ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL., NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC., et al.,	)	Supreme Court Case No. 2010-0943
Appellants,	)	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
v.	)	Court of Appeals Case No. CA 24898
BARBERTON CITY SCHOOLS BOARD OF EDUCATION, et al.,	)	
Appellees.	)	

MEMORANDUM IN RESPONSE OF APPELLEE BARBERTON CITY SCHOOLS BOARD OF EDUCATION

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RECEIVED
JUN 25 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 25 2010
CLERK OF COURT
SUPREME COURT OF OHIO

I. INTRODUCTION

Appellee Barberton City Schools Board of Education incorporates by reference the memorandum in opposition to jurisdiction of Appellee Ohio School Facilities Commission, as if fully written herein.

II. APPELLANTS' APPEAL DOES NOT INVOLVE A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.

Appellants Northern Ohio Chapter of Associated Builders & Contractor, Inc., Fechko Excavating, Inc. (collectively "Bidders"), Dan Villers, and Jason Antill (collectively "Taxpayers") seek this Honorable Court's discretionary jurisdiction to challenge the Ninth District Court of Appeals' Decision and Journal Entry of April 28, 2010 ("Journal Entry"), which affirmed the trial court's decision finding that neither the Taxpayers nor the Bidders had standing. Discretionary jurisdiction should not be granted in this case for the following reasons.

First, discretionary jurisdiction should not be granted as the Ninth District's decision in this matter is consistent with well-settled Ohio law regarding standing. Standing to pursue an action requires demonstration of a concrete injury in fact, rather than an abstract or suspected injury, and that a party demonstrates an immediate pecuniary interest in the subject matter. See *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 1994-Ohio-183; *State ex rel. Masterson v. Ohio Racing Comm.* (1954), 162 Ohio St. 366, 123 N.E.2d 1; *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 503 N.E.2d 1025. With respect to the Taxpayers, the Ninth District correctly found that that they were not able to allege damages different from those sustained by any other taxpayer in the City of Barberton whose property may be burdened by taxes imposes because of a 2008 bond levy. Journal Entry at ¶22.

Moreover, in its review of the Bidders standing, the Ninth District stated the mere submission of a bid, while a threshold matter in finding standing, does not end the inquiry.

Rather the law requires that a bidder demonstrate an actual injury, not one that is speculative or abstract. The Ninth District then correctly found that the Bidders' asserted injury was speculative at best. Journal Entry at ¶¶15-17.

Further, discretionary jurisdiction should not be granted as Appellants' Propositions of Law Nos. 3 and 4 are not properly before this Court, because the Ninth District did not review the underlying merits of Appellants' claims. Journal Entry at ¶26. See *State ex rel. Ohio Civil Service Emp. Assoc. v. State Emp. Relations Bd.* (2004), 104 Ohio St.3d 122, 2004-Ohio-6363 at pp. 22-24 (finding "this court generally does not consider issues that the court of appeals did not reach").

As a final matter, discretionary jurisdiction should not be granted as the early site work contract for the New Barberton Middle School, which was the basis of Appellants' Amended Verified Complaint, was completed in August of 2009. The appeal is therefore moot. *State ex rel. Gaylor, Inc. v. Goodman*, 2010-Ohio-1844, ¶11 (holding that if a successful bidder fails to obtain injunctive relief to stop construction and construction begins, the "action will be dismissed as moot").

Under the circumstances, the Barberton City Schools Board of Education respectfully submits that Appellants' appeal does not present "a question of public or great general interest" so as to merit this Court's discretionary jurisdiction.[1]

Appellees respond to each of Appellants Propositions of Law 1-4 in turn as follows:[2]

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[1] Appellants do not contend that their appeal involves a "substantial constitutional question" under S.Ct.Prac.R. 2.1(A).

[2] The following responds as well to the arguments in support of jurisdiction advanced by *amici curiae* Associated Buildings & Contractors of Ohio, Inc.

A. **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 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 specification for the project contain unlawful terms or when public funds are expended for unlawful purposes.

Appellants' principal argument is that Taxpayers have paid taxes pursuant to a 5.2 mill bond levy to finance the Project and that they suffered damages separate and distinct from that of any other taxpayers in the State – namely, through the increased costs of construction related to the project – such that they have standing to bring this action. Memo. Supp. Juris. at pp. 6-8. This position is contrary to the controlling precedent of this Court found in *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, 123 N.E.2d 1 and *Racing Guild of Ohio v. Ohio State Racing Commission* (1986), 28 Ohio St.3d 317, 503 N.E.2d 1025. In *Masterson*, this Court held 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." *Masterson*, 162 Ohio St. 366, paragraph one of the syllabus. Taxpayers have never claimed any special interest in this case. Rather, they always alleged that the inclusion of the prevailing wage requirement in the Board's construction contracts would result in harm to Barberton taxpayers as a whole. Amended Verified Complaint at ¶44. Confronted with this prior contrary admission, Appellants are now forced to argue that the Taxpayers "injuries" are distinct, not from those of the citizens of the City of Barberton, but from the taxpayers of the State of Ohio or that their injuries should be presumed, under the authority of *State ex rel. Connors v. Ohio Department of Transportation* (1982), 8 Ohio App. 3d 44. With respect the former, it is unsupported by any judicial precedent and would lead to absurd results, providing literally, any taxpayer with standing to challenge every decision of every board of education with whom they disagree. With respect to the latter argument, as the

Ninth District clearly noted, in *Connors*, the contract was awarded in violation of the statutory requirements that required the award of the contract to the lowest bidder. Journal Entry at ¶22. Here, the Board's award of the contract, for the early site work packages for the New Barberton Middle School was not in violation of any statutory requirements because Mr. Excavator was the lowest responsible bidder and was rightfully awarded the contract. Journal Entry at ¶22.

B. <u>Proposition of Law No. 2:</u> 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.

Similarly, Appellants' untenably position has forced them to argue that a contractor need only bid on a project before a contractor or association can invoke standing to challenge bid specifications. Memo. Supp. Juris. at pp. 8-10. Again, judicial precedent does not support Appellants' proposition. In *Ohio Contractors Association v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994-Ohio-183, the Court unanimously found that in order to challenge a bid award, a contractor must have bid on the project. However, this is not the end of the analysis. In order to have standing, a contractor must also demonstrate actual injury, that is, an injury that is "concrete and not simply abstract or suspected." *Id.*, 71 Ohio St.3d 318 at 320. Here, the Bidders failed to show that it had suffered any real injury. As the Ninth District succinctly stated:

> Fechko speculates that, had there been no requirement for the 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 concluded Fechko's assertions that the prevailing wage requirement caused it any actual injury is 'abstract [and] suspect [,]' at best. Consequently, this assertion cannot serve as the foundation for Fechko's standing argument.

Journal Entry at ¶17. Neither did the Ninth District find that the Bidder was a "wrongfully rejected bidder," as in *Meccon, Inc. v. University of Akron*, 2009-Ohio-1700, where a construction contract was awarded in direct contradiction of the express terms of the University

of Akron's bidding requirements and the corresponding statutory language of R.C. 4115. Journal Entry at ¶16.

C. **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).

Proposition of Law No. 3 is not properly before this Court, as the Ninth District did not reach the merits. Journal Entry at ¶¶25-26. See *State ex rel. Ohio Civil Service Emp. Assoc. v. State Emp. Relations Bd.* (2004), 104 Ohio St.3d 122, 2004-Ohio-6363 at pp. 22-24 (finding "this court generally does not consider issues that the court of appeals did not reach"). See, also, *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 89, 585 N.E.2d 384 (declining to pass judgment on issue of enforceability of registration release card where question was not properly before the court of appeals).

However, even if subject to review, Proposition of Law No. 3 fails because Appellants must show by clear and convincing evidence that the Board abused its discretion in requiring the payment of prevailing wage as a contract specification. See *S. Ohio Bank v. S. Ohio Savings Assn.* (1976), 51 Ohio App.2d 67, 366 N.E.2d 296. As 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.* (1953), 159 Ohio St. 581, 590, 50 O.O. 465. The term "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, 21 O.O.3d 225. Appellants cannot prove that the Board in any way abused its discretion with respect to the use of a prevailing wage requirement in the early site work contract for the New Barberton Middle School. Rather, the

evidence clearly shows that the Board acted lawfully and within the bounds of authority under Ohio Law. See *Clay v. Harrison Hills City School Dist. Bd. of Edn.* (1999), 102 Ohio Misc.2d 13, 25, 723 N.E.2d 1149 (finding "the black-letter law of Ohio is irrefutable that the legislature has vested the superintendent of schools and boards of education with almost unlimited reasonable authority to manage and control schools within their districts"). Appellants, at best, can only show that they disagree with the Board's decision. Such disagreement, however, does not rise to the level of an abuse of discretion by the Board.

Specifically, Appellants allege that because R.C. 4115.04(B)(3) specifically exempts boards of education from the requirement of Ohio's prevailing wage law, the Board exceeded its authority and abused its discretion when it required bidder to comply with R.C. Chapter 4115 and pay prevailing wages on the Project. Amended Verified Complaint at ¶¶29, 36-37. Plaintiffs' contention that the Board is prohibited from requiring the payment of prevailing wages on the Project and including such term in its contracts with successful bidders is unsupported by both the plain reading of the statute and any legal authority. See *Enertech Electrical, Inc. v. Ashtabula Area City School Dist. Bd. of Edn.* (Sept. 30, 2009), Ashtabula App. No. 2009-CV-1032, unreported (finding that while R.C. 4115.04(B)(3) exempts school boards from the statutory Prevailing Wage requirements, it "does not prohibit OSFC and the Board from using Prevailing Wage Law as a condition within a bid specification for a school project).

As an initial matter, Appellants fail to identify any specific provision in R.C. Chapter 4115 that prohibits a board of education from placing a requirement in its bid specifications that bidders comply with R.C. Chapter 4115 and pay prevailing wages on the Project. Amended Verified Complaint (omitting the same). Had the legislature intended to prohibit boards of education from paying prevailing wages on construction projects it could simply have said so. It has not. Rather, Appellants conduct a tortured reading of the law that seeks to imply that the

legislature "deliberately" considered the provisions of the school exemption side-by side with the hospital exemption and created a prohibition by failing to insert similar "election" language in the provisions of the laws dealing schools. This argument is not supported by the legislative histories of the two exemptions. The hospital exemption was not created at the same time as the school exemption, but two years later, as part of an omnibus hospital reform bill. See Am.Sub.S.B. No. 55. If the law is as Appellants argue, the legislature certainly did not believe them, because in July 2007, members of legislature introduced Am.Sub.S.B. No. 139 to prohibit school boards from entering into contracts that require payment of prevailing wages. The bill died in committee with only three sponsors.

Under R.C. 3313.46(A)(1), when a board of education "determines to build, repair, enlarge, improve, or demolish any school building, the Board shall cause to be prepared the plans, specification and related information as required in division (A), (B) and (D) of R.C. 153.02. Revised Code Section 153.01(D) states that the board of education "shall cause to be made * * * definite and complete specifications of the work to be preformed, together with direction that will enable a competent mechanic or other builder to carry them out and afford bidders all needful information." Furthermore, the authority of the Board to require in its bid specifications that bidders comply with R.C. Chapter 4115 and pay prevailing wage on the Project can be necessarily implied from R.C. 3313.37,[3] R.C. 3313.47,[4] as well as R.C. 3313.17, which provides that: "The board of education of each school district shall be a body politic and corporate, and, as such, *capable of * * * contracting and being contracted with.*" (Emphasis added.) In exercising its authority a board of education has broad discretion, which should not

[3] R.C. 3313.37 (granting to boards of education the power to acquire build, enlarge, repair, and furnish necessary schoolhouses and make all other necessary provisions for the schools under its control).

[4] R.C. 3313.47 (granting to boards of education the management and control of all public schools within their districts).

be interfered with by a court of law in the absence of fraud or other abuse of discretion. *State ex rel. Greisinger v. Grand Rapids Bd. of Edn.* (1949), 88 Ohio App.3d 64, 100 N.E.2d 294, paragraph one of the syllabus. See, also, *State ex rel. Associated Builders and Contrs. v. Jefferson Cty. Bd. of Commrs.* (1995), 106 Ohio App.3d 176, 665 N.E.2d 723 (holding that the State's competitive bidding laws do not prohibit the insertion of a project labor agreement into the statutory bidding process).

Because the Board acted lawfully in requiring the 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 the Board, which is vested by law with the duty and responsibility of determining the terms of its projects. See *Hancock Cty. Bd. of Edn.*, 105 Ohio St. at 245. Appellants, are unable to demonstrate by clear and convincing evidence the Board abused its discretion in contractually requiring the payment of prevailing wages on the Project.

D. **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 Prevailing Wage Law, does not apply to such projects through operation of R.C. 4115.04(B)(3)

The fourth proposition of law is not properly before this Court, as the Ninth District did not reach the merits. Journal Entry at ¶¶25-26. See *State ex rel. Ohio Civil Service Emp. Assn. v. State Emp. Relations Bd.* (2004), 104 Ohio St.3d 122, 2004-Ohio-6363, ¶¶22-24 (finding "this court generally does not consider issues that the court of appeals did not reach," thus limiting its inquiry to the issue addressed by the court of appeals, whether Am.Sub.H.B. No. 405 violated the one-subject rule). See, also, *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 89, 585 N.E.2d 384, 390 (declining to pass judgment on issue of enforceability of registration release card where question not properly before the court of appeals).

Should this Honorable Court determine that the fourth proposition of law is properly before it, Appellee Barberton City Schools Board of Education incorporates by reference the response of Appellee Ohio School Facilities Commission to Appellants Proposition of Law No. 4, as if fully written herein.

III. CONCLUSION

For each, and all, of the foregoing reasons, the Board respectfully requests that this Honorable Court decline to exercise its jurisdiction over any of the four propositions of law asserted by Appellants as the issues in this case do not present "a question of public or great general interest" so as to merit this Court's discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by Email on June 24, 2010, to the following:

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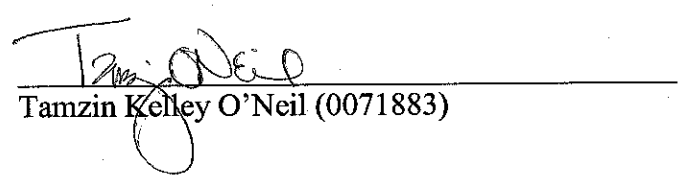

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