

**IN THE SUPREME COURT OF OHIO**

STATE EX REL., NORTHERN OHIO	)	
CHAPTER OF ASSOCIATED BUILDERS	)	Case No. 2010-0943
& CONTRACTORS, INC., et al,	)	
	)	Appeal from the Ninth District
Plaintiffs-Appellants,	)	Court of Appeals, Summit County
	)	Case No. CV 2009 04 2636
v.	)	
	)	
BARBERTON CITY SCHOOLS BOARD	)	
OF EDUCATION, et al.,	)	
	)	
Defendants-Appellees.	)	

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF  
DEFENDANT-APPELLEE OHIO SCHOOL FACILITIES COMMISSION**

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## **Introduction**

Appellants and their amici (essentially the same organization with the same counsel) present this Court with nothing more than a policy disagreement—a disagreement that presents no significant legal issues warranting this Court’s review. Moreover, as both courts below easily concluded, Appellants have no standing to pursue these claims. Despite this, Appellants ask this Court to review substantive positions never considered in substance by any court below. But this Court should not be the first to do so.

This case began as an effort by Appellants to enjoin the Barberton City Schools Board of Education (the “Board”) and the Ohio School Facilities Commission’s (“OSFC”) lawful exercise of discretion to award a construction contract to the lowest responsible bidder for the early site work (“ESW”) contract for the construction of the New Barberton Middle School (“Project”). In 2007, the OSFC passed a resolution that allowed school districts to choose to pay prevailing wages as a term of contract without objection from the OSFC. In 2008, the Board made such a choice for the Project. In 2009, Appellants then asked the trial court to substitute its judgment for that of the Board and enjoin the Project’s early site work contract.

The trial court denied the temporary restraining order and injunction requested by Appellants. Then, upon separate motions to dismiss filed by Appellees Board, OSFC and Mr. Excavator (“Appellees”), the trial court dismissed Appellants’ case in its entirety, finding that Appellants lacked standing and that their claims were otherwise without merit. Work is now complete on the contract at issue before the trial court.

The Ninth District unanimously affirmed the trial court’s decision finding that all plaintiffs lacked standings. The court correctly held that Taxpayer plaintiffs lacked standing because they were unable articulate an injury that was different from other similarly situated

Barberton taxpayers. Likewise, the Ninth District found that Fechko and the association could not demonstrate any actual injury. The Ninth District's ruling is unremarkable, as it merely applied current and long-understood standing principles.

Now, even though the Ninth District's decision is unremarkable, and the Ninth District did not review Appellants' substantive propositions, Appellants ask this court become the first court to opine substantively on Appellants' propositions. The Court should decline this invitation as it is improper.

Here, Appellants ask the Court to step beyond these long-settled standing issues to serve as a super board of education to make decisions about the proper construction specifications for a local school project. But just as this Court should not be the first court to weigh in on the substantive propositions, this Court should also not – and cannot properly – determine how a local board of education defines its specifications for a construction project. Awarding relief to Appellants subjects every decision of every board of education to challenge by anyone who disagrees with the choice these boards were elected to make. Policy choices should be challenged at the ballot box, not in the courts.

Given the absence of any support for Appellants' position and this Court's lack of dominion over policy questions, this Court should deny jurisdiction.

#### **STATEMENT OF CASE AND FACTS**

In 1997, the legislature amended Ohio's prevailing wage law to exempt Boards of Education from compliance with the statutorily mandated procedures commonly applying to other public work projects. Section 4115.04(B)(3). At the same time, the legislature created the OSFC. *Verified Amended Complaint at ¶30.* OSFC is an instrumentality of state government created pursuant to R.C. Chapter 3318 to administer the provision of financial assistance to

school districts for the acquisition or construction of classroom facilities. *See* R.C. 3318.30(A). OSFC and the Board are co-owners of the Project. *Verified Amended Complaint at* ¶¶17 and 19.

In July 2007, consistent with R.C. 4115.04(B)(3), OSFC issued a resolution recognizing the discretion of local boards of education to choose whether or not to require contractors to pay the prevailing wage on OSFC-funded projects. *Verified Amended Complaint at* ¶33. On October 21, 2008, Barberton's Board exercised that discretion by passing a resolution to require contractors to pay prevailing wages on the project as a term of contract.

On or about March 3, 2009, the Board advertised for bids for the ESW contract. *Verified Amended Complaint at* ¶15. Consistent with the Board's resolution, the bid advertisement included a requirement that bidders comply with the terms of R.C. 4115 of the Revised Code and pay prevailing wages on the ESW contract. *Verified Amended Complaint at* ¶20.

Thereafter, as verified by the Appellants, all bidders for the project, including Fechko, "submitted their bids using wage rates supplied by the board in its bid specifications, which the contractors believed to be the applicable prevailing wage rates for Summit County," where the Project is located. *Verified Amended Complaint at* ¶21. The sealed bids were opened on March 25, 2009. On or about April 1, 2009, the Board awarded the contract for site work to Mr. Excavator as the lowest responsive and responsible bidder. *Verified Amended Complaint at* ¶¶22 and 23.

Like Fechko, Mr. Excavator utilized the "applicable prevailing wage rates for Summit County in preparing its bid for the Project..." included in the Project specifications. *Verified Amended Complaint at* ¶23. The Board entered into a contract with Mr. Excavator on or about April 6, 2009, and the contract was approved by the Commission.

On April 3, 2009, Fechko and ABC (collectively, the “Bidders”), along with Barberton residents Dan Villers and Jason Antil (collectively, “Taxpayers”), filed a verified complaint seeking to permanently enjoin the Board from requiring the payment of prevailing wages as a term of contract. The complaint also sought a declaration that the bidding requirements and subsequent contracts imposing the requirement for the payment of prevailing wage were an abuse of the board’s discretion and unlawful. *State ex. Rel. N. Ohio Chapter of Associated Builders & Contrs., Inc. (9<sup>th</sup> District), 2010-Ohio-1826, ¶4*. The trial court held a hearing, at which the magistrate denied the motions for temporary restraining order and expedited discovery and set the preliminary injunction and declaratory injunction hearing on April 15, 2009. *Id.*

On April 13, 2009, the Board filed a motion to dismiss Bidders and Taxpayer’ complaint under Civ.R. 12(B)(7) based on failure to join an indispensable party, namely the OSFC. *Id. at ¶5*. In response, the Appellants filed a Verified Amended Complaint naming the OSFC and Mr. Excavator as additional defendants.

The Board and OSFC filed motions to dismiss on May 28, 2009 under Civ.R. 12(B)(1) and (B)(6), arguing that Appellants lacked standing to bring their complaint and that they had failed to state a claim that would entitle them to relief. Likewise, on June 17, 2009, Mr. Excavator filed its own motion to dismiss.

In early July, after the trial court advised the parties that a decision on the pending motions to dismiss was imminent, the Appellants moved to file a second amended complaint, to which OSFC, the Board, and Mr. Excavator objected. The second amended complaint purported to add claims to prohibit an upcoming second bid package.

On July 31, 2009, the trial court granted the motions to dismiss filed by the Board, the OSFC, and Mr. Excavator. The Court concluded that Appellants lacked standing and had failed to state a claim under Civ. R. 12(B)(6). The trial court also denied Appellants motion to amend.

Next, the Appellants filed a notice of appeal to the Ninth District and also sought a stay of the trial court's decision as well as injunctive relief beyond the scope of its original request. After objection by the OSFC, the Board, and Mr. Excavator, the Ninth District denied the Appellants' motion on August 11, 2009. The next day, the Appellants appealed that decision to this Court and also sought an injunction from this Court pending appeal.

In the interim, OSFC and the Board moved the Ninth District to dismiss the Appellants appeal as moot, as the ESW contract had been completed. On September 8, 2009, the Ninth District entered an entry denying the motion "at this time." Thereafter, this Court denied the ABC Parties motion for injunction on September 21, 2009. Then, on October 19, 2009, the Supreme Court dismissed the Appellants' discretionary appeal for failure to timely prosecute their cause.

On April 28, 2010, the Ninth District issued a decision affirming the trial court's decision, holding that the neither the Taxpayers nor the Bidders had standing. With respect to the Bidders, the Ninth District correctly noted that while a bidder must, in fact, submit a bid on a project in order to have standing, this is the not end of the inquiry. Consistent with case law, the Ninth District held that a bidder must also demonstrate an actual injury, not one that was merely speculative or abstract. The Ninth District found Fechko's purported injury was speculative at best.

With respect to Taxpayer standing, the Ninth District followed this Court's decision in *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366 and *Racing*

*Guild of Ohio, Local 304, Service Employees Intern. Union, AFL-CIO, CLC v. Ohio State Racing Com'n* (1986), 28 Ohio St.3d 317 to find that Taxpayers in this case cannot allege that they have suffered any damages different than those sustained by any other taxpayer in Barberton whose property taxes might be burdened by the 2008 levy. Although the Ninth District did not address the underlying merits of Appellants' claims, Appellants now seek to have this Court review them in this appeal.

**THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

**A. The Ninth District's ruling on standing was consistent with prior case law and is unremarkable.**

Appellants' jurisdictional memorandum presents no question of public or great general interest. This case turns on a simple standing question, which the Ninth District answered unanimously by looking to this Court's prior decisions. Those decisions made clear that before a court can consider the merits of a claim, the person seeking relief must establish standing to sue. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 469. The Ninth District applied that standard to each of the Appellants and determined, just as the trial court did, that none of the plaintiffs had standing to sue.

Nothing in the Ninth District's decision was remarkable and the actual decision is far from Appellants' exaggerated suggestion that "no one" would have standing to challenge a decision of a school board or OSFC related to the choice of specifications for school construction projects. By contrast, it is Appellants who seek a blanket ruling that would eliminate standing requirements altogether and allow *any taxpayers* in a school district to ask a court to sit as a super board of education because that taxpayer did not like the policy decisions made by elected officials.

In short, the Ninth District’s analysis of standing is a straightforward and unremarkable application of this Court’s well-worn precedents. Because the lower court broke no new ground, no further review is needed.

**B. A disagreement with a policy choice does not equate to a legal question of great public or general interest.**

Appellants fare no better in trying to dress up their policy dispute as a set of legal questions. At the heart of Appellants’ complaints is a disagreement with the policy decisions made by the OSFC and the Board. But once again, such policy disagreements do not amount to a general or great public interest associated with either Appellants or amici’s complaints. As stated above, this case turns simply on a standing issue.

**C. This case is a poor vehicle for resolving Appellants’ propositions.**

Even if Appellants somehow had standing—though they do not—this case is a poor vehicle for resolving the issues they present. The ESW contract at issue has long been completed, rendering this case moot. *State ex rel. Gaylor, Inc. v. Goodenow*, 2010-Ohio-1844, at p. 11 (holding that if an unsuccessful bidder fails to obtain injunctive relief to stop construction and construction begins, the “action will be dismissed as moot”).

In addition, neither the trial court nor the Ninth District ever addressed with any substance the underlying merits of Appellants’ claims, having ruled (correctly) that the standing questions were dispositive of the whole case. Thus, Appellants proposed propositions of law 3 and 4 are not properly before this Court for consideration, and this Court should not accept Appellants’ invitation to become to first court to review the substantive propositions.

## ARGUMENT

### Defendant-Appellees' Proposition of Law No. 1

*Common law taxpayer standing for residents of a school district requires a special interest to demonstrate damages different than those sustained by any other taxpayer in that school district.*

Appellants argue that, as residents and taxpayers of Barberton who have paid into a special fund by way of a bond levy that is financing a portion of the Project, they have standing to pursue this action because they have an interest that differs from other taxpayers in Ohio. Essentially, Appellants say that any Barberton taxpayer who contributes to the general Barberton tax fund has standing to challenge any expenditure from that fund. But such a position is contrary to Ohio law that unequivocally holds that a “taxpayer lacks capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.” *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, paragraph one of the syllabus. Merely being a taxpayer to the bond levy does not mean that the Taxpayers sustained damages different in kind from those sustained by any other taxpayer in Barberton whose property taxes are burdened by the 2008 levy. *Id.* at 368. In fact, Appellants merely alleged that inclusion of the prevailing wage requirement will result in harm to the Barberton taxpayers as a whole. Verified Amended Complaint, ¶44. The failure to allege an injury “distinct from the general injury experienced by everyone when the government spends taxpayer money unlawfully” is fatal to their taxpayer claim. See *Brinkman v. Miami Univ.* (12<sup>TH</sup> Dist.) 2007-Ohio-4372, quoting *State ex. rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366.

Instead, what Appellants want is a ruling on taxpayer standing that is inconsistent with the prior decisions of this Court, to make it easier for taxpayers to look to the courts as super

boards of education, when constituents do not like the policy decisions of those elected to make them. Merely disagreeing with the policy decisions of those elected to make them does not equate to injuries to one's own property interest different than those from the relevant tax base as a whole. The Ninth District properly understood this and ruled consistently with this Court's prior decisions.

**Defendant Appellees' Proposition of Law No. II:**

*A contractor must bid on a project and demonstrate actual injury to have standing to challenge a bid award.*

Appellants seek to have this Court modify its prior ruling in *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, to suggest that a contractor need only *intend* to bid on a project before a contractor or association can invoke standing to challenge bid specifications. In addition, Appellants seek to have this Court presume standing for any contractor who is *contemplating* bidding, despite the fact that such contractor may not have anything more than a speculative injury. Those positions are contrary to this Court's well-settled standing jurisprudence requiring that an actual injury is a necessary prerequisite to standing. *Id.* at 320.

This Court has long held that in order to challenge a bid award, a contractor must have bid on a project. *Id.* at 320. Likewise, for a contractor association to assert standing, one of its members must have bid on a project.

And merely submitting a bid does not allow a contractor to presume "actual injury." A contractor must also show an actual injury that is "concrete and not simply abstract or suspected." *Ohio Contractors Assn.* 71 Ohio St.3d at 320. Here, the Ninth District, similar to the trial court, unanimously found that although Fechko had bid the project, Fechko could not also demonstrate an actual injury, and any suggested injury was merely speculative.

The Ninth District's decision does not conflict with the Tenth District's decision in *State ex rel. Connors v. Ohio Department of Transportation* (1982), 8 Ohio App. 3d 44. *Connors* is distinguishable from this matter in that it questioned whether sovereign immunity barred a challenge to minority set-aside in an ODOT contract. *Id.* at Syllabus 1. There are no minority set-aside issues in this case. Likewise, the Ninth District recognized the distinction in *Connors* and found that it was the only court to hold that injuries could be presumed. The basis for that holding was the Court's belief that the awarding of the contract was in violation of the statutory requirement to award the contract to the lowest bidder. *Id.* at 22. Here, however, the Ninth District recognized that the contract was awarded to the lowest responsible bidder and "not in violation of any statutory requirements." *N. Ohio Chapter of Associated Builders & Contrs., Inc. at ¶22.* Appellants want to ignore these standing precedents so that the courts can be used to challenge legitimate policy decisions made by public owners and sit as a super board of education to review all decisions by the duly elected Board members. That is improper and does not warrant this Court's review.

### **Defendants-Appellees Proposition of Law No. III**

*R.C. 4115.04(B)(3) merely exempts school construction Projects from the mandatory statutory prevailing wage law but is not proscriptive against requiring prevailing wage as a term of contract.*

Although the Ninth District's decision specifically did not reach the merits, Appellants contend that this Court should consider Propositions of Law 3 and 4 merely because the court affirmed the trial court's denial of Appellants attempt to bring a second amended complaint. But such reasoning is inconsistent with this Court's general rule "that it does not consider issues the Court of Appeals did not reach" and further demonstrates why this case is not an appropriate vehicle to consider Appellants propositions. *State ex rel. Ohio Civil Serv. Employees Assn.*

*Local 11 v. State Empl. Rels. Bd.*, 104 Ohio St. 3d 122, 129. There exists no reason for this Court to deviate in this case.

But even if this Court does consider them, there is no merit to Appellants' contentions. In order to succeed on the merits, Appellants must demonstrate that OSFC and the Board abused their discretion in requiring the payment of prevailing wage as a contract specification requirement. To do so, Appellants must demonstrate by clear and convincing evidence that they have a right to the relief they seek. *Southern Ohio Bank v. Southern Ohio Savings Assn.* (Hamilton Cty. 1976), 51 Ohio App.2d 67, 366 N.E.2d 296. Because government actions are presumed to be lawful, this necessarily means that the bidder must show that the government body committed an "abuse of discretion." *State ex rel. Shafer v. Ohio Turnpike Comm'n* (1953), 159 Ohio St. 581, 590. An "abuse of discretion" involves more than an error of law or judgment; it implies an unreasonable, arbitrary, or unconscionable attitude. *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St. 2d 356, 359. In this context, the word "unreasonable" has been held to mean "irrational." *Id.* Appellants cannot make this showing.

In July 2007, OSFC issued a resolution that acknowledged local school boards' discretion to determine whether to require the payment of prevailing wages by contract. The Board exercised that discretion and chose to require contractors to pay prevailing wages on this Project, including the early site work package. Thereafter, the bid advertisement and specifications notified the bidders that the early site package required the payment of prevailing wages by contract.

All bidders for the early site work package, including Appellant Fechko, submitted bids based on the prevailing wage rate information included in the bid specifications. The Board

awarded the contract to Mr. Excavator as the lowest responsible bid<sup>1</sup> and the OSFC approved that contract (Work on the early site work is now complete and Mr. Excavator is off the project).

The lynchpin of Appellants' claims is their assertion that because R.C. 4115.04(B)(3) provides an exemption to the statutorily mandated prevailing wage for school districts' construction projects, OSFC and the Board are somehow prohibited from requiring the payment of prevailing wage by contract. This argument is unsupported by both the plain reading of the statute and any legal authority.<sup>2</sup> Had the legislature intended to prohibit boards of education from paying prevailing wages on construction it could have simply said so. It did not. R.C. 4115.04(B)(3) provides, in relevant part, that R.C. Sections 4115.03 to 4115.16, which govern prevailing wage, do not apply to:

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

<sup>2</sup> To the extent this Court does consider the attempt by Appellants and amici to blur what should be at issue on appeal, the Court should understand that Appellants cite and rely heavily on the report generated by the Legislative Service Commission ("LSC") in arguing their case. Exhibit A to Plaintiffs Motion to Stay, S.B. 102 Report ("Report"). (In the trial court, the Report was unauthenticated.) The LSC criticized its own methodology and raised doubts about any conclusions from the results presented. Report at pp. 17-22. Most importantly for this case, the LSC said:

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

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

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

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

By its plain language, R.C. 4115.04(B)(3) (the “(B)(3) language”) merely creates an exemption for school boards from the statutorily mandated prevailing wage requirements generally found on construction projects for public improvements paid for in part or in whole by public funds. See R.C. 4115.10(A). Indeed, both OSFC and the Board agree that prevailing wages are not mandated on school construction projects and that the Department of Commerce has no statutory jurisdiction or authority to enforce or apply what is merely a contractual requirement. But being exempted from a statutory mandate does not translate into OSFC or the Board being prohibited from requiring the payment of prevailing wage as a term of contract. Because the Board and OSFC are not prohibited from requiring the successful bidder to pay prevailing wage as a term of its contract, the Board and OSFC retain the discretion to choose whether to include a contractual term requiring the payment of prevailing wage. The Ninth District confirmed this thought in its decision below in affirming the trial court’s decision to deny Appellants second attempt to amend, stating that “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.’” *N. Ohio Chapter of Associated Builders & Contrs., Inc.* at ¶22 (internal citations omitted).

Appellants additionally distort the lowest responsible bidder requirement to remove a school board’s discretion to determine the labor and material parameters for the bid specifications. Appellants suggest a mandate, which if followed, would convert the lowest responsible bidder requirement into one requiring that public owners must always choose the lowest cost building option. Taken to its illogical conclusion, Appellants’ proposition would

require school boards to educate children in windowless warehouses because walls without windows cost less than walls with windows. So, according to Appellants, requiring windows – something for which school boards also have no specific statutory authority to provide – would be prohibited as it results in a misuse of taxpayer funds. Appellants’ proposition would produce absurd results and is not what the law demands.

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

Because OSFC and the Board acted lawfully in requiring payment of prevailing wages as a contractual term, it is not within the province of Appellants or this Court to substitute their judgment for the judgment of OSFC and the Board, which are invested by law with the duty and responsibility of determining the terms of the Project. See *Hancock Cty. Bd. of Edn v. Moorehead* (1922), 105 Ohio St. 237, 245. Appellants are unable to demonstrate by clear and convincing evidence that OSFC and the Board abused their discretion in contractually requiring the payment of prevailing wages on the Project.

#### **Defendants-Appellees Proposition of Law No. IV**

*The lower courts properly concluded that Appellants lacked standing to challenge OSFC’s authority to issue a Responsible Bidder Criteria.*

Nowhere in its appeal or in the pleadings below have Appellants ever offered any rationale to suggest standing to challenge OSFC’s ability to issue a resolution adopting a model bidder responsibility provision. Appellants’ arguments are nothing more than policy disagreements, but there is neither a basis to suggest standing to make such arguments nor any

substance behind them. The OSFC acted within its authority, and Appellants present no arguments to suggest otherwise.

**E. Conclusion**

For all these reasons, this Court should decline to exercise jurisdiction over this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of Defendant-Appellee Ohio School Facilities Commission was sent by e-mail and regular mail, postage prepaid, this 24th day of June, 2010 to:

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