

ORIGINAL

In the
Supreme Court of Ohio

MECCON, INC., et al., : Case No. 2009-0950
: :
Plaintiff-Appellee, : On Appeal from the
: : Franklin County
v. : Court of Appeals,
: : Tenth Appellate District
THE UNIVERSITY OF AKRON, : :
: : Court of Appeals Case
Defendant-Appellant. : No. 08AP-727
: :

**APPELLANT UNIVERSITY OF AKRON'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS-APPELLEES' MOTION FOR ATTORNEY'S FEES**

PETER D. WELIN* (0040762)
**Counsel of Record*
ANDREW R. FREDELAKE (0081396)
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6103
614-469-3200
614-469-3361 fax
peter.welin@thompsonhine.com

Counsel for Plaintiffs-Appellees,
Meccon, Inc. and Ronald R. Bassak

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*
ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General
WILLIAM C. BECKER (0013476)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant,
The University of Akron

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INTRODUCTION

Mecon is not entitled to attorneys' fees under R.C. 2335.39 as a result of the Court's decision in this case. First, Mecon is not a "prevailing" party at this juncture, see R.C. 2335.39(A)(5). To the contrary, Mecon *lost* ground through this Court's decision, as compared to the Tenth District's decision that was appealed. Second, the University's position on appeal was substantially justified, see R.C. 2335.39(B)(2). Indeed, the Court, by limiting the Tenth District's decision considerably, heeded the University's appeal to protect the public and public owners from excessive costs associated with bidding-law violations. The Tenth District's ruling was broad. Its reasoning blessed the recovery of bid-preparation costs in *all* public bidding cases and for *any* disappointed bidder. By contrast, this Court ruled that bid-preparation costs are recoverable only under narrow circumstances—if a bidder promptly sought, but was denied, injunctive relief, and it is later determined that the bidder should have been awarded the contract and injunctive relief is no longer available. *Mecon, Inc. v. Univ. of Akron*, 2010-Ohio-3297, syl. and ¶ 13.

Moreover, the Court declined to find Mecon eligible for such damages, but rather remanded the case for further proceedings on that score. *Id.* at ¶ 20. Had the University not appealed to this Court, Mecon would have been able to proceed, on remand, straight to the merits of its case. That is not so now. As a result of the University's appeal, this Court has erected a series of hurdles to Mecon's recovery that were not previously there, and quite possibly, has set the stage for its defeat.

Additionally—and independent of those reasons—R.C. 2335.39(B)(2)(a) states that a fee petition "shall be denied" where "special circumstances make an award unjust." That is the case here for multiple reasons. Chief among them, four days ago, Mecon and its owner pleaded

guilty to federal felonies for bribing a federal officer in exchange for U.S. Postal Service contracts. (See Information attached as **Exhibit A**). Because it has now come to light that Mecon was engaging in this criminal activity during the period it bid on the University's project, it is inconceivable that Mecon could even have qualified as a responsible bidder under Ohio law. Therefore, its entire lawsuit has likely been invalid from the start. The University will be addressing these significant developments on remand in the Court of Claims. In the meantime, awarding Mecon fees at this point would manifestly be unjust.

For all of these reasons, Mecon's fee petition should be denied.

BACKGROUND

Mecon is a disappointed bidder that, along with the company's owner, Ronald Bassak, sued the University in the Court of Claims for alleged bidding-law violations arising from the University's construction of a new football stadium. The merits of the case have yet to be litigated because there was a predicate jurisdictional question that needed to be resolved. Specifically, the University moved to dismiss the case in the Court of Claims for lack of subject matter jurisdiction, on the ground that Mecon's claim for money damages was improper because *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d 475, 2006-Ohio-2991, limited a disappointed bidder to injunctive relief.

The Court of Claims granted the University's motion and dismissed the case for lack of jurisdiction. Mecon appealed and the Tenth District reversed, holding that Mecon, if it prevailed, could recover bid-preparation costs—and that jurisdiction was therefore proper in the Court of Claims. *Mecon, Inc. v. Univ. of Akron* (10th Dist.), 2009-Ohio-1700, ¶¶ 15-23.

The University appealed the decision to this Court, which granted discretionary review. *Mecon, Inc. v. Univ. of Akron*, 2009-Ohio-0950. The Court affirmed the judgment of the Tenth

District, thereby reinstating the action in the Court of Claims. *Meccon*, 2010-Ohio-3297, at ¶ 21. This Court's holding was much narrower than the Tenth District's ruling, which would have permitted bid-preparation costs in all competitive bidding cases and for any disappointed bidder. By contrast, this Court ruled that a disappointed bidder may recover bid-preparation costs as damages only if that bidder promptly sought, but was denied, injunctive relief, and it is later determined that the bidder should have been awarded the contract and injunctive relief is no longer available. *Id.* at syl. and ¶ 13.

On August 20, 2010, Meccon filed the instant fee petition under R.C. 2335.39. Six days later, Meccon and Bassak pleaded guilty to federal felonies for bribing a federal official for U.S. Postal Service construction contracts. According to the federal Information—attached here as **Exhibit A**—Meccon's criminal activity took place throughout the period between January 10, 2005 and June 26, 2009, which included the period (the spring and summer of 2008) during which Meccon bid on the University's football stadium project.

ARGUMENT

Ohio's fee-shifting statute, R.C. 2335.39, permits certain parties, in select situations, to recover attorneys' fees from the State. The law is an exception to the traditional "American Rule," under which parties typically pay their own attorneys' fees, but this exception is limited in key ways. Most important here, the party seeking fees must clearly be a "prevailing eligible party," R.C. 2335.39(A)(5), and fees may be awarded only when the State's position was not "substantially justified," meaning that the State does not pay every time it loses, but only when it takes unreasonable positions, R.C. 2335.39(B)(2). Meccon's fee request fails on both counts.

Additionally, under R.C. 2335.39(B)(2)(a), the Court must deny an award where special circumstances make an award unjust, as is the case here. Among other things, the fee-requesting

plaintiffs just pleaded guilty to criminal activity related to public contracting—developments that almost certainly invalidate Meccon’s bid and its entire lawsuit.

A. Meccon is not a prevailing party in this appeal under R.C. 2335.39.

R.C. 2335.39(A)(5) defines “prevailing eligible party” as “an eligible party that prevails in an action or appeal involving the state.” In interpreting an analogous statute, this Court has explained that a party prevails on an appeal if “he obtains a new trial, or a modification of the judgment,” and he “must achieve only substantial, not complete, victory.” *Parker v. I&F Insulation Co., Inc.*, 89 Ohio St. 3d 261, 264-65, 2000-Ohio-151. Meccon meets none of those qualifications.

Instead, the sole argument Meccon propounds in support of its “prevailing party” status is based on flawed logic that places undue weight on whether the judgment below was affirmed or reversed. In Meccon’s view, because this Court affirmed the Tenth District’s opinion, the University could not have prevailed, and therefore Meccon must be the prevailing party. But Meccon ignores the *content* of the Court’s opinion, which struck a balance between the parties’ positions, rather than declaring a clear victor.

As a preliminary matter, all Meccon achieved in the Tenth District and this Court is the right to *try to* prevail. It does not qualify as “prevailing” merely to secure reinstatement of a case that has otherwise never left the starting gate.

Furthermore, far from securing a “substantial victory,” Meccon failed even to hold the ground it had won in the Tenth District. While the ultimate judgment of the Tenth District was affirmed, this Court’s holding is considerably more constricted than that of the court of appeals. The Tenth District had broadly recognized the recovery of bid-preparation costs in *all* public bidding cases and for *any* disappointed bidder. In contrast to that expansive view, this Court

held that bid-preparation costs are recoverable only under narrow circumstances—if a bidder promptly sought, but was denied, injunctive relief, and it is later determined that the bidder should have been awarded the contract and injunctive relief is no longer available. *Mecon*, 2010-Ohio-3297, at syl. and ¶ 13. Moreover, the Court noted that Mecon might not even meet the eligibility standard for such damages and remanded the case for further proceedings on that score. *Id.* at ¶ 20. Had the University not appealed to this Court, Mecon would have been able to proceed straight to the merits of its case on remand. Not so now. As a result of the University’s appeal, this Court has erected multiple hurdles to Mecon’s recovery that were not previously there, and quite possibly has set the stage for its defeat.

A fair reading of this Court’s decision indicates that the University got half a loaf and Mecon got half a loaf, *not* the victor’s feast that the company ballyhoos. The Court itself stated that it was seeking “to strike a balance” between the parties’ positions. *Id.* at ¶ 26. And it did. Although the Court affirmed the judgment of the Tenth District, it narrowed the Tenth District’s ruling considerably, thereby heeding the University’s appeal to protect the public and public owners from excessive costs associated with bidding-law violations. And significantly, the Court declined to find Mecon entitled to such damages at this juncture, but instead, put up hurdles to such recovery that would not have existed but for the appeal.

As this Court has previously recognized, considering Mecon the prevailing party under these circumstances and compelling the State to pay fees “would essentially penalize an appellant achieving anything less than a complete victory even though . . . the appeal was meritorious and achieved a substantial reduction of the judgment.” *Parker*, 89 Ohio St. 3d at 264-65.

Accordingly, this Court should decline to find that Mecon is a prevailing party under R.C. 2335.39.

B. The University's appeal was substantially justified.

Even if Mecon could establish that it was a prevailing party, its motion still fails because the University was substantially justified in filing its motion to dismiss in the Court of Claims and in appealing the Tenth District's decision.

Ohio's fee-shifting statute does not require the State to pay attorneys' fees every time it loses, but rather only when its position was not "substantially justified." R.C. 2335.39(B)(2). The fee-shifting law exists to "censure frivolous government action that coerces a party to resort to the courts to protect his or her rights" and to allow parties to "challenge unreasonable or oppressive governmental behavior by relieving [them] of the fear of incurring large litigation expenses." *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 122 Ohio St. 3d 557, 2009-Ohio-3628, ¶ 23. This case does not come close to presenting such concerns. An Ohio court, following the lead of the United States Supreme Court, has noted that "substantially justified" means "justified to a degree that could satisfy a reasonable person." *Gilmore v. State Dental Bd.* (1st Dist.), 2005-Ohio-2856, ¶ 9. The University easily meets that standard here. It appealed the Tenth District's ruling in good faith and put forward reasonable arguments—many of which the Court incorporated into its decision.

Mecon first argues that "the University's conduct that gave rise to the litigation" was unjustified, referring to the alleged bidding-law violation over which it sued the University. Motion at 7. This argument is premature. The merits of Mecon's underlying bidding-law claim have yet to be adjudicated. Indeed, only now (upon the Court's remand) will this case proceed beyond the jurisdictional and motion-to-dismiss stage. But in asking this Court to adjudicate the

merits through this fee petition, Meccon seeks to leapfrog over the orderly litigation process. That is patently improper. Moreover, the one court that has already touched on the merits of Meccon's claims—the Tenth District, which considered Meccon's request for an injunction pending appeal—determined that Meccon was *not* likely to succeed on the merits of its case. Journal Entry, *Meccon v. Univ. of Akron* (10th Dist. Sept. 2, 2008), No. 08AP-727. In short, there is no basis for this Court to be the first to assess the substantive merits of Meccon's claims, let alone to award attorneys' fees based on them.

Meccon also assails the University's motion to dismiss the case from the Court of Claims and its position in this appeal. Those arguments also fail. The University believed, and argued in good faith, that this Court's decision in *Cementech*, 2006-Ohio-2991, had limited disappointed bidders to injunctive relief. That position was reasonable. Indeed, in accepting the University's discretionary appeal, this Court implicitly recognized that the case presented a "substantially justified" question—that is, "a question of public or great general interest." S.Ct.Prac.R. 2.1(A)(3).

The University's position was also consistent with the view of Ohio's trial courts post-*Cementech*. That is, between this Court's decision in *Cementech* in 2006 and the instant litigation, *no Ohio court recognized the ability of a disappointed bidder to recover money damages in a public contract case*. And the Court of Claims *granted* the University's motion to dismiss, finding that *Cementech* precluded the recovery of bid-preparation costs. The trial court's favorable ruling—and the uniform view of *Cementech* among Ohio's trial courts—gave the University a legitimate basis for appealing the Tenth District's decision. Moreover, the Tenth District's decision rested entirely on "public policy" grounds. *Meccon* (10th Dist.), 2009-

Ohio-1700, at ¶¶ 10, 24. It is eminently justifiable for a party to ask *this* Court to be the final arbiter for such pronouncements.

Above all, however, it is this Court's own decision that confirms the reasonableness of the University's appeal. As discussed in detail above, while the Court affirmed the judgment of the Tenth District and declined to bar bid-preparation costs entirely, the Court narrowed the Tenth District's ruling significantly, thereby heeding the University's appeal to protect the public and public owners from excessive costs associated with bidding-law violations. By requiring a rejected bidder to seek injunctive relief promptly, the Court applied the principle of "mitigation of damages"—a tenet the Tenth District ignored, but which clearly springs from the concerns raised by the University's appeal. *Mecon*, 2010-Ohio-3297, at ¶ 14. In addition, by declining to find Mecon eligible to recover such damages—and by remanding for further proceedings on that issue—the Court obviously took note of the University's allegations that Mecon had *not*, in fact, sought injunctive relief promptly and that it would be unjust to award bid-preparation costs under those circumstances. *Id.* at ¶ 20. The Tenth District had sidestepped that problem too, and absent this Court's favorable responsiveness to the University's appeal, the timeliness question would have gone unaddressed. Thus, given the multiple ways this Court narrowed the Tenth District's ruling—and the limitations it placed on the recovery of bid-preparation costs—the University's appeal was substantially justified.

Mecon's authorities are unavailing. As it did in its merit brief, Mecon attempts to rely on three Tenth District decisions arising out of a construction project undertaken by the University of Cincinnati—*Tiemann v. University of Cincinnati* (10th Dist. 1998), 127 Ohio App. 3d 312, *Mechanical Contractors Association of Cincinnati, Inc. v. University of Cincinnati* ("Mechanical Contractors I") (10th Dist. 2001), 141 Ohio App. 3d 333, and *Mechanical Contractors*

Association of Cincinnati, Inc. v. University of Cincinnati (“*Mechanical Contractors II*”) (10th Dist.), 152 Ohio App. 3d 466, 2003-Ohio-1837. But those cases are beside the point because they were all decided *before* this Court’s *Cementech* decision. And for the reasons the University explained at greater length in its merits reply brief, these authorities are inapposite to the question that was at hand. Reply Br. at 7-8. Indeed, despite those cases having been the focal point of Mecon’s merit brief, this Court did not rely on them in its opinion at all.

Finally, Mecon wrongly claims that the University’s appeal was unjustified because the State took “the exact opposite position” in *Barr v. Jones* (5th Dist.), 160 Ohio App. 3d 320, 2005-Ohio-1488. Motion at 12. Mecon contends that in *Barr*, the State sought to invoke the subject matter jurisdiction of the Court of Claims by arguing that a prayer for attorneys’ fees incurred before the complaint was filed is a claim for “money damages.” *Id.* at 10. These arguments are utterly mistaken and groundless. In *Barr*, the State sought to invoke the jurisdiction of the Court of Claims on the basis that “a prayer for attorney fees incurred *before the filing of the complaint* constitutes a claim for money damages.” *Barr* (5th Dist.), 2005-Ohio-1488, at ¶ 10 (emphasis added). *Barr* involved a claim for *pre-complaint* attorneys’ fees, which are distinguishable from attorneys’ fees incurred in the course of litigation, which are the typical “attorneys’ fees” parties seek at the end of litigation, as in this case. *Id.* Pre-litigation fees are a different beast entirely and are similar to a situation in which a party seeks indemnification from the State *after* it already incurred the costs of litigation—though such costs represent the amount the party already paid to his attorney, they are distinct from traditional attorneys’ fees. *Cullen v. Ohio Dep’t of Rehab. & Corr.* (10th Dist. 1998), 125 Ohio App. 3d 758, 764-65 (noting that “a claim for indemnification is a claim for money damages” over which the Court of Claims has exclusive jurisdiction, “even when ancillary relief such as an injunction or declaratory relief is

sought”). Thus, the State’s position in *Barr* was perfectly consistent with the law governing claims for those types of attorneys’ fees and does nothing to inform this case.

C. An attorneys’ fee award would be unjust at this juncture.

This Court should deny Meccon’s motion for all the reasons above. But independent of those reasons, R.C. 2335.39(B)(2)(a) states that a fee petition “shall be denied” where “special circumstances make an award unjust.” That is the case here for three reasons: (1) Meccon and Bassak’s recent federal felony convictions in connection with a bribery scheme; (2) the fact that this case has yet to proceed beyond the jurisdictional stage; (3) and the fact that the instant fee request duplicates a fee request Meccon already filed with the Court of Claims.

1. Meccon and Bassak’s federal felony convictions are “special circumstances” that render a fee award unjust.

On August 20, 2010, Meccon filed this fee petition under R.C. 2335.39. Six days later, on August 26, 2010, Meccon and its owner, Ronald Bassak—the plaintiffs in this case—pleaded guilty to federal felonies for bribing a federal official for U.S. Postal Service contracts. Meccon and Bassak pleaded guilty to the criminal charges in the federal Information attached here as **Exhibit A**. According to the Information, Meccon’s criminal activity took place over the period between January 10, 2005 and June 26, 2009. The University’s bidding process took place during this period—in the spring and summer of 2008. Because it has now come to light that Meccon’s criminal activity was ongoing when it bid on the University’s project, it is inconceivable that Meccon could even have qualified as a responsible bidder under Ohio law. Simply put, these developments almost certainly invalidate Meccon’s original bid and thus this entire lawsuit.

The University will be addressing the implications of Meccon’s criminal conviction on remand in the Court of Claims. But in the meantime, these significant new events—and the

potential effect they have on Meccon's entire suit—easily qualify as “special circumstances” that render a fee award unjust at this time.

2. The timeliness of Meccon's claim has yet to be determined.

In addition to Meccon and Bassak's fresh criminal convictions, it is also unjust to award attorneys' fees at this point because the timeliness of Meccon's claim has not yet been determined. This action—which Meccon initiated—has yet to proceed beyond the jurisdictional stage. But as this Court recognized, it is possible that Meccon's entire damages claim was out-of-line, because Meccon failed to seek injunctive relief promptly. The Court remanded the case for further proceedings to determine that question. Thus, it may well be the case that the University never should have been subject to Meccon's suit to begin with.

The requirement to seek injunctive relief promptly is an elementary principle in public contracting cases. Thus, if Meccon in fact failed in this regard—as the University will demonstrate to the Court of Claims—it is *Meccon's* litigation tactics that will be exposed as frivolous and unreasonable. Accordingly, it would plainly be unjust for this Court to award attorneys' fees to Meccon now, before that vital question is resolved.

3. Meccon already filed a fee request in the Court of Claims.

Finally, Meccon already has a fee request pending in the Court of Claims. On August 20, 2010—the same day it filed *this* fee petition—Meccon filed a motion in the Court of Claims requesting, among other things, attorneys' fees. See Pls.' Request to Lift Stay and Rule on Motions Submitted, at 3, No. 2008-08817 (Court of Claims, Aug. 23, 2010). Meccon offered no explanation to either court for its duplicative filing; and there is none. Rather, Meccon's actions underscore the unjust prematurity of its motion to this Court.

Accordingly, regardless of what the Court determines with respect to the other statutory requirements discussed in Sections A and B above, the Court should determine under R.C. 2335.39(B)(2)(a) that the current posture of this case—including significant new criminal developments that call into question the propriety of Mecon's bid in the first place—present special circumstances that would make a fee award unjust at this time.

CONCLUSION

For the foregoing reasons, this Court should deny Mecon's motion for attorneys' fees.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General

WILLIAM C. BECKER (0013476)
Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant,
The University of Akron

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellant University of Akron's Memorandum in Opposition to Plaintiffs-Appellees' Motion for Attorney's Fees was served by regular U.S. mail this 30th day of August, 2010, upon the following counsel:

Peter D. Welin
Andrew R. Fredelake
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6103

Counsel for Plaintiffs-Appellees,
Mecon, Inc. and Ronald R. Bassak

Stephen L. Byron
Rebecca K. Schaltenbrand
Schottenstein, Zox & Dunn Co., L.P.A.
4230 State Route 306, Suite 240
Willoughby, Ohio 44094

Counsel for *Amicus Curiae*,
The Ohio Municipal League and on behalf
of the County Commissions Association of
Ohio



Alexandra T. Schimmer

JAMES BONINI
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

2010 AUG -6 P 3:30

2:10-cr-204
SOUTHERN DIST. OHIO
EAST DIV. COLUMBUS
JUDGE WATSON

UNITED STATES OF AMERICA

vs.

NO.

18 U.S.C. § 2
18 U.S.C. § 4
18 U.S.C. § 201(c)(1)(A)

RONALD R. BASSAK

and

MECCON, INC.,

Defendants

INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

COUNT 1

On or about the period January 10, 2005 through June 26, 2009, in the Southern District of Ohio, and elsewhere, RONALD R. BASSAK, the defendant, having knowledge of the actual commission of a felony cognizable by a court of the United States, to wit: bribery of a public official, in violation of 18 U.S.C. § 201(b)(2), did conceal and did not as soon as possible make known the same to some judge or other person in civil authority under the United States.

In violation of 18 U.S.C. § 4.

COUNT 2

On or about the period January 10, 2005 through June 26, 2009, in the Southern District of Ohio, and elsewhere, MECCON, INC., the defendant, did directly and indirectly give, offer, and promise a thing of value to Ashvin Shah, a public official, otherwise as provided by law for the

EXHIBIT A

proper discharge of official duties, for and because of official acts performed and to be performed by such official, that is, did pay and cause to be paid money to Ashvin Shah for and in relation to construction contracts awarded to MECCON, INC., the defendant, by the United States Postal Service.

In violation of 18 U.S.C. §§ 201(c)(1)(A) and 2.

CARTER M. STEWART
United States Attorney


GARY L. SPARTIS (0023428)
Deputy Criminal Chief