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IN THE SUPREME COURT OF OHIO

STATE EX. REL., NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC., *et. al.*	:	Case No.: 2010 - 0943
	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District Case No. CA-24898
Plaintiffs/Appellants,	:	
v.	:	Summit County Court of Common Pleas Case No. 2009-04-2636
THE BARBERTON CITY SCHOOLS BOARD OF EDUCATION, *et al.*	:	
Defendants/Appellees.	:	

NOTICE OF COURT OF APPEALS NINTH JUDICIAL DISTRICT DENIAL OF MOTION TO CERTIFY CONFLICT

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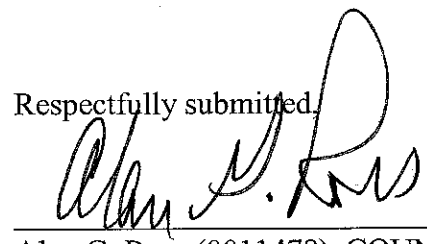
NOTICE OF COURT OF APPEALS NINTH JUDICIAL DISTRICT DENIAL OF MOTION TO CERTIFY CONFLICT

Appellants The Northern Ohio Chapter of Associated Builders & Contractors, Inc., Dan Villers, Jason Antill, and Fechko Excavating, Inc. hereby give notice to the Supreme Court of Ohio that the Court of Appeals Ninth Appellate District denied Appellants' Motion to Certify the Conflict in the Court of Appeals Case No. CA-24898 on July 8, 2010. A copy of said journal entry is attached.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Court of Appeals Ninth Judicial District Denial of Motion to Certify Conflict was served via ordinary U.S. mail, postage prepaid, upon the following:

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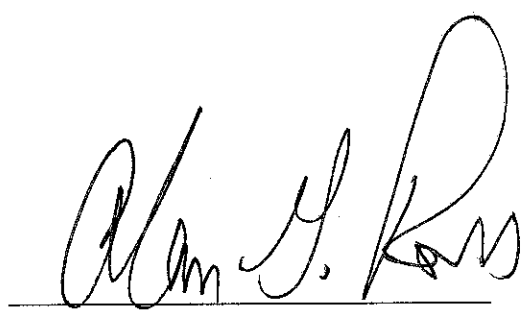
this 15th day of July 2010.



Counsel for Appellants

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COURT OF APPEALS
DANIEL M. HORRIGAN

2010 JUL -8 PM 12: 26

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CLERK OF COURTS

STATE OF OHIO)
) SS:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE EX. REL., NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS Appellant v. THE BARBERTON CITY SCHOOL BOARD OF EDUCATION Appellee	C.A. No. 24898 JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify conflicts between the judgment in this case, which was journalized on April 28, 2010, and several judgments from various districts. Appellee has responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that conflicts exist between the districts on the following issues:

> (1) "Whether standing to bring a common law taxpayer action against a school district is sustainable by a showing that the taxpayer(s) whose taxes will be burdened by a school levy, are residents and taxpayer(s) of the school district, thereby creating their 'special interest' sufficient to sustain their common law

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taxpayer cause of action, or must taxpayer(s) show that they have sustained damages different in kind than those sustained by any other taxpayer in a school district whose property taxes are burdened by the same levy?"

(2) "Whether damages and/or injury (sic) are presumed in a common law taxpayer action which alleges that the execution of a public construction contract violated the mandatory provisions of statutes respecting such contracts or alleges that the expenditure of public funds for an unlawful purpose, such that the foregoing is sufficient to confer standing on such common law taxpayers, or is standing of such common law taxpayers limited and restricted to only those situations where a public contract was awarded to a bidder in violation of the statutory requirement that the award be made to the 'lowest and best bidder?'"

(3) "Does a contractor/bidder have to be the apparent low bidder whose bid was subsequently rejected by a governmental entity in order to have standing to challenge unlawful bid specifications on the project, or is submitting a bid on the project sufficient to establish standing to challenge unlawful bid specifications?"

As to the first issue, Appellant argues that this Court's judgment is in conflict with *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. As to the second issue, Appellant argues that this Court's judgment is in conflict with *State ex rel. Connors v. Ohio Dept. of Transportation, et al.*, (1982), 8 Ohio App.3d 44. As to the third issue, Appellant argues that this Court's judgment is in conflict with *Connors*, supra, *Cedar Bay Constr., Inc. v. Fremont* (Nov. 18, 1988), 6th Dist. No. CA S-87-36, and *C.E. Angles, Inc. v. Evans*, (Dec. 14, 1982), 10th Dist. No. 82AP-635.

"Whether standing to bring a common law taxpayer action against a school district is sustainable by a showing that the taxpayer(s) whose taxes will be burdened by a school levy, are residents and taxpayer(s) of the school district, thereby creating their 'special interest' sufficient to sustain their common law taxpayer cause of action, or must taxpayer(s) show that they have sustained damages different in kind than those sustained by any other taxpayer in a school district whose property taxes are burdened by the same levy?"

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In essence, Appellant argues our judgment conflicts with that of the *Bonnell* Court as to whether a taxpayer must demonstrate that he has a "special interest" in order to sustain a common law cause of action. We conclude there is no conflict on this matter, as the *Bonnell* Court did not address this question of law. In *Bonnell*, the Seventh District addressed the propriety of awarding attorney fees in common law and/or statutory taxpayer actions. The Seventh District held that the taxpayer-plaintiff was not entitled to attorney fees and that a hearing on the matter was not required. This Court acknowledged the *Bonnell* decision when reviewing the underlying matter, noting that standing was not raised as an issue in the *Bonnell* appeal. As the *Bonnell* case progressed through the trial court, several named defendants were dismissed from the suit for unidentified reasons, which resulted in plaintiff-taxpayer dismissing the balance of his complaint, yet seeking reimbursement for his attorney fees. *N. Ohio Chapter of Associated Builders & Contrs., Inc. v. Barberton City School Bd. of Edn.*, 9th Dist. No. 24898, at ¶24. The basis for the trial court's dismissals is not apparent from the *Bonnell* decision, however, it is evident that the Seventh District's holding dealt only with the propriety of attorney fees in taxpayer actions; it did not address the requisite showing necessary to sustain a common law taxpayer action. Because the *Bonnell* Court did not address the same question of law as was before this Court in the above captioned matter, we conclude that no conflict exists between the two cases.

"Whether damages and/or injury (sic) are presumed in a common law taxpayer action which alleges that the execution of a public construction contract violated the mandatory provisions of statutes respecting such contracts or alleges that the expenditure of public funds for an unlawful purpose, such that the foregoing is sufficient to confer standing on such common law taxpayers, or is standing of such common law taxpayers limited and restricted to only those situations where a public contract was awarded to a bidder in violation of the statutory requirement that the award be made to the 'lowest and best bidder?'"

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The second question advanced by Appellants alleges a conflict between the districts as to whether actual damages can be presumed in the case of a common law taxpayer action. In *State ex rel. Connors v. Ohio Dept. of Transportation, et al.*, (1982), 8 Ohio App.3d 44, the Tenth District held that sovereign immunity did not bar "[a]n action against the Ohio Department of Transportation *** seeking declarative and injunctive relief from performance of a construction contract containing an allegedly invalid bid condition dealing with minority business enterprises[.]" *Connors*, 8 Ohio App.3d at paragraph one of the syllabus. The Court further held that "[t]axpayers of the State of Ohio who are specially affected by the bid conditions" had standing to pursue the foregoing type of action. *Connors*, at paragraph two of the syllabus. In concluding that standing was properly conferred to the plaintiff-taxpayers for that specific cause of action, the Tenth District noted limited instances in which a plaintiff-taxpayer's injuries could be presumed. It held that damages could be presumed in certain circumstances, including "the award of public contracts in violation of statutory requirements that such award must be made to the lowest bidder, *** 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*, 8 Ohio App.3d at 47. As indicated in this Court's decision, the contract awarded in this case was awarded to the lowest responsible bidder. *N. Ohio Chapter of Associated Builders & Contrs., Inc.*, at ¶16-19, 22. Additionally, this case falls outside of the express language utilized in the Tenth District's holding that limited its standing analysis to the cause of action brought in that case. *Connors*, 8 Ohio App.3d at paragraph two of the syllabus (providing four different bases for standing in the case of a

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minority set-aside contract put out for bid by the Ohio Department of Transportation). Accordingly, this Court's judgment does not conflict with the Tenth District's judgment on a matter of law.

"Does a contractor/bidder have to be the apparent low bidder whose bid was subsequently rejected by a governmental entity in order to have standing to challenge unlawful bid specifications on the project, or is submitting a bid on the project sufficient to establish standing to challenge unlawful bid specifications?"

Appellant's third question proposes that this Court's judgment conflicts with several courts as to whether standing can be conferred on a bidder by virtue of their having submitting a bid, irrespective of whether they were the wrongfully rejected lowest bidder. We held that the bidder in this case, Fechko, lacked standing because it had failed to demonstrate any "actual injury" that was discrete and particularized as a result of it having submitted an unsuccessful bid. *N. Ohio Chapter of Associated Builders & Contrs., Inc.*, at ¶14-19. Again, we note that the *Connors* Court specifically limited its holding to permit standing in circumstances where a bidder was "seeking *** relief from performance of a construction contract [issued by the Ohio Department of Transportation] containing an allegedly invalid bid condition dealing with minority business enterprises." *Connors*, 8 Ohio App.3d at paragraph two of the syllabus. Accordingly, the same question of law is not presented by this case.

The remaining cases are authority advanced by Appellant for the first time in its motion to certify a conflict. Appellant argues that the Sixth District's decision in *Cedar Bay Constr., Inc. v. Fremont* (Nov. 18, 1988), 6th Dist. No. CA S-87-36 and Tenth District's decision in *C.E. Angles, Inc. v. Evans*, (Dec. 14, 1982), 10th Dist. No. 82AP-635 are in conflict with the decision of this Court. In *Cedar Bay Constr., Inc.*, the disappointed bidder,

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who had submitted the second-lowest bid, challenged the determination to award the construction contract to the lowest bidder, arguing that the lowest bidder had not complied with all of the bid specifications. The Sixth District allowed the disappointed bidder's suit, noting that no other party, including a taxpayer, could seek such relief based on the nature of the harm alleged by the bidder. It is undisputed that Appellant in this case complied with all the bid requirements in that it included prevailing wage rates in its bid; Appellant was not challenging the application of or compliance with the bidding requirements, but challenged the bidding requirements themselves. Based on these material distinctions in the facts underlying the case, the resultant judgment of the court did not address the same issue of law. Accordingly, it is not in conflict with the judgment of this Court.

Finally, in *C.E. Angles*, the bidder was challenging the constitutionality of Ohio's prevailing wage law. That case challenged the constitutionality of the law itself, and did not address the issue of actual injury as related to the bidding requirements. Likewise, it is not in conflict with the judgment of this Court.

Appellant's motion to certify is denied with respect to all three questions presented in its motion because no conflict exists between this case and the judgment of those courts.

Judge

Concur:
Dickinson, P.J.
Moore, J.