of whether the contractor was the “apparent low bidder whose bid was wrongfully rejected.” More so, no compensable damage is needed to establish an “actual injury.” As such, Fechko and other ABC members suffer and will continue to suffer an “actual injury” as the unlawful PWL requirement impedes upon their ability to submit a competitive bid [in this case \$10,000 less than the bid submitted by Mr. Excavator]. Increased bid costs through the unlawful application of PWL to a school project results in Fechko and other ABC members suffering an “actual injury” in the form of a lost contracts and business opportunities. The fact that Fechko may not be entitled to compensable damages in the form of “bid costs,” bears no weight on Fechko’s standing to challenge the PWL specification and its ability to establish other injuries such as the infringement upon its ability to submit a competitive bid on a school project.

It is respectfully submitted that this Court accept Appellants Proposition of Law No. 3 for review.

**Proposition of Law No. 3:** A board of education exceeds its statutory authority and abuses its discretion by imposing or mandating the payment of so called prevailing wages on a school construction project because the Legislature expressly stated that Chapter 4115 of the Ohio Revised Code, Ohio’s Prevailing Wage Law, “do[es] not apply to” such projects through operation of R.C. 4115.04(B)(3)

In affirming the trial court’s refusal to grant Appellants leave to file their SAVC, the Ninth District held that Appellants were unable to “. . . identify any basis upon which the provision exempting school boards from the use of the prevailing wage somehow constitutes a prohibition of the same, Bidders and Taxpayers are unable to make ‘at least a prima facie showing [that they] can marshal support for the new matter sought to be pleaded.’” Id. at ¶31. As such, the Ninth District found no merit whatsoever to Appellants underlying claims in this case and Proposition of Law Nos. 3 and 4 are properly before this Court for review.

It is submitted that the Board and the OSFC lack any express or implied statutory authority to apply a PWL requirement to a school project pursuant to R.C. 4115.04(B)(3), thereby, abusing their discretion. The plain language of R.C. 4115.04(B)(3) and (B)(4) when read *in pari materia* clearly demonstrates for the Court that the Legislature intended to prohibit the Board and the OSFC from exercising any authority to “elect” to apply PWL requirement to a construction project. R.C. 4115.04(B) provides in part the following:

(B) Sections 4115.03 to 4115.16 of the Revised Code **do not apply to:**

\* \* \*

**(3) 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;**

**(4) Public improvements undertaken by, or under contract for, a county hospital operated pursuant to Chapter 339 of the Revised Code or a municipal hospital operated pursuant to Chapter 749...provided that a county hospital or municipal hospital may elect to apply sections 4115.03 to 4115.16 of the Revised Code to a public improvement undertaken by, or under contract for, the hospital;**

\* \* \*

(Emphasis added). The statutory language deliberately used by the Legislature in Section (B)(3) bars the Board and the OSFC from applying a PWL requirement to a school project by removing such projects from PWL altogether. When Section (B)(3) is compared with the explicit language

used in Section (B)(4), which removes hospital projects from PWL, it is clear that the Legislature specifically included language to allow county hospitals the “option” to “elect” to apply PWL to their projects, thereby vesting the Department of Commerce with jurisdiction to administer and enforce the law, while intentionally denying the same authority to school boards or the OSFC. When enforcing the statute as written, it is clear from this plain language that the Board and the OSFC are exceeded their authority by applying a PWL requirement to a school project.

**A. The Board cannot Exceed the Statutory Mandate of the Legislature.**

The prevailing wage prohibition intended by the Legislature in R.C. 4115.04(B)(3) on school boards is bolstered by case law detailing the statutory authority of school boards. In *Hall v. Lakeview Local Sch. Dist. Bd. of Ed.* (1992), 63 Ohio St. 3d 380, this Court found that a school board exceeds its authority when it acts outside the powers granted to it by statute. In so ruling, this Court analyzed the two statutory provisions to determine that a school board did not have the authority to enter into a supplemental contract with a custodial employee. The Court held, “Boards of education, as creatures of statute, have no more authority than that conferred upon them by statute...Clearly, if the General Assembly had intended to employ a board of education to enter into supplemental contracts with non-teaching employees, the General Assembly could have specifically so stated as it did with regard to teachers...” Id. (internal citations omitted).

Likewise, in *Educational Services Institute, Inc., et al., v. Gallia-Vinton Education Service Center, et al.*, 4<sup>th</sup> Dist No. 03CA6, 2004 Ohio 874, the court held a school board had no authority to contract with a consulting company to provide superintendent services when the statute failed to provide the school board with explicit authority to do so, causing the contract the school board entered into to be void. The court stated that an act by the school board is not

rendered permissible simply because there nothing in the Revised Code that expressly prohibits it. *Id.* ¶15. Contrary, to the school board’s argument, it does not have the power to act unless that power is expressly granted unto them by statute. *Id.*

*Educational Services*, like *Hall, supra*, directly contradict the proposition that the Board or the OSFC, as creatures of statute, have any authority to “clect” to apply PWL to a school project because no statute in the Revised Code provides them with this authority. R.C. 4115.04(B)(3) clearly states PWL “do[es] not apply to school projects” and the simple fact that school boards and the OSFC lack the police powers of the Legislature to set minimum wage rates, is clear evidence that they exceeded their authority under Ohio Law. Furthermore, because the Board and the OSFC lack authority by statute to set minimum wages or require PWL on a school project, they also cannot impose the same by contract. See *Hamilton Local Bd. of Educ. v. Arthur*, 1973 Ohio App. LEXIS 1777 (Ohio Ct. App., Franklin County July 24, 1973). If such conduct were permitted, the enactments of the Legislature would be rendered meaningless. *State, ex rel. Bd. of End. of Cincinnati, v. Griffith*, 74 Ohio St., 80, 77 N. E., 686.<sup>5</sup>

**B. The Board is Violating R.C. 3313.46(A)(6).**

Appellants assert that based upon the language of R.C. 4115.04(B)(3), when read in conjunction with R.C. 3313.46(A)(6), the Board violated its statutory duty by making it impossible to accept the “lowest” responsible bid for the Project, because PWL increased the cost of construction. R.C. 3313.46(A)(6) mandates the Board and the OSFC advertise and accept only the “lowest” responsible bid for work on the Project, thereby impeding competitive bidding.

Legislative Service Commission Report No. 149, commissioned by the Legislature,

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<sup>5</sup> All of the Board and OSFC arguments raised in this case were considered and rejected by the Louisiana Supreme Court in *Louisiana Associated General Contractors v. The Calcasieu Parish School Board* (1991), 586 So.2d 1354, a case directly on all fours to the issues presented herein.

evidenced an aggregate 10.7% savings on school projects after PWL requirements were removed, amounting to a 487.9 Million Dollars saving in school construction costs over the five year period of the LSC Study. Following the results of the LSC Report in 2002, the Legislature did not act to amend the statute to allow a board of education to “elect” to apply PWL to a school project. Utilizing the LSC Report findings, removing the PWL requirement would generate a savings of 2.35 million dollars for Barberton taxpayers. Thus, when the Board imposes a PWL requirement it cannot, meet its statutory obligation to award contracts to the “lowest responsible bidder” pursuant to R.C. 3313.46(A)(6), since PWL based bids are proven to be on average 10.7% higher. Appellants respectfully request this Court accept Proposition of Law No. 4 for review.

**Proposition of Law No. 4:** The Ohio School Facilities Commission exceeded its statutory authority and abused its discretion by enacting Resolution 07-98 that promotes the imposition of so called prevailing wages on a school construction projects because the Legislature expressly stated that Chapter 4115 of the Ohio Revised Code, Ohio’s Prevailing Wage Law, does not apply to such projects through operation of R.C. 4115.04(B)(3).

Likewise, the OSFC’s Resolution 07-98, passed July 26, 2007, is also unlawful given the Legislature’s mandate to remove school projects from PWL requirements. The OSFC, an administrative agency was created by S.B. No. 102 to fund school projects without PWL requirements in order to “reduce costs” and “maximize” the number of districts served. The OSFC itself has no authority to legislate or pass resolutions in contravention of State law, particularly in contravention of R.C. 4115.04(B)(3) or R.C. 3313.46(A)(6). Therefore, the OSFC has no authority to usurp the Legislature by attempting to legislate through Resolution 07-98 or allow school board to spend funds on school projects with PWL requirements.

It is well established that administrative regulations and resolutions cannot dictate public policy, but rather can only develop and administer policy already established by the General Assembly. *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 259-260

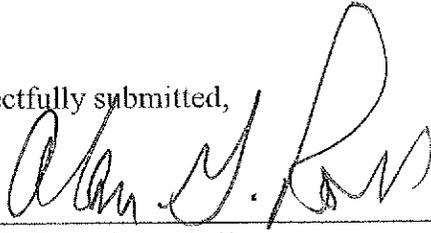
(Ohio 2002), citing, *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 567, 697 N.E.2d 198. *In D.A.B.E.*, this Court explained that an administrative agency has only such regulatory power as is delegated to it by the Legislature and authority that is conferred by the Legislature cannot be extended by the administrative agency. This Court stated further “such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.” (Emphasis added). In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it. *Id.* at P38-40, quoting *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6.

Under this rationale R.C. 4115.04(B)(3) or S.B. No. 102 does support the proposition that the OSFC can apply a PWL requirement to a school project because PWL explicitly “do[es] not apply” to such projects. Without an “express grant” to permit application of PWL, “there is no implied grant to do so.” Therefore, any PWL requirement imposed by the OSFC violates State law and is invalid. Appellants respectfully request Proposition of Law No. 5 be accepted for review.

#### **IV. CONCLUSION**

For the foregoing reasons, this case involves a matter of great public and general interest. Appellants request this Court grant jurisdiction to review the rulings of the Ninth District Court of Appeals and Summit Court of Common Pleas.

Respectfully submitted,



Dated: May 25, 2010

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellants Memorandum in Support of Jurisdiction was served via ordinary U.S. mail, postage prepaid, upon the following:

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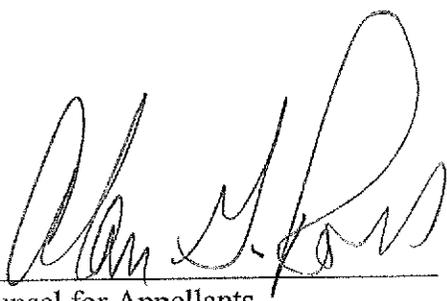
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this 25<sup>th</sup> day of May 2010.

  
\_\_\_\_\_  
Counsel for Appellants

**IN THE SUPREME COURT OF OHIO**

STATE EX. REL., NORTHERN OHIO	:	Supreme Court Case No:
CHAPTER OF ASSOCIATED	:	
BUILDERS & CONTRACTORS, INC.,	:	
<i>et. al.</i>	:	On Appeal from the Summit County Court of
	:	Appeals, Ninth Appellate District
Plaintiffs/Appellants,	:	Case No. CA-24898
	:	
v.	:	
	:	Summit County Court of Common Pleas
THE BARBERTON CITY SCHOOLS	:	Case No. 2009-04-2636
BOARD OF EDUCATION, <i>et al.</i>	:	
	:	
Defendants/Appellees.	:	

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**APPENDIX**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS  
THE NORTHERN OHIO CHAPTER OF  
ASSOCIATED BUILDERS & CONTRACTORS, INC.  
DAN VILLERS, JASON ANTILL AND FECHKO EXCAVATING, INC.**

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COURT OF APPEALS  
DANIEL M. HORRIGAN

STATE OF OHIO )  
COUNTY OF SUMMIT )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

ss:2010 APR 29 AM 7:55

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

SUMMIT COUNTY  
CLERK OF COURTS

C.A. No. 24898

Appellants

v.

BARBERTON CITY SCHOOL BOARD  
OF EDUCATION, et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2009 04 2636

Appellees

DECISION AND JOURNAL ENTRY

Dated: April 28, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Associated Builders & Contractors, Inc. (“ABC”), Fechko Excavating, Inc. (“Fechko”), Dan Villers, and Jason Antill appeal from the judgment of the Summit County Court of Common Pleas, dismissing for lack of standing. This Court affirms.

I

{¶2} In 2008, voters in the City of Barberton passed a 5.2 mill levy to aid the Barberton City School District in building a new middle school. The Barberton Middle School Construction Project (“the Project”) is estimated to cost approximately \$30 million dollars and is scheduled to be completed in several phases. In addition to the use of levy monies from Barberton taxpayers, the Project is also being funded by the Ohio School Facilities Commission (“the OSFC”), a state agency created by the Ohio Legislature to administer and fund school construction projects.

{¶3} In March 2009, the Barberton City School District Board of Education (“the Board”) sought bids for the first phase of the construction, known as the Early Site Work (“ESW”). In its request for proposals, the Board specified that all bids were to include prevailing wage rate requirements as set forth in R.C. 4115 et seq. Eligible bids were to be submitted to the Board by no later than March 25, 2009. Fechko, who is a member of the Northern Ohio Chapter of ABC, timely submitted a bid, incorporating into its bid the requisite prevailing wage rates for Summit County. ABC, a national trade association comprised of merit shop construction associates and contractors throughout the country, aids its members in addressing issues that are of concern industry-wide.

{¶4} On or about April 1, 2009, the Board awarded the ESW contract to Mr. Excavator. On April 3, 2009, Fechko and ABC (collectively “Bidders”), along with Barberton residents Dan Villers and Jason Antill (collectively “Taxpayers”), filed a verified complaint seeking to permanently enjoin the Board and the OSFC from applying Ohio’s prevailing wage requirement to the ESW project. Their complaint also sought a declaration that the bidding requirements and subsequent contracts imposing a prevailing wage requirement were an abuse of the Board’s discretion and unlawful. Simultaneously, they filed motions seeking a preliminary injunction, temporary restraining order, and expedited discovery. The trial court held a hearing, at which the magistrate denied the motions for a temporary restraining order and expedited discovery and set the preliminary injunction and declaratory judgment for hearing on April 15, 2009.

{¶5} On April 8, 2009, the Board entered into a written contract with Mr. Excavator for completion of the ESW project. On April 13, 2009, the Board filed a motion to dismiss Bidders and Taxpayers’ complaint under Civ.R. 12(B)(7) based on a failure to join an indispensable party

pursuant to Civ.R. 19, namely the OSFC. In response, Bidders and Taxpayers filed an amended verified complaint naming the OSFC and Mr. Excavator as defendants, in addition to the Board. In May, the magistrate held a pretrial hearing at which he established a discovery schedule and set a trial date for mid-August.

{¶6} On May 28, 2009, the Board filed a motion to dismiss under Civ.R. 12(B)(1) and (B)(6), arguing that Bidders and Taxpayers lacked standing to bring their complaint and that they had failed to state a claim which would entitle them to relief. On that same day, the OSFC also filed a motion to dismiss arguing the same. Mr. Excavator likewise filed a motion to dismiss on June 17, 2009. Bidders and Taxpayers opposed the foregoing motions and the parties proceeded with discovery.

{¶7} In early July, Bidders and Taxpayers requested leave to file a second amended verified complaint based on information they learned in their discovery depositions. The Board, the OSFC, and Mr. Excavator opposed the request for leave, arguing that there were dispositive motions pending before the court, and further, that the second amended verified complaint presented claims that were not yet ripe, as they dealt with future phases of the Project for which bids had not yet been requested or bid requirements issued.

{¶8} On July 31, 2009, the trial court granted the motions to dismiss filed by the Board, the OSFC, and Mr. Excavator. In doing so, it concluded that Bidders and Taxpayers lacked standing and had failed to state a claim under Civ.R. 12(B)(6). The trial court also denied Bidders and Taxpayers' motion to amend their second verified complaint. Bidders and Taxpayers timely appealed and sought a stay of the trial court's decision as well as an injunction. This Court denied the motion for stay and request for injunction, which Bidders and Taxpayers appealed to the Ohio Supreme Court. In the interim, the Board and the OSFC filed a motion to

dismiss the appeal as moot, arguing that the ESW project had been completed. Bidders and Taxpayers opposed the motion to dismiss and this Court subsequently denied it. On September 21, 2009, the Ohio Supreme Court denied Bidders and Taxpayers' motion for stay and request for injunctive relief.

## II

### First Assignment of Error

“THE TRIAL COURT ERRED IN DISMISSING THE AMENDED VERIFIED COMPLAINT AND HOLDING NONE OF THE PLAINTIFFS HAD STANDING TO BRING THIS ACTION UNDER CIV. R. 12(B)(1).”

{¶9} In their first assignment of error, Bidders and Taxpayers argue that the trial court erred in concluding that they lacked standing to pursue the causes of action set forth in their complaint. We disagree.

{¶10} “The issue of standing is a threshold test that, once met, permits a court to determine the merits of the questions presented.” *Hicks v. Meadows*, 9th Dist. No. 21245, 2003-Ohio-1473, at ¶7. “A person has standing to sue only if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury as a result of the challenged action.” *Fair Hous. Advocates Assn., Inc. v. Chance*, 9th Dist. No. 07CA0016, 2008-Ohio-2603, at ¶5. “Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. Accordingly, a motion to dismiss for lack of standing is properly brought pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, at ¶4. See, also, *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), 9th Dist. No. 18250,

at \*1. Because standing presents this Court with a question of law, we review the matter de novo. *Zagrans v. Elek*, 9th Dist. No. 08CA009472, 2009-Ohio-2942, at ¶7.

### **Bidders and Taxpayers' Amended Verified Complaint**

{¶11} In their amended verified complaint, Bidders and Taxpayers challenge the use of prevailing wages as a bidding requirement and contractual term for work on the ESW project. Ohio's prevailing wage law, as set forth in R.C. 4115 et seq., "require[s] contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the project is to be performed." *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, 122 Ohio St.3d 283, 2009-Ohio-2957, at ¶14, quoting *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 349. The Ohio Department of Commerce is charged with enforcing the prevailing wage law. See generally, R.C. 4115.10, R.C. 4155.13, and R.C. 4115.16. The statute, however, specifically identifies several exceptions to the prevailing wage law provisions, including "public improvements undertaken by, or under contract for, the board of education of any school district[.]" R.C. 4115.04(B)(3). Consequently, school boards are not required to pay prevailing wages when entering into a public improvement project, such as the construction of a middle school. See R.C. 4115.03(C) (defining "public improvement" to include "all buildings \*\*\* constructed by a public authority" which would include a school board under the definition of "public authority" set forth in R.C. 4115.03(A)).

{¶12} In their amended verified complaint, Bidders and Taxpayers allege that the "prevailing wage requirement included by the Board in the bid specifications for [the Project] that are to be made part of the contract for the [ESW] renders the contract illegal \*\*\* as the Board exceeded its authority under the law resulting in a misappropriation and misuse of public

funds.” Therefore, they allege that “the Board exceeded its authority under the law resulting in a misappropriation and misuse of public funds” and “entered into an illegal contract and/or exceeded its authority \*\*\* by mandating compliance with Ohio’s [p]revailing [w]age [l]aw on the Project.” Additionally, Taxpayers and Bidders maintain that “the OSFC does not require, nor can it require, the application of Ohio’s [p]revailing [w]age [l]aw to the Project.”

{¶13} The trial court concluded that Bidders and Taxpayers lacked standing to pursue the aforementioned claims alleged in their complaint. Given that Bidders and Taxpayers arrive at their basis for standing in different manners, we address each party’s argument separately.

### **Fechko’s Standing**

{¶14} Fechko alleges that the trial court failed to apply the correct standard of review in deciding the Board, the OSFC, and Mr. Excavator’s motions to dismiss because the trial court did not accept Fechko’s factual allegations as true and draw all reasonable inferences in its favor. Fechko points to several excerpts in the trial court’s entry to support its claim that the trial court discredited the assertions set forth in its complaint and instead, “drew adverse inference against [it].” These arguments, however, have little bearing on Fechko’s ability to assert that it has standing in this matter. Consequently, we focus our analysis on Fechko’s assertion that, as a bidder on the ESW project, it has standing to challenge the award of the bid and subsequent contract to another contractor, even if the bid award unlawfully incorporates prevailing wage requirements. Though Fechko provides ample citations to case law which support its assertion that a party must have actually bid on a project in order to have standing to later challenge the bid award, those cases provide only the threshold requirement necessary to challenge the propriety of a bid award. See *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320 (concluding that association lacked standing to pursue cause of action in representative capacity

to challenge legality of bidding procedure because none of its members submitted a bid on the project); *State ex rel. Associated Bldrs. & Contrs., Cent. Ohio Chapter v. Jefferson Cty. Bd. of Commrs.* (1995), 106 Ohio App.3d 176, 182 (concluding that contractors and contractors' association lacked standing because neither the contractors nor one of the association's members had submitted a bid). That is, while Fechko correctly notes that a bidder must, in fact, submit a bid on a project in order to have standing and allege an actual injury, it incorrectly concludes that if a party submits a bid, it is able to demonstrate actual injury simply by having done so. Such is not the case.

{¶15} This Court has defined “actual injury” in terms of standing as “an invasion of a legally protected interest that is concrete and particularized.” *Haley v. Hunter*, 9th Dist. No. 23027, 2006-Ohio-2975, at ¶12, quoting *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560-61. Moreover, in order to have standing, “[a] plaintiff must have a personal stake in the matter; the plaintiff’s injury cannot be merely speculative but must be palpable and, also, must be an injury to himself personally or to a class.” *Hicks* at ¶7, citing *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 325. An actual injury is one that is “concrete and not simply abstract or suspected.” *Ohio Contractors Assn.*, 71 Ohio St.3d at 320.

{¶16} Fechko argues that it has suffered an “actual injury” by expending costs to prepare and submit a bid in response to “unlawful” bidding requirements imposed upon it by the Board and the OSFC. Under the authority of *Meccon, Inc. v. Univ. of Akron*, 10th Dist. No. 08AP-727, 2009-Ohio-1700, Fechko alleges that as “an unsuccessful bidder on a public project [it is] entitled to recover its bid costs due to unlawful conduct by the governmental authority[.]” In *Meccon Inc.*, however, the University of Akron awarded construction contracts to a bidder in direct contradiction to the express terms of the University of Akron’s bidding requirements and

corresponding statutory language of R.C. 4115. *Meccon, Inc.* at ¶4 (noting that both the bid documents and statute governing bidding “prohibit[ed] withdrawal of a bid ‘when the result would be the awarding of the contract on another bid of the same bidder,’” which is what occurred when the bidder withdrew its combined bid, but was still awarded two stand-alone bids). Thus, Meccon, Inc. was able to demonstrate an actual injury as a result of the bidding process because it was a wrongfully rejected bidder. The Tenth District therefore concluded that the Court of Claims was vested with jurisdiction to hear Meccon Inc.’s claims for bid preparation costs and attorney fees. Unlike Meccon Inc., however, Fechko was not the wrongfully rejected bidder for the ESW contract. Fechko’s complaint evidences that Mr. Excavator’s bid was approximately \$15,000 less than Fechko’s. Thus, Mr. Excavator was properly awarded the ESW contract because it was the lowest responsible bidder.

{¶17} Fechko asserts in its complaint that, but for having to use prevailing wages in calculating its bid for the ESW project, its bid would have been approximately \$10,000 less than Mr. Excavator’s. Therefore, Fechko speculates that, had there been no requirement for use of prevailing wages, it would have been the lowest bidder, but based on the Board’s “unlawful” application of R.C. 4115, it was not. Based on such speculation, we conclude Fechko’s assertion that the prevailing wage requirement caused it any actual injury is “abstract [and] suspect[.]” at best. *Ohio Contractors Assn.*, 71 Ohio St.3d at 320. Consequently, this assertion cannot serve as the foundation for Fechko’s standing argument.

{¶18} Additionally, Fechko argues that it is entitled to recover its bid costs under the authority of *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. There, the Supreme Court left intact the award of bid costs to an unsuccessful bidder on appeal, despite concluding the bidder was not entitled to lost profits. Again, we note that *Cementech, Inc.*,

presents a case factually inapposite to the case at bar, given that the bidder in *Cementech, Inc.*, had submitted the “lowest and best bid [which] by law, [meant it] should have been awarded the bid.” *Cementech, Inc. v. Fairlawn*, 160 Ohio App.3d 450, 2005-Ohio-1709, at ¶15, overruled by *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. Fechko was not the “lowest and best bid[der]” and is therefore not entitled to recover its bid costs, having been unsuccessful in its attempts to obtain the ESW contract.

{¶19} While this Court is obligated to accept Fechko’s factual allegations as true, and make all reasonable inferences in its favor, doing so still fails to support a conclusion that Fechko suffered any actual injury as a result of the Board and the OSFC’s requirement that bidders utilize prevailing wages in their bids. Fechko was unable to demonstrate to the trial court or to this Court on appeal any instance where a bidder who was not the lowest responsible bidder was able to pursue a cause of action to recover its bid costs. Accordingly, the trial court did not err in finding that Fechko lacked standing in this matter.

### **ABC’s Standing**

{¶20} ABC argues that it has associational standing to pursue relief on behalf of one of its trade association members, Fechko. The Ohio Supreme Court has explained that:

“[A]n association has standing on behalf of its members when ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’ However, to have standing, the association must establish that its members have suffered actual injury.” *Ohio Contractors Assn.*, 71 Ohio St.3d at 320.

Based on our determination that Fechko lacked standing to bring this action based on the absence of any actual injury, we necessarily conclude that ABC lacked standing as well. Accordingly, the trial court did not err in dismissing its complaint.

## Taxpayers' Standing

{¶21} Taxpayers argue that, as residents and taxpayers of Barberton who have paid into a “special fund” by way of the bond levy that is financing the Project, they have standing to pursue this action because they have an interest which differs from other taxpayers in Ohio. They rely on the seminal case for taxpayer standing, *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, in support of this proposition. In that case, Masterson sought to challenge the expenditure of revenues collected by the Ohio State Racing Commission. The revenues were not general taxpayer moneys, but were revenues generated from taxes and fees paid into the “state racing commission fund.” *Masterson*, 162 Ohio St. at 369. Because Masterson did not contribute to this special fund and the Ohio State Racing Commission did not spend general taxpayer money, the Supreme Court reasoned that Masterson lacked standing to sue. The Supreme Court held that “[i]n 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.” *Id.* at paragraph one of the syllabus. The high court explained that a person’s “property rights are [] in jeopardy” when the person can “allege and prove damage to themselves different in character from that sustained by the public generally.” *Id.* at 368. Like Masterson, Taxpayers in this case cannot allege that, as a result of the Board and the OSFC’s actions, they have sustained any damages different in kind than those sustained by any other taxpayer in Barberton whose property taxes are burdened by the 2008 levy.

{¶22} We similarly reject Taxpayers’ attempts to argue that this is a case where damages or injury should be presumed. The only instance where a court chose to do so was where a contract was awarded to a bidder in violation of the statutory requirements that the

“award [] be made to the lowest bidder[.]” *State ex rel. Connors v. Ohio Dept. of Transportation, et al.* (1982), 8 Ohio App.3d 44, 47, quoting 74 Am.Jur. 2d 190, Taxpayers’ Actions, Section 4. Taxpayers in this case fall outside of the rubric where damages could be presumed. As we have previously indicated, the contract awarded to Mr. Excavator was not done so in violation of any statutory requirements because Mr. Excavator was the lowest responsible bidder on the ESW project and was rightfully awarded the ESW contract.

{¶23} Taxpayers gain no additional support for their assertion of standing based on the principles espoused by the Supreme Court in *Racing Guild of Ohio, Local 304, Service Employees Intern. Union, AFL-CIO, CLC v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317. In *Racing Guild*, several racetrack clerks sued the Ohio State Racing Commission, seeking injunctive relief on multiple grounds. The clerks asserted that they had standing on three different bases: as general taxpayers, as contributors to a special fund, and as members of the racing industry. The Court determined that the clerks had standing based on their “status as contributors to a special fund” and therefore “no other basis of standing need be addressed.” *Racing Guild of Ohio*, 28 Ohio St.3d at 322. Consequently, *Racing Guild* controls only in cases where the plaintiffs have contributed to a special fund, which is not the case here. Accord *State ex rel. Dann v. Taft* (2006), 110 Ohio St.3d 252, 2006-Ohio-3677, at ¶10 (noting that “Dann arguably has a ‘special interest’ in the management of the Worker’s Compensation Fund because he had paid into that fund as an employer”); *Gildner v. Accenture, L.L.P.*, 10th Dist. No. 09AP-167, 2009-Ohio-5335, at ¶18 (noting that the *Dann* Court recognized his standing on the basis of his contribution to a special fund, but not on the basis that he was a general taxpayer); *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, at ¶13 (explaining that plaintiffs “merely contributed to the school district’s funding as other citizens in

the district generally contributed, as opposed to contributing to some special fund” and therefore lacked standing).

{¶24} Taxpayers ask this Court to align itself with the Seventh District’s decision in *East Liverpool City School Dist. ex rel. Bonnell v. East Liverpool City School Dist. Bd. of Edn.*, 7th Dist. No. 05 CO 32, 2006-Ohio-3482, where the court indicated that a taxpayer had standing to enjoin a school board from further construction and renovation of schools. We note, however, that the only matter before the Seventh District in that case was the propriety of attorney fees, so there was no analysis of taxpayer standing undertaken by the court in that matter. *East Liverpool City School Dist. ex rel. Bonnell* at ¶17-54. Additionally, the underlying case which formed the basis for the appeal in *Bonnell* was resolved by a stipulated dismissal, and based on the trial court’s summarization of the proceedings, it is unclear whether the issue of standing was ever fully addressed by the trial court. *East Liverpool City School Dist. ex rel. Bonnell* at ¶14 (recounting the trial court’s entry in which it denied Bonnell’s request for attorney fees, and noted that “[e]ven if the Court were inclined to consider [Bonnell’s] complaint as a common law taxpayer’s action \*\*\* [Bonnell] obtained no judgment against Respondents[ and i]n fact, [] failed to obtain a single ruling in his favor during the pendency of his two complaints”). Therefore, we are not persuaded that Bonnell’s taxpayer standing was ever scrutinized in that case. Instead, we are persuaded by the thorough analysis and sound reasoning of the Tenth and Twelfth Districts, which have held that a taxpayer who pays into a general revenue fund lacks standing to challenge the expenditure of those funds, unless he can satisfy *Masterson*’s requirement of proving damages that were different in kind. *Gildner* at ¶8-25; *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, at ¶19-25; *Brown* at ¶6-15; *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, at ¶30-48.

{¶25} Based on the foregoing analysis, we conclude that the trial court did not err in concluding that Bidders and Taxpayers lacked standing to pursue their complaint. Accordingly, their first assignment of error is overruled.

#### Second Assignment of Error

“THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER CIV. R. 12 (B)(6) WHEN PLAINTIFFS ALLEGED THAT DEFENDANTS ABUSED THEIR DISCRETION AND EXCEEDED THEIR AUTHORITY UNDER THE LAW BY MANDATING BIDDERS COMPLY WITH CHAPTER 4115 ON A SCHOOL CONSTRUCTION PROJECT.”

{¶26} In their second assignment of error, Bidders and Taxpayers argue that the trial court erred in dismissing their complaint for their failure to state a claim. Because we have already determined that Bidders and Taxpayers lacked standing in this matter, this assignment of error is moot and we decline to address it. App.R. 12(A)(1)(c).

#### Third Assignment of Error

“THE TRIAL COURT ERRED IN DENYING PLAINTIFFS LEAVE TO FILE A SECOND AMENDED COMPLAINT FOLLOWING THE DISCOVERY (sic) OF NEW EVIDENCE.”

{¶27} In their third assignment of error, Bidders and Taxpayers argue that the trial court erred in denying their motion for leave to file a second amended verified complaint. We disagree.

{¶28} The decision to grant or deny a motion for leave to amend a pleading is within the discretion of the trial court. *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6. “[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.” *Id.* However, “[w]here a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the

pleading.” *Wilmington Steel Products, Inc. v. Clev. Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, at syllabus. This Court has held that “[a]n attempt to amend a complaint following the filing of a motion [to dismiss] raises the spectre of prejudice.” *Brown v. FirstEnergy Corp.*, 9th Dist. No. 22123, 2005-Ohio-712, at ¶6, quoting *Johnson v. Norman Malone & Assoc., Inc.* (Dec. 20, 1989), 9th Dist. No. 14142, at \*5. A party is not “permitted to sit by for this period and bolster up their pleadings in answer to a motion [to dismiss].” *Brown* at ¶6, quoting *Eisenmann v. Gould-Natl. Batteries, Inc.* (E.D.Pa.1958), 169 F.Supp. 862, 864. Consequently, we will not reverse such a decision unless the trial court has abused its discretion. See *Hoover*, 12 Ohio St.3d at 6. An abuse of discretion is more than an error of law or judgment; it is a finding that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Under this standard, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶29} Bidders and Taxpayers argue that they discovered “new facts” in the course of discovery of which they were unaware at the time they filed, and later amended, their complaint. Specifically, Bidders and Taxpayers allege that during the discovery depositions of several board members they learned that: 1) the Board intended to mandate compliance with R.C. 4115 for every phase of the Project; and 2) the Board’s purpose for mandating compliance with R.C. 4115 was based on discriminatory and unlawful motives, given that board members had articulated a desire to ensure that “Mexicans” were not employed to work on the Project.

{¶30} The record reveals that Bidders and Taxpayers filed their complaint for injunctive relief and declaratory judgment on April 3, 2009. Following the Board’s first motion to dismiss, Bidders and Taxpayers amended their complaint on April 24, 2009 to include the OSFC and Mr.

Excavator as defendants. Thereafter, the trial court set August 10, 2009, as the trial date on the matter. Both the Board and the OSFC filed motions to dismiss on May 28, 2009, and Mr. Excavator's motion was filed on June 17, 2009. It was not until July 6, 2009, that Bidders and Taxpayers requested leave to file a second amended complaint in the matter, asserting new claims as to future requests for bids on subsequent phases of the Project.

{¶31} Bidders and Taxpayers reflect in their appellate brief that they objected to the trial court's scheduling decision by noting it resulted in an "extraordinary three month delay" for a decision in this matter. They now complain, however, that the trial court erred by denying their request to amend their complaint, filed nearly two months later, which by their own description would have resulted in "additional claims [based on] newly discovered facts[.]" Moreover, Bidders and Taxpayers' request for leave to amend was untimely, as it was filed less than a month out from the trial date, while dispositive motions were pending. See, e.g., *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank Natl. Assn.*, 8th Dist. No. 93295, 2010-Ohio-911, at ¶25 (affirming the trial court's denial of a motion to amend following the deposition of witnesses, the filing of dispositive motions, and a trial date seven weeks out). The request for leave to amend was also prejudicial, in that it altered the nature of the case by incorporating a request for relief on portions of the Project not yet put out for bid and alleged, for the first time, discriminatory conduct upon the part of the Board. *Id.* See, also, *Marx v. Ohio State Univ. College of Dentistry* (Feb. 27, 1996), 10th Dist. No. 95APE07-872, at \*4 (concluding that plaintiff's request for leave to amend was properly denied because it sought to alter the initial request for injunctive relief by adding claims, as opposed to merely correcting an oversight or omission contained in the original complaint). Furthermore, having failed to identify any basis upon which the provision exempting school boards from use of the prevailing wages somehow

constitutes a prohibition of the same, Bidders and Taxpayers are unable to make “at least a *prima facie* showing [that they] can marshal support for the new matters sought to be pleaded.” *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 122, quoting *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117. Accordingly, Bidders and Taxpayers’ argument that the trial court erred by denying them leave to amend lacks merit and is overruled.

### III

{¶32} Bidders and Taxpayers’ first and third assignments of error are overruled. Bidders and Taxpayers’ second assignment of error is moot. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

  
BETH WHITMORE  
FOR THE COURT

MOORE, J.  
CONCURS

DICKINSON, P. J.  
CONCURS IN JUDGMENT ONLY, SAYING:

{¶33} I agree with the majority’s judgment and most of its opinion. I write separately to note my enlistment in Judge Fain’s war on “the most unfortunate formulation to appear in Ohio appellate jurisprudence: “The term “abuse of discretion” connotes more than an error of law or of judgment.”” *Enquip Techs. Group Inc. v. Tycon Technoglass S.R.L.*, 2nd Dist. Nos. 2009 CA 42, 2009 CA 47, 2010-Ohio-28, at ¶123-124 (Fain, J., concurring). The majority’s talismanic repetition of this nonsensical phrase in ¶28 of its opinion adds nothing to the resolution of this appeal.

APPEARANCES:

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