

IN THE SUPREME COURT OF OHIO

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

Appellants,

v.

BARBERTON CITY SCHOOL BOARD OF
EDUCATION, *et al.*,

Appellees.

CASE NO.: 2010-0943

On Appeal from the Ninth District Court of
Appeals Case No. 06CA0104-M

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

MERIT BRIEF OF APPELLANTS

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JASON ANTILL, DAN VILLERS, AND FECHKO EXCAVATING, INC.**

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STATEMENT OF FACTS

I. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Relevant Facts.

In March of 2008, Barberton taxpayers passed a 5.2 mill bond levy to fund various school construction projects totaling approximately 72 Million Dollars in the City of Barberton, including the 30 Million Dollar New Barberton Middle School Project (“Project”). (Supp. p. 34, AVC ¶18).¹ The entire Project is scheduled to be completed in phases. (Supp. p. 798 (McQuade Depo. at 9). At least 40% of the construction costs for the Project are being paid for by the 5.2 mill bond levy passed by Barberton taxpayers. (Supp. p. 34, AVC ¶18). The remaining 60% of the construction costs for the Project are being funded by taxpayer monies received from the Ohio School Facilities Commission (“OSFC”), a state agency created by the 122nd Ohio General Assembly to fund school construction projects.² (Supp. p. 34, AVC at ¶19). The Board and the OSFC are co-owners of the construction Project. (Supp. p. 34, AVC ¶16). The Project is subject to Ohio’s competitive bidding laws and R.C. 3313.46(A)(6). (Supp. p. 37, AVC ¶35).

On October 21, 2008, the Barberton Board of Education (“Board”) passed a Resolution requiring that all work on the Project be subject to the requirements of Ohio’s Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16 (the “PW requirement”).³ (See SAVC at ¶15, Supp. p. 85; Supp. p. 102, Exhibit “A” attached to the SAVC; and Supp. p. 770). The Barberton taxpayers

¹ The following abbreviations are used throughout this Brief: “VC” for the Verified Complaint; “AVC” for the Amended Verified Complaint; and “SAVC” for the Second Amended Verified Complaint.

² Appellee OSFC was created by Senate Bill 102 to administer financial assistance to school districts for the acquisition or construction of classroom facilities in accordance with sections 3318.01 to 3318.33 of the Revised Code. (Supp. p. 33, AVC at ¶12).

³ Appellee the Barberton Board of Education (“Board”) is a board of education organized under the Laws of the State of Ohio, pursuant to R.C. 3313.01 *et seq.* (Supp. p. 34, AVC at ¶11).

were not informed of this PW requirement when 5.2 mill bond levy was passed. (Supp. p. 52, AVC Exhibit “A”).

The Board adopted this PW requirement based on Resolution 07-96 enacted by the OSFC which purportedly “permits” boards of education that receive OSFC funding the option and authority to “elect” to apply PW requirements to a school construction project, even though such projects were removed from PW requirements when the Legislature enacted R.C. 4115.04(B)(3) in 1997. (Supp. p. 67, AVC Exhibit “D”). Specifically, the solicitation for bids for the early site work package (“ESP”), which Fechko Excavating, Inc., (“Fechko”) bid, stated “PREVAILING WAGE RATES APPLY; BIDDERS SHALL COMPLY WITH CHAPTER 4115 OF THE OHIO REVISED CODE.” (Supp. p. 34, AVC at ¶15 and ¶20; and Supp. p. 60, Exhibit “B” attached thereto). Sealed bids for the ESP were submitted to the Treasurer of the Board on March 25, 2009, and opened and read immediately thereafter. (Supp. p. 35, AVC at ¶22). Prior to the receipt or of the opening of the sealed bids, the Appellants sent two letters to the school board and their representatives objecting to the inclusion of the PW requirements in the bid specifications. (AVC Exhibit “A,” Supp. pp. 51-59). On or about April 1, 2009, and instead of rejecting all bids submitted subject to the PW requirements, the Board held a “special session” in which it awarded the contract for the ESP to Mr. Excavator, the low bidder for the contract.⁴ (Supp. p. 37, AVC at ¶34). A contract with Mr. Excavator and the Board was entered into on April 8, 2009. (Supp. p. 64, AVC Exhibit “C”).

B. Procedural History.

⁴ Appellee Mr. Excavator is a construction contractor that was awarded the Early Site Work Package contract for the Project subject to PW requirements. (AVC at ¶13).

On April 3, 2009, ABC⁵, Fechko⁶ and Barberton Taxpayers Villers and Antill filed a Verified Complaint against the Board seeking a preliminary and permanent injunction and a declaratory judgment alleging the Board had included an unlawful PW requirement in the bid specifications and subsequent contract award for the Project. (Supp. p. 1, VC at ¶1). Appellants Dan Villers (“Villers”) and Jason Antill (“Antill”) are home owners and taxpayers of the City of Barberton whose properties and taxes are subject to the 5.2 mill levy funding the school construction. (Supp. p. 32, ACV at ¶5). In their Verified Complaint, Appellants claimed, *inter alia*, the Board had abused its discretion by exceeding its authority in requiring bidders for the Project to comply with the provisions of Chapter 4115, or otherwise mandate the payment of prevailing wages in the bid specifications and contract documents for the Project in violation of both R.C. 4115.04(B)(3) and R.C. 3313.46(A)(6). (Supp. pp. 1, 8, and 13, AVC at ¶¶’s 2, 3, 37 and 65).

The case was assigned to a Magistrate. A hearing was held with the Magistrate in chambers on April 3, 2009, at which time Plaintiffs Motion for a Temporary Restraining Order was verbally denied. The Magistrate set a Preliminary Injunction hearing for April 15, 2009.

On April 13, 2009, the Board filed a Motion to Dismiss this lawsuit alleging Appellants failed to join an indispensable party to the litigation, the OSFC. In order to ensure that the

⁵ The Northern Ohio Chapter of Associated Builders & Contractors, Inc. (“ABC”) is a non-profit corporation and a local chapter of Associated Builders and Contractors, Inc., which is a national trade association consisting of over twenty-five thousand Merit Shop construction industry associates and contractors. (Supp. p. 32, AVC at ¶7). ABC represents over three hundred and fifty Merit Shop associate members and construction contractors, including contractors located in Summit County and contractors employing residents of Summit County and the City of Barberton. (Supp. p. 32-33, AVC at ¶9). Appellant Fechko Excavating, which submitted a bid on the Project, is a member of ABC. (Supp. p. 33, AVC at ¶10).

⁶ Fechko Excavating, Inc. (“Fechko”) is a construction company that received bid specifications for the Project and submitted a bid to obtain the contract for the Early Site Work Package for the Project subject to PW requirements. (Supp. p. 32, AVC at ¶6).

injunctive relief proceedings were not delayed, and rather than oppose the Board's Motion, Appellants advised the parties and the Magistrate that they would add the OSFC, and at the Magistrate's direction, also added Mr. Excavator, as parties to this litigation.

On April 24, 2009, Appellants filed its Amended Verified Complaint for Declaratory Judgment and Other Relief and a Motion for Permanent Injunction against the Board, Mr. Excavator and the OSFC, alleging additional claims for declaratory and injunctive relief against the OSFC regarding its July 26, 2007 Resolution 07-98 permitting school boards the authority to "elect" to apply a Chapter 4115 PW requirement to school construction projects to which R.C. 4115.04(B)(3) clearly states "do[es] not apply to." (Supp. p. 31-32, AVC ¶¶ 1-4; Supp. pp. 67-71, OSFC Resolution 07-98, AVC Exhibit "D").

On May 7, 2009, the Magistrate held a pretrial hearing setting a discovery cut-off date of July 6, 2009 and a trial date of August 10, 2009. At first, the Magistrate permitted Appellants to conduct some limited discovery. Later, and without any articulated reason, the Magistrate stayed all discovery, depriving Plaintiffs of the opportunity to take the scheduled depositions of then OSFC Executive Director Michael Shoemaker, and Robert Kennedy, Superintendent of the Ohio Department of Commerce, Division of Labor & Worker Safety, the person responsible for administering and enforcing Ohio's Prevailing Wage Law.⁷

It took until June 22, 2009 for Appellants to get Appellees to produce witnesses, at which time Plaintiffs deposed Dennis Liddle the Board's current President and Deanne McQuaide the Board's Vice President. The depositions of Liddle and McQuaide revealed that the Board

⁷ The Board and the OSFC conceded in briefs filed before the trial court that the Ohio Department of Commerce is without jurisdiction to administer or enforce the requirements of Chapter 4115 on a school construction project due to the enactment of R.C. 4115.04(B)(3). As such, the Board and the OSFC's requirement that contractors pay prevailing wages places the Board in the position of setting, administering or enforcing minimum wage rates for the Project.

intended its October 21, 2008 Resolution to mandate compliance with Chapter 4115 for each and every construction contract for the Project. (Supp. pp. 87-88, SAVC at ¶30; Supp. pp. 796-797 (McQuaide Depo. 9-10); and Supp. pp. 680-681 (Liddle Depo. at p. 13-14).⁸ Furthermore, the Board President and Vice President testified that the Board “exercised its discretion” and adopted the PW requirement on the Project to please their blue collar union constituents, and according to the Vice President of the Board, to ensure that “Mexicans” she believed to be employed by non-union contractors did not perform work on the Project. (Supp. p. 88, SAVC at ¶33; see also Supp. pp. 801 and 805-806 (McQuaide Depo. 14 and 18-19); Supp. pp. 685-686 and 708 (Liddle Depo. at 18-19, and 41).⁹

The President and Vice President of the Board further testified that the PW requirement was NOT a factor used to determine if a bidder was “responsible” pursuant to R.C. 9.312 for the Project. (Supp. p. 88, SAVC at ¶34 and ¶35; Supp. pp. 687 and 695-696 (Liddle Depo. at 20, and 28-29); Supp. pp. 803-805 (McQuaide Dep. at p. 16-18). As further evidence that paying prevailing wages is not a “responsibility” factor, the Board President and Vice President testified that the PW requirement was not applied to any other construction projects currently being undertaken or recently completed by the Board.¹⁰ (Supp. p. 88, SAVC at ¶36; see also, Supp. pp. 829-833 (McQuaide Depo. at 42-46); Supp. pp. 678-680 (Liddle Dep. at 11-13).

⁸ McQuaide’s deposition is attached to Appellants App. R. 7 Motion for Stay and Request for Injunction as Exhibit “P,” Supp. pp. 788 to 899, and Liddle’s deposition is attached as Exhibit “O,” Supp. pp. 668 to 787.

⁹ The Board’s stated reasons for electing to impose prevailing wage requirements on the Project bears no reasonable relation to the R.C. 9.312 contractor responsibility factors, the Board’s own Bylaws and Policies for awarding contracts, which mirror R.C. 9.312, and are direct evidence of unlawful discrimination, collusion and/or favoritism. (Supp. pp. 88, SAVC ¶34).

¹⁰ These Projects include the Norton Homes Demolition, demolition of the Natatorium/ Fitness Center, construction of the Sharkey Stadium and Field House project, the High School Roofing Repair project and the High School Circulation project. Id.

In view of the testimony obtained at the depositions, on July 6, 2009, immediately after the stenographer provided Appellants with the deposition transcripts, Appellants requested leave from the trial court to file a Second Amended Verified Complaint to accurately reflect the facts of this case and add additional claims. Appellants argued that these newly discovered facts mooted the Appellees Motions to Dismiss, as they had been presented to the trial court, since their Motions were originally limited to the first small phase of the Project, the ESP, and now it was revealed that the PW requirement would be imposed on an extensive series of construction contracts to be awarded over a period of years.

On July 7, 2009, and while Appellees Motions to Dismiss and Appellants Motion for Leave to Amend its Complaint were pending before the trial court, the Board issued another advertisement to receive sealed bids for additional construction contracts for the Project. (Supp. p. 269, App. R. 7 Motion for a Stay of Execution and Request for Injunction, Ross Aff. ¶2, and Supp. p. 271, Exhibit "A" attached thereto). The advertisement for bids and the specifications for the Project issued by the Board and the OSFC, again, required all contractors submitting bids on the Project to pay prevailing wages for all work performed on the Project. (Supp. p. 269, Ross Aff. at ¶3). The sealed bids submitted by contractors for the Project were opened and read by the Board on August 11, 2009. (Supp. pp. 269-270, Ross Aff. ¶4).

On July 31, 2009, the trial court issued a decision holding that none of the Appellants had standing to assert claims in this case against the Board and the OSFC, held that Appellants claims lacked any merit and also denied Appellants Motion for Leave to file the Second Amended Verified Complaint. On August 5, 2009, Appellants filed their Notice of Appeal with the Ninth District Court of Appeals and also filed an App. R. 7 Motion for a Stay of Execution and Request for Injunction with regard to the decision issued by the trial court on July 31, 2009.

On August 11, 2009, the Ninth District denied Appellants Motion for Stay and Request for Injunction.

On August 12, 2009, Appellants appealed the Ninth District's denial of Appellants App. R. 7 Motion for Stay and Request for Injunction to this Court. On August 19, 2009, Appellees filed a Motion to Dismiss Appellants appeal filed with the Ninth District claiming the issues presented were moot. On September 9, 2009, the Ninth District denied the Appellees Motion to Dismiss based on mootness. On September 21, 2009, this Court denied Appellants App. R. 7 Motion for Stay and Request for Injunction, Justice Pfeifer and Justice Stratton dissenting, stating they would grant injunctive relief.

On April 28, 2010, the Ninth District Court of Appeals affirmed the decision of the trial court holding that none of the Appellants had standing to challenge the bid specifications or contract awards, and further, holding that Appellants request for leave to file a Second Amended Verified Complaint was untimely and prejudicial. In denying Appellants leave to amend their complaint, the Ninth District also addressed the merits of the case by holding "having failed to identify any basis upon which the provision exempting schools 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.'" (Appx. p. 18, Opinion at ¶31).

On May 8, 2010, Appellants filed an App. R. 25 Motion to Certify a Conflict with the Ninth District arguing its decision regarding the standing of taxpayers, the bidder and the trade association was in conflict with decisions rendered by other Ohio Appeals courts. On May 26, 2010, Appellants filed a Notice of Appeal with this Court presenting four Propositions of Law regarding the standing of all of the Appellants and the merits of the case. On July 8, 2010,

Appellants Motion to Certify a Conflict was denied by the Ninth District. On September 29, 2010, this Court accepted Proposition of Law Number 1 for review regarding the common law taxpayer standing of Dan Villers and Jason Antill. The instant argument follows.

II. LAW AND ARGUMENT

A. Preliminary Statement.

The Ninth District held that common law taxpayers who are paying a special bond levy to construct a public school have no standing to challenge alleged unlawful bid specifications or public contract awards. 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.” Appellants submit that this decision concerning the standing of taxpayers completely eviscerates this Court’s decisions concerning the standing of common law taxpayers 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 instead compared the interests of the 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 owner because they are all paying the same levy to construct the school. In essence, the Ninth District’s decision eliminates common law taxpayer standing in Ohio 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. Thus, 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, supra*, 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 expending taxpayer funds unlawfully.

B. Law and Argument.

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

The essence of the standing doctrine is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issue upon which the court so largely depends for illumination.” *Baker v. Carr* (1962), 369 U.S. 186, 204. The Ohio Constitution provides at Section 16, Article I that “All Courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” With these principles in mind, Appellants present the following arguments regarding common law taxpayer standing.

1. Taxpayers in this Case pay into a “Special Fund” and have an Injury.

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.” (Appx. p. 13, Opinion at ¶21). This approach misconstrues what constitutes a “special interest” and injury to

taxpayers. The Barberton Taxpayers submit they have standing because they are paying into a special fund to finance the construction of the Project and they have an interest and injury that differs from other taxpayers generally in the State of Ohio.

This Court in *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, N.E.2d 1; *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St. 3d 317, 503 N.E.2d 1025, and more recently, *State ex rel. Dann v. Taft*, Ohio St. 3d 252; 2006-Ohio-3677, 853 N.E.2d 263, has held taxpayers 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, thereby differentiating the standing of taxpayers who are specifically injured from the public in general. *Racing Guild* p.321. See also *Clay v. Harrison Hills City School Dist. Bd. of Educ.* (1999), 102 Ohio Misc. 2d 13 (finding that taxpayers had standing to enjoin a school district); See also, *East Liverpool City School Dist. ex rel. Bonnell*, (Jun. 22, 2006), 7th Dist. App. No. 05 CO 32, 2006-Ohio-3482 (same).

In *Masterson*, the taxpayer sought to challenge the expenditure of revenues collected by the Ohio Racing Commission. The revenues collected by the Commission were not general taxpayer moneys, but were revenues generated from fees paid to the Racing Commission. *Id.* at 369. This Court held that the taxpayer lacked standing because he did not contribute to this “special fund” and the Racing Commission did not spend taxpayer money from the general revenue fund. This Court stated that in order to have standing, and in the absence of statutory authority, a taxpayer must establish a “special interest” in the litigation by reasons of his/her own property rights being placed in jeopardy. *Id.* at ¶1 of the Syllabus. A persons property rights are placed in jeopardy when the person can allege and prove damage to that is different in character from that sustained by the public generally.

This Court further clarified its decision in *Masterson* when deciding *Racing Guild*. In *Racing Guild*, several pari-mutuel clerks sued the Racing Commission seeking, among other things, the revocation of Northfield Park's operating permit and tax abatements due to bribery and fraud convictions of Northfield Park's owner. The clerks asserted that they had standing based upon their status as general taxpayers, as contributors to a "special fund" and as members of the racing industry. *Id.* at 1027. This Court determined that the clerks had standing and a "special interest" in the litigation based upon their status as contributors to a "special fund." *Id.* at Syllabus ¶2. This Court found that the clerks provide funding for the Racing Commission's operations through the contribution of their license fees into the operating account of the state's special revenue fund. *Id.* at 1029.

The Commission attempted to distinguish *Masterson*, stating that *Masterson* was a "taxpayer standing case," while the basis of standing asserted by the clerks in *Racing Guild* involves their status as "license fee payers." In response, this Court explicitly stated, ". . . *Masterson* involves the standing doctrine in relation to contributors to a special fund, regardless of whether the contributions are in the form of taxes, fees or other monies." *Id.* at 1029. This Court went on to hold:

There is no question that the clerks are contributors to the relevant special fund, nor is there any question that the allegedly illegal actions of the commission resulted in insufficient contributions into that same special fund. This alone is enough to satisfy the *Masterson* requirement of a special interest in the relevant fund.

Id. at 1029. This Court went on to explain that the Commission's alleged unlawful actions would cause the amount of license fees clerks pay to increase, or cause the services rendered by the Commission to decrease. *Id.* at 1030. Regardless, this Court concluded that the clerks have property rights in their own income and that interest was placed in jeopardy by the actions of the

Commission. Id.

Again, in *State ex. rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677, 853, N.E.2d 263, this Court reaffirmed that a taxpayer who pays into a “special fund” has standing to file suit. While serving as a State Senator, Marc Dann filed an action in mandamus seeking certain weekly Worker’s Compensation reports from Governor Taft. Taft asserted privilege over a portion of the records and Dann indicated he needed the records because he intended to file a taxpayer lawsuit alleging misconduct against the State. Id. at ¶7. This Court stated that Ohio law does not authorize a private Ohio citizen, acting without official authority, to prosecute government officials suspected of misconduct based on a citizen’s status as a taxpayer. Id. at ¶9. However, this Court held that Dann, as an employer, had contributed to the Worker’s Compensation fund had a “special interest” in the management of that fund. Id. at ¶10. This Court stated that Dann arguably had standing based upon his contributions to this “special fund” as an employer, although he did not have standing to prosecute misconduct as a general taxpayer. See also, *State ex rel. Dann v. Taft*, 110 Ohio St.3d 1, 2006-Ohio-2947, 850 N.E.2d 27 (reaffirming this Court’s holding in *Masterson* that a taxpayer has standing if he/she has an interest in the public funds at issue).

Indeed, the Seventh District has already recognized that a common law taxpayer has a “special interest” sufficient to enjoin the construction of a school project being jointly constructed by a school board and the OSFC. See *East Liverpool City School Dist. ex rel. Bonnell*, (Jun. 22, 2006), 7th Dist. App. No. 05 CO 32, 2006-Ohio-3482. However, the Ninth District dismissed this Seventh District decision, improperly speculating that taxpayer standing was not sufficiently scrutinized. In *Bonnell*, the Court 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. *State ex. rel. Shetzer v. Harshaw Chem. Co.*, (Dec. 18, 1975), 8th Dist. No. 34281, 1975 Ohio App. LEXIS 6938.

Id. at ¶21. Under the above quoted standard, Barberton taxpayers Antill and Villers 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."

Regardless of the weight given to the Seventh District's decision, it is apparent that the facts of this case are analogous to the facts and circumstances discussed above in *Racing Guild* and *Taft*, and fall in line with this Court's reasoning for finding that the clerks who paid a special fee in *Racing Guild* had standing, as well as when determining that Marc Dann, as an employer making contributions to the Worker's Compensation fund, also had standing.

Here, the standing of Barberton Taxpayers Villers and Antill 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. The 5.2 mill levy is a special tax or fee that only affects Barberton property owners. Therefore, both Villers and Antill belong to a special class of taxpayers contributing to this fund, i.e. the levy, in order to construct the school. Thus, the Barberton Taxpayers at issue here have a "special interest" and injury that differs from the public in general, as both will suffer an injury caused through the increased cost of construction due to the unlawful PW requirement, which will adversely affect their property values, their incomes and also increase the amount of property taxes paid over the life of the bond levy.

In 1997, the Legislature through the enactment of Senate Bill No. 102, added language to R.C. 4115.04(B)(3)¹¹ which explicitly states that PW requirements “do[es] not apply to” boards of education in school construction projects. When the Legislature acted to remove such projects from the application of PW requirements, it did not include any language in R.C. 4115.04(B)(3) or elsewhere in the Revised Code granting school boards or the OSFC any statutory authority to “elect” to apply PW requirements on school projects. Without explicit language included in R.C. 4115.04(B)(3) that provides school boards with authority to elect to apply PW requirements, as was provided to county and municipal hospitals in R.C. 4115.04(B)(4), the Board and the OSFC are without any authority to do so. Compare R.C. 4115.04(B)(3) with (B)(4). See generally, *Hall v. Lakeview Local Sch. Dist. Bd. of Ed.* (1992), 63 Ohio St. 3d 380, 588 N.E.2d 785; *Educational Services Institute, Inc., et al., v. Gallia-Vinton Education Service Center, et al.*, 4th Dist No. 03CA6, 2004 Ohio 874; *State, ex rel. Bd. of End. of Cincinnati, v. Griffith*, 74 Ohio St., 80, 77 N. E., 686; and *Hamilton Local Bd. of Educ. v. Arthur*, 1973 Ohio App. LEXIS 1777 (Ohio Ct. App., Franklin County July 24, 1973).

The Ohio Revised Code explicitly sets forth the authority of a school district or the OSFC to act when constructing a school. See R.C. 3313.01 and 3318.01 *et. seq.* Nothing contained in any of the applicable Code sections grants the OSFC or a school board the authority, express or implied, to establish, administer or enforce minimum wage or PW requirements. Ironically, S.B. 102 which created the OSFC to fund and administer school construction projects, was a result of legislation that was explicitly passed to remove PW requirements from school projects. Now, to hold that the Barberton Taxpayers lack standing to litigate the Legislature’s clear intent that PW

¹¹ Section 4115.04(B) sets forth the list of public construction projects to which “Section 4115.03 to 4115.16 of the Revised Code do not apply to.” Section 4115.04(B)(3) provides: “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.”

“do[es] not apply to” their school project, when their tax dollars from the 5.2 mill levy and state tax dollars from the OSFC are unlawfully being spent, blatantly obliterates any common law right to bring into question how their tax dollars are being expended. Thus, the taxpayers’ “special interest” could not be made more clear in this case.

Also as part of S.B. 102, the Legislature commissioned the Legislative Service Commission (“LSC”) to conduct a study to examine the effects of the removal of PW requirements from school projects. In accordance with the directive of the Legislature, the LSC did conduct a study through its Legislative Budget Office. (Supp. pp. 189-268). On May 20, 2002, it published Report No. 149, which concluded that an aggregate 10.7% savings on school construction costs was attributable to NOT applying PW requirements on school projects. (Supp. pp. 196-197). The LSC found that the PW removal from school projects saved Ohio taxpayers 487.9 million dollars in construction costs in just the five-year period of the study with no other adverse effects. (Supp. pp. 196-197).

The Barberton Taxpayers’ injury here is caused by the alleged unlawful application of PW requirements to a school construction project. In this case, it is alleged that the Board’s unlawful actions (exceeding their authority) in requiring the payment of prevailing wages for work on the Project are causing school construction funds misused and misappropriated. *Id.* It is also alleged that the Board and OSFC actions are needlessly increasing the cost of construction to Barberton Taxpayers. It was undisputed that Fechko’s bid for the ESP portion of the Project would have been \$10,000 lower than Mr. Excavator’s PW bid had it not been for the unlawful PW requirement. (Supp. pp. 38, AVC ¶¶ 40-44). This minimum increase of \$10,000 due to unlawful inclusion of the PW requirement could have been greater had other contractors been able to bid this one contract without the inclusion of the PW requirement.

Furthermore, in awarding a school construction contract that contains an unlawful PW requirement, Appellants alleged that the Board and the OSFC not only violated R.C. 4115.04(B)(3), but also R.C. 3313.46(A)(6), making it impossible for them to advertise for and award contracts to the “lowest bidder.”¹² Due to the Board and OSFC’s unlawful actions in imposing the PW requirement on the Project, acceptance of the lowest responsible bid for the Project has been made impossible.

Thus, when the Board or the OSFC imposes a PW requirement it cannot, by enactment of R.C. 4115.04(B)(3) meet its statutory obligation to award contracts to the “lowest responsible bidder” pursuant to R.C. 3313.46(A)(6), since PW based bids have been determined by the LSC Report to be in the aggregate 10.7% higher. (Supp. pp. 196-197). Hence, the Board’s unlawful imposition of PW will amount to millions of dollars of additional construction costs to Barberton Taxpayers, adversely affecting their personal incomes, property values and property taxes for decades to come.

2. The Taxpayers Injury is Presumed.

The Ninth District misconstrued and ignored the longstanding holding of *Connors v. Ohio Dept. of Transportation* (10th Dist. 1982), 8 Ohio App.3d 44, where the Tenth District held that injuries to taxpayers are presumed in certain circumstances. The injury suffered by Barberton Taxpayers should be presumed in this case as the contracts were awarded in violation of both R.C. 4115.03(B)(3) and R.C. 3313.46(A)(6), and will result in the unlawful expenditure of public funds.

In *Connors*, the Tenth District held that common law taxpayers have standing to challenge invalid minority bid requirements included in construction contracts. The Tenth

¹² R.C. 3313.46(A)(6) mandates a board of education to accept only the “lowest responsible bid” for a school construction project.

District found that a contractors association, contractors qualified to bid on state projects and who purchased plans and who did bid as prime contractors, contractors qualified to bid on department projects who purchased plans and sought to obtain contracts as subcontractors and taxpayers of the State of Ohio who are specially affected by the bid conditions all have standing to bring an action against the State with regard to public project bid. *Connors*, interpreting the Ohio Supreme Court's decision in *Masterson v. Ohio Racing Commission* (1954), 162 Ohio St. 366, and citing 74 American Jurisprudence 2d 190, Taxpayers' Actions, Section 4 further held:

It has been stated that in the absence of such a showing of direct pecuniary injury by the taxpayer, no justiciable case or controversy would exist, and that the case would not be decided on the merits even if this point were waived in the court below. However, in some situations such damage or injury may be presumed, as in the sale of bonds for less than their par value, in 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 which a public officer has a personal interest, 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.

(*Id.* at pp. 47-48, emphasis added).

In this case, the Ninth District declined to hold that “damages to taxpayers in this case should be presumed.” In doing so, the Ninth District narrowly focused on only one situation cited by the Tenth District and concluded that since no contract was awarded “. . . in violation of statutory requirements that such award must be made to the lowest bidder,” therefore, Barberton Taxpayers did not have standing. In limiting their holding to just one situation where damages are presumed, the Ninth District put the proverbial cart before the horse in assuming that the PW requirement was in fact lawful, then concluding that the contract had been correctly awarded to the lowest bidder, Mr. Excavator.

In other words, by concluding that Appellants claim regarding the application of PW requirement to the Project had no merit, the Ninth District found Appellants had no standing. As

Appellants have argued above, requiring the payment of prevailing wage on a school project, makes the acceptance of the “lowest bid” for any contract on the Project impossible, because the Board acted in violation of R.C. 4115.04(B)(3), and its proven from the LSC Report that the PW requirement increases the cost of construction.

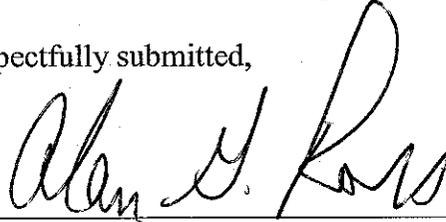
Furthermore, the Ninth District completely ignored Appellants other arguments as to why damages should be presumed in this case, including: (1) “. . . the execution of [the] public contracts [were] in violation of mandatory provisions of a statute respecting such contracts. . . ,” namely R.C. 4115.04(B)(3) and R.C. 3313.46(A)(6) due to the unlawful imposition of the PW requirement on a school project; and (2) any contract awarded containing the unlawful PW requirement was a “. . . expenditure of [public] funds for an unlawful . . . purpose” for the multitude of arguments stated above. Indeed, this Court explicitly recognized in *Masterson* that “even in the absence of legislation, a taxpayer has a right to call upon a court of equity to interfere to prevent the consummation of a wrong such as occurs when public officers attempt to make an illegal expenditure of public money, or to create an illegal debt which he, in common with other property holders of the taxing district, may otherwise be compelled to pay.” *Masterson*, 162 Ohio St. at 368.

Here, it was alleged that Villers and Antill are residents, freeholders and taxpayers of Barberton. (Supp. p. 32, AVC at ¶5). Given the claims made by Appellants as to why the PW requirement was unlawful on a school construction project, the Appellants submit the Ninth District should have concluded the injury to Barberton Taxpayers was presumed. It is irrefutable that Barberton Taxpayers Antill and Villers have standing to seek to enjoin the award of a public contract or the expenditure of public money in violation of state law, especially when they are paying for the 5.2 mill levy to construct the school. (Supp. p. 34, AVC ¶18).

III. CONCLUSION

It is respectfully submitted that the decision of the Ninth District be reversed and this matter be remanded for further proceedings consistent with this Court's Opinion.

Respectfully submitted,



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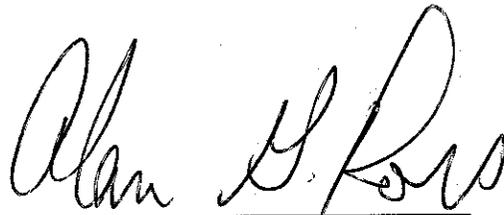
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Appendix

<u>No.</u>	<u>Page No.</u>	<u>Document</u>
1	1	Date-stamped Notice of Appeal filed May 26, 2010 with the Ohio Supreme Court.
2	4	April 28, 2010 Notice of Decision and Journal Entry of the Ninth Judicial Court of Appeals.
3	21	Trial Court's July 31, 2009 Final Appealable Order dismissing all of Plaintiffs' respective claims against all designated Defendants dismissed with prejudice at Plaintiffs' costs and denying Plaintiffs' Motion to file a Second Amended Complaint.
4	35	O.R.C. 3313.46
5	37	O.R.C. 4115.04

IN THE SUPREME COURT OF OHIO

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

Case No.:

10-0943

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 APPEAL
THE NORTHERN OHIO CHAPTER OF
ASSOCIATED BUILDERS & CONTRACTORS, INC.
DAN VILLERS, JASON ANTILL AND FECHKO EXCAVATING, INC.

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FILED
MAY 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

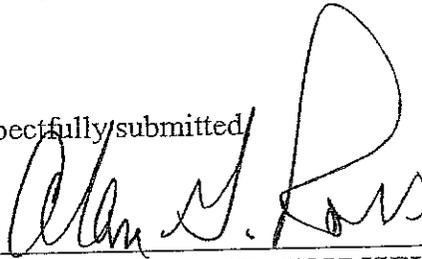
NOTICE OF APPEAL OF APPELLANTS

The Northern Ohio Chapter of Associated Builders & Contractors, Inc.
Dan Villers, Jason Antill, and Fechko Excavating, Inc.

Appellants The Northern Ohio Chapter of Associated Builders & Contractors, Inc., Dan Villers, Jason Antill, and Fechko Excavating, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. CA-24898 on April 28, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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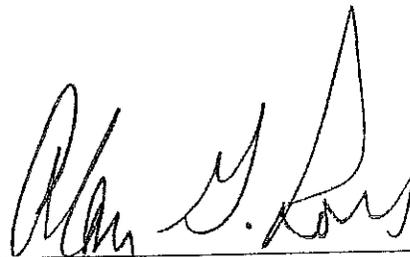
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this 25th day of May 2010.



Counsel for Appellants

COURT OF APPEALS
DANIEL M. HERRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)

COUNTY OF SUMMIT)

ss: 2010 APR 28 AM 7:56

STATE EX. REL. NORTHERN
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.

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:

ALAN G. ROSS, NICK A. NYKULAK, and RYAN T. NEUMEYER, Attorneys at Law, for Appellants.

TAMZIN KELLY O'NEAL, and PATRICK S. VROBEL, Attorneys at Law, for Appellees.

RICHARD CORDRAY, Ohio Attorney General, WILLIAM C. BECKER, JON C. WALDEN, and JAMES E. ROCK, Assistant Attorneys General, for Appellee.

DANIEL M. HERRIGAN

2009 JUL 31 PM 2:36

SUMMIT COUNTY
IN THE COURT OF COMMON PLEAS
OF SUMMIT COUNTY

COUNTY OF SUMMIT

STATE EX. REL., NORTHERN OHIO)
CHAPTER OF ASSOCIATED BUILDERS)
& CONTRACTORS, INC., et al,)
Plaintiffs,)
-vs-)
BARBERTON CITY SCHOOL BOARD OF)
EDUCATION, et al,)
Defendant)

CASE NO. CV 2009 04 2636

JUDGE CALLAHAN
MAGISTRATE SHOEMAKER

JUDGMENT ENTRY
(FINAL AND APPEALABLE)

This matter comes on before the Court upon Motions to Dismiss pursuant to Civil Rule 12(B) filed by Defendants, the Barberton City School Board of Education (Board), the Defendant, Mr. Excavator and the Defendant, the Ohio School Facilities Commission, (OSFC). The Plaintiffs, Northern Ohio Chapter of the Association of Builders & Contractors, Inc., (ABC), FECHKO Excavating (FECHKO), Dan Villers, (Villers), Jason Antill, (Antill) filed replies to the same.

The Court finds this is in reference to the Magistrate. The Court however, will proceed to consider these Motions and rule on the same in the interest of judicial efficiency, judicial economy and to assist all the parties to a speedy and just resolution of the issues in this case.

Briefly put, the focus of this lawsuit centers upon the Plaintiffs' April 24, 2009 Amended Complaint whereby it seeks to enjoin the Board and OSFC from allowing the excavating contractor, Mr. Excavator, from proceeding or otherwise going forward with its

portion of the new Barberton Middle School project. Plaintiffs' five-count complaint asserts as a general proposition that the Board's inclusion of what's known as the Prevailing Wage Law as otherwise established by Ohio Revised Code 4115 within the project's bid specifications provided to prospective bidders, such as FECHKO and Mr. Excavating, was illegal and also renders the ultimate contract which was awarded to Mr. Excavator illegal, or in the alternative constitutes an abuse of discretion by the Board as such contract will result in misappropriation and misuse of public monies. The Plaintiffs also assert within the body of the amended complaint that that prevailing wage requirement within the bid specifications, and as established by OSFC, which is a partner in this school project, is vague and ambiguous.

It is further found by the Court in reviewing the documents in regard to these Motions and response thereto that it is beyond dispute or argument that the Board and OSFC can best be described as a co-venturers in this new school construction project inasmuch as approximately 40% of the cost of such project is derived from a Levy passed in 2008 by Barberton taxpayers, and the other approximate 60% being funded, or otherwise supplied, by the OSFC. OSFC is a statutorily-created governmental agency of the State of Ohio created by the legislature with the statutory purpose to assist in funding school construction projects across the State of Ohio.

Likewise, there can be found no dispute that on or about March 3, 2009 the Board published by public advertisement notice that it would be accepting sealed bids with reference here to the specific excavating work, and that such notice unambiguously stated within the body of the information presented to prospective bidders that, "prevailing wage rates apply: bidders shall comply with Chapter 4115 of the Ohio Revised Code." As such, all prospective bidders who sought to obtain the excavating work, such as Mr. Excavator and FECHKO, were required when constructing the monetary amounts as a bid for the excavation portion of the work, to

incorporate prevailing wage calculations within their bid. In fact, this is exactly what both parties did, that is, Mr. Excavator and FECHKO, inasmuch presented their bids to the Board for review on March 25, 2009, included within the body of their bids the necessary monetary calculations taking into consideration the labor costs for the excavation portion of the project as otherwise required by the RC 4115.04 (A). When the bids were opened and presented to the Board for review, such review taking place on or about April 1, 2009 at a special session, the Board awarded the contract for the excavation site work to the Defendant, Mr. Excavator.

A further review of these matters establishes that at no point can it be disputed that any of the bidders for the excavation portion of the project, which includes Mr. Excavator and FECHKO, ever offered any objections to the bid language or otherwise offered any complaint or objections to the bidding language requiring them to incorporate the prevailing wage law prior to submission of their respective bids. Additionally, there can be found no dispute by any of the parties in this matter that when OSFC is a partner in such school construction projects, and pursuant to Ohio Revised Code 3318.10 that the School Board was obligated because of this relationship to accept the "lowest, responsible bids." Thus, the criteria for acceptance is the lowest monetary amount, and coupled with that, the prospective bidder has to be responsible.

The Plaintiffs in their claim in this lawsuit have not argued, or otherwise asserted, that Mr. Excavator's bid was not the lowest, nor that it was not a responsible bidder. Further, there has been no argument or showing by the Plaintiffs in their complaint and amended complaint that the procedures in regard to the bidding matters, to include the advertisement, the acceptance of such bid, the opening of such bid, the calling of the meeting to evaluate such bid, and the awarding of such bid to Mr. Excavator, were tainted by fraud, corruption or favoritism or any other blatant legal error on the face of such procedures. Plaintiffs have narrowed their

objection to the process upon the sole argument that the Board and OSFC erred when they required, within the body of the bid specifications, that all bidders must submit bids including wage calculations based on the prevailing wage law, as it was illegal to do, and that such requirement, should not have been used within the bid submitted by interested parties and any bid submitted that included the prevailing wage cannot be accepted. However, if it was in violation of the law, as FECHKO now argues, then FECHKO willfully ignored that problem and knowingly submitted its bid in violation of the law which included the prevailing wage conditions.

The Court finds that it was noteworthy that FECHKO, when it submitted its bid, did not object in any form to the Defendant's use of the prevailing wage law in the bid specification, nor did FECHKO offer any caveat or other contingency that if its bid was accepted, it would then be able to decide not to pay its workers under the prevailing wage law concept as set out by the aforementioned Revised Code and as it had committed to do when it submitted its bid but could have the contract less any requirement to abide by the prevailing wage law. Nor, in its response to the Motions in this matter, FECHKO never addressed the fact as to what it would do if the Board would have awarded the contract for excavation to FECHKO when it had in fact incorporated within the body of its bid the calculations as related to the duty of complying with the prevailing wage law.

In brief procedural history, on May 28, 2009 the Board filed its Motion seeking to dismiss the Plaintiffs' Amended Complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Plaintiffs replied to the Board's Motion on June 5, 2009 in a joint response to OSFC's Motion to Dismiss which it filed on May 28, 2009 asserting Civ.R. 12(B)(6). Thereafter, on June 17, 2009 Mr.

Excavator filed its own Civ.R. 12(B)(1) and (B)(6) Motion to Dismiss the Amended Complaint.

On June 5, 2009 Plaintiffs collectively filed their reply to the Motions of the Board and OSFC.

Though the claims for dismissal by the OSFC, Board and Mr. Excavator are substantially similar, the Court will address the claims of each separately within the body of this Judgment Entry.

1. Ohio School Facilities Commission's Motion to Dismiss and Barberton City Schools Board of Education's Motion to Dismiss.

The Motion to Dismiss filed by OSFC contains an assertion that itself and the Board had the lawful discretion to require the payment of prevailing wages in school contracts such as the instant matter. A review of RC 4115.04(B)(1) does in fact provide an exemption to the statutorily mandated rule that prevailing wages must be paid except in regard to school districts. Plaintiffs' argument in regard to this matter is that since RC 4115.04 exempts school boards from complying with the prevailing wage law, the bidding instructions were illegal, as was letting the contract as to Mr. Excavator. It was also the intent of the legislature that the law was to be construed as meaning that a school board, or a school board in partnership with OSFC, cannot at their discretion choose to require bidders to pay prevailing wages in contracts let out for bid. However, as argued by OSFC, being exempted from a statutory requirement, does not then by means of some matter of transmutation or as otherwise argued by the Plaintiffs that OSFC and the Board should now be prohibited from including the use of the prevailing wage law as a term within a contract or the bid specifications upon subcontract. Plaintiffs' arguments are just that, arguments, and are without any valid basis. Plaintiffs provide no credible statutory or case law to support such a claim.

Additionally, the argument offered by OSFC is that the Plaintiffs, Villers and Antill, as taxpayers seeking to enjoin further work on this project with specific reference to the excavation matters, should not be allowed under existing law to seek relief by the lawsuit filed in their name in the Amended Complaint. Again without reciting the foregoing analysis of the Court, the Court concludes that both Mr. Villers and Mr. Antill are situated no differently than any other landowner taxpayer within the City of Barberton who, as property owners, had their property burdened with the levy referred to above. In short, Mr. Antill and Mr. Villers are, along with everyone else living within such levy area who is a property owner and taxpayer, all subject to their tax dollars utilized as provided for in the levy to build this new school. In short, neither Mr. Villers nor Mr. Antill can demonstrate that they individually have any unique or special interest separate, apart, or different in character from all other landowners taxpayers in the district such that they may sustain is different in character from all harm to all of the general taxpayers in the area of the Barberton City School District affected by the levy. It is specifically concluded that any economic harm they claim to assert as taxpayers is no different than any of the other landowner taxpayers. Under Ohio law, it does not allow them separate standing to complain as they have done in this lawsuit. *Brinkman, Jr. v. Miami Univ.*, 12 Dist. No. CA2006-12-313, 2007-Ohio-4372; *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677, at p9.

Additionally, the Court concludes that the Plaintiff FECHKO has not asserted any claim for injury or any right which would entitle it under existing Ohio law to recover any of its monetary expenditures in its bidding activities as damages as an unsuccessful bidder as it was in this matter. It is found that FECHKO knowingly and intentionally, through its officers, agents or employees, prepared a bid to do the excavation work in this area, and included within such bid

was FECHKO's computation of the prevailing wage law for its laborers which would have to be paid per the prevailing wage rates, if it were awarded the contract. When FECHKO now says it was illegal to require such of bidders, that argument is disingenuous. Noteworthy is the fact that it never, at any point until such suit was filed, objected to such matter, as it well could have. Nor did it, within its bid, reserve any right to any later objection to the prevailing wage law requirement after the bid was let to a bidder. However, now that FECHKO is unhappy with the fact that it was not awarded the bid, it makes the sniveling complaint that the law was violated. All of these arguments are without merit.

This Court specifically concludes the monetary amount specified in the FECHKO bid incorporated the prevailing wage law. As it did as such, FECHKO has waived any right to now complain that Mr. Excavator was the successful bidder or that the process was legally flawed. With no evidence showing that either one was not a responsible bidder, the contract would have in all likelihood been awarded to FECHKO, had its monetary amount been the lesser. FECHKO would then have been required, pursuant to its bid, to comply with the prevailing wage law. It cannot, as it seeks to do in this matter, submit a bid including a requirement of the prevailing wage law within its calculations, stand silent to that matter, and wait and see if its bid was accepted and then, if not, act as an unsuccessful bidder, complaining about the matter. If FECHKO's logic is accepted, it would allow a bidder to knowingly violate the contract like the one at issue here; but if unsuccessful, to then turn around and say the process was fatally defective. If such a practice were to be adopted in Ohio, it would create chaos in public contract bidding and encourage dishonest bidding practices.

The Court further concludes that, if for argument sake, FECHKO's actions offering as it did its bid to the Board, knowing that it contained computation of the prevailing wage, and

which it now says was illegal, shows at the very least the Plaintiff FECHKO was acting illegally seeking to be awarded a contract obtained in contravention of the law it claims was inappropriate. Had FECHKO's bid been accepted, it would likely never have raised the prevailing wage issue. The alternative conclusion is that if FECHKO, knowing the illegal nature of the contract specifications, nevertheless proceeded to then bid, it has an ulterior motivation such that if it were successful, it would then claim it had been awarded the contract but would have then repudiated that portion relating to the prevailing wage as being illegal. In either case, FECHKO, in its perfidious action presented to the Board a bid that the Board had no reason to believe was other than honest, and that the bidder here, FECHKO, had no problem with the terms and would stand behind it if awarded the bid. In short, the Board justifiably relied on bids as presented to it, including FECHKO's, as it had no reason to know about what the Court concludes was the hidden agenda of FECHKO. As such, the Court concludes that FECHKO has waived any right to assert and any illegality in the bid specifications and it is to be estopped from now asserting same.

Further, the Court goes on to address the Board's claim that the Northern Ohio Chapter of Associated Builders & Contractors, Inc. ("ABC") lack of standing in this matter. It is first of all concluded that such Plaintiff has not been demonstrated to have one of its members named in this case as a party Plaintiff. Nowhere in Plaintiffs' Amended Complaint of April 24, 2009 is there any assertion that Plaintiff FECHKO is a member of Plaintiff ABC. And further, even if for argument sake, had FECHKO been shown to be a member, Plaintiff ABC cannot demonstrate that its member, for discussion purposes, FECHKO, suffered the type of injury which would otherwise allow Plaintiff ABC, as an independent body in trade association, to participate in a claim such as this. As such, the Court concludes that the Northern Ohio Chapter

of Associated Builders & Contractors, Inc.'s claims are without merit as to all designated Plaintiffs. Plaintiff ABC must successfully demonstrate that it meets the tripart test for standing long recognized in Ohio. Plaintiff ABC absolutely fails in this regard. *Warth v. Seldin* (1975), 422 U.S. 490; *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44; *Ohio Academy of Nursing Homes, Inc. v. Barry* (1987), 37 Ohio App.3d 46; *Tiemann v Univ. of Cincinnati* (1998), 127 Ohio App.3d 312.

Additionally, the Court concludes that FECHKO has not demonstrated under any existing Ohio law that as an unsuccessful and disappointed bidder it is entitled to any monetary relief for any damages that it incurred as a result of preparing its bid and submitting the same.

As such, this Court concludes that the Barberton City School Board's assertion that the Plaintiffs' Amended Complaint be dismissed pursuant to 12(B)(1) and 12(B)(6) is well taken. Additionally, the Court finds that the claims against the OSFC fail and are dismissed pursuant to Civ.R.12(B)(6). As such, the Amended Complaint is dismissed against the Barberton City Schools and Ohio School Facility Commission at the cost to all the Plaintiffs.

2. Mr. Excavator's Motion to Dismiss.

The Court next turns to the arguments asserted by Mr. Excavator, the demonstrated successful bidder on the contract in this matter. Mr. Excavator filed its Motion to Dismiss June 17, 2009. Plaintiffs' brief in opposition filed on June 26, 2009, with a reply to such filed by Mr. Excavator on July 7, 2009. Mr. Excavator likewise moves to dismiss this matter and in conjunction, thereto asserts a Motion based upon Civ.R. 12(B)(1) addressing jurisdiction and Civ.R. 12(B)(6) as upon a failure to state a claim.

Mr. Excavator makes an argument which is similar to arguments made by the other party Defendants in this matter. That is the two taxpayers, Mr. Antill and Mr. Villers, are simply

members of the overall landowner taxpayers category within the tax levying district of the City of Barberton, and their complaint fails to allege any special interest in a special fund, and any special damage they will suffer which is separate and distinct from all other taxpayers in the district, or that they have any independent right that is unique to them as opposed to all other taxpayers who live within the district and who are property owners that have their property subject to such levy. In short, neither has a special interest upon which they are placed in jeopardy unique to them and under Ohio law have no standing to assert their claim in this lawsuit. These two Plaintiffs provided no evidence that they are participants in any "special fund" or have any equitable ownership in any such fund. As such, these Plaintiffs' arguments are fully unpersuasive and the Court finds that both lack standing to pursue their claims.

Brinkman, supra.

Also correctly asserted by Mr. Excavator is the position that both FECHKO and ABC lack standing. FECHKO does not assert any known legal injury under Ohio law as a result of its being an unsuccessful bidder. FECHKO also fails to address the fact that it, along with Mr. Excavator, submitted its bid for consideration by the Board, incorporating therein the prevailing wage law calculations into the bid and otherwise complied with the requirements in the bidding instructions. Further, neither FECHKO nor ABC have been shown to have challenged the bidding procedure prior to FECHKO'S bid submission.

Also correctly presented by Mr. Excavator is that ABC is simply an association without any valid assertion to make such a claim. ABC could only assert such claim where it had a member and that such member would have standing in their own right to make a claim. Mr. Excavator correctly concludes that FECHKO does not have such standing. This Court

restates its conclusion that there is no evidence that FECHKO was ever a member of the trade association known as ABC at all times material.

Further Mr. Excavator also correctly asserts, under the existing law, that just because the Board is exempt from utilizing prevailing wages pursuant to RC 4115, in its contracts for construction work, that does not therefore stand for the proposition that it could not elect to choose to include such prevailing wage requirements within its bid requirements should it choose to do so. Simply put, the exclusion of the Board from compliance with the mandatory prevailing wage language, does not create the opposite effect, meaning it cannot use such. Arguments by the Plaintiffs in regard to this can only be accomplished by tortured and otherwise unreasonable logic. A plain reading of the statute and the case law precludes such application as the Plaintiffs seek in this matter. The Plaintiffs' interpretation of this Statute is clearly misplaced.

As such, the Court concludes that Mr. Excavator's motion, based upon Civ.R. 12(B)(1) and 12(B)(6) is to be granted in that not only do parties such as Mr. Antill and Mr. Villers, as well as ABC and FECHKO lack standing, but even if the standing argument were accepted, none of the Plaintiffs have demonstrated that under any existing law that they have any right to relief. It is concluded beyond doubt from Plaintiffs' Amended Complaint that none of the Plaintiffs can prove any set of entitlement by any of the Plaintiffs to recover.

Ohio law is well settled as to the standards Court must apply in reviewing Motions pursuant to 12(B)(1) and 12(B)(6). In general, Motions to Dismiss pursuant to Civ.R. 12(B)(6) are designed to test the sufficiency of the party's complaint. In any ruling upon such Civ.R. 12(B)(6) Motions, the evaluating tribunal is required to take all allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. The trial court can only dismiss a complaint made upon a Civ.R. 12(B)(6) motion after it has been shown plaintiff

can show no set of facts which would entitle it to relief. It is concluded beyond doubt from Plaintiffs' Amended Complaint that they can prove no set of facts entitling any of the Plaintiffs to recover.

In the instant matter, the Court has considered such guidance in evaluating the Motion for 12(B)(6) as filed by the parties in this matter. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d. 242; *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192; *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, at p.9.

The Court has also considered the guidance trial courts must utilize when ruling upon a Civ.R. 12(B)(1) motion. The standard review for dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *State ex rel. Bush v Spurlock* (1980), 42 Ohio St.3d 80; *Avco Fin. Services, Inc. v. Hale* (1987), 36 Ohio App.3d 65.

Plaintiffs, collectively, have by this Judgment Entry all of their respective claims against all designated Defendants dismissed with prejudice at Plaintiffs' cost.

The Court further concludes that in light of the foregoing ruling, Plaintiffs' Motion to file a Second Amended Complaint is denied.

It is so ordered. No just cause for delay. This is a final appealable order.

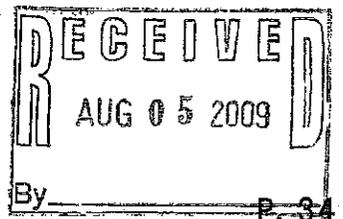
Pursuant to Civ. Rule 58(B) the Clerk of Courts shall serve upon all parties in this matter notice of this order and state upon the journal of this court.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Alan R. Ross
Nick A. Nykulak
Ryan T. Neumeyer
Tamzin Kelley O'Neil
James T. Dixon
William C. Becker
Jon C. Walden

so



3313.46 Contract bidding process - exceptions.

(A) In addition to any other law governing the bidding for contracts by the board of education of any school district, when any such board determines to build, repair, enlarge, improve, or demolish any school building, the cost of which will exceed twenty-five thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, and except as otherwise provided in division (D) of section 713.23 and in section 125.04 of the Revised Code, all of the following shall apply:

(1) The board shall cause to be prepared the plans, specifications, and related information as required in divisions (A), (B), and (D) of section 153.01 of the Revised Code unless the board determines that other information is sufficient to inform any bidders of the board's requirements. However, if the board determines that such other information is sufficient for bidding a project, the board shall not engage in the construction of any such project involving the practice of professional engineering, professional surveying, or architecture, for which plans, specifications, and estimates have not been made by, and the construction thereof inspected by, a licensed professional engineer, licensed professional surveyor, or registered architect.

(2) The board shall advertise for bids once each week for a period of not less than two consecutive weeks in a newspaper of general circulation in the district before the date specified by the board for receiving bids. The board may also cause notice to be inserted in trade papers or other publications designated by it or to be distributed by electronic means, including posting the notice on the board's internet web site. If the board posts the notice on its web site, it may eliminate the second notice otherwise required to be published in a newspaper of general circulation within the school district, provided that the first notice published in such newspaper meets all of the following requirements:

- (a) It is published at least two weeks before the opening of bids.
- (b) It includes a statement that the notice is posted on the board of education's internet web site.
- (c) It includes the internet address of the board's internet web site.
- (d) It includes instructions describing how the notice may be accessed on the board's internet web site.

(3) Unless the board extends the time for the opening of bids they shall be opened at the time and place specified by the board in the advertisement for the bids.

(4) Each bid shall contain the name of every person interested therein. Each bid shall meet the requirements of section 153.54 of the Revised Code.

(5) When both labor and materials are embraced in the work bid for, the board may require that each be separately stated in the bid, with the price thereof, or may require that bids be submitted without such separation.

(6) None but the lowest responsible bid shall be accepted. The board may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate. In all other respects, the award of contracts for improvement or repair, but not for purchases made under section 3327.08 of the Revised Code, shall be pursuant to section 153.12 of the Revised Code.

(7) The contract shall be between the board and the bidders. The board shall pay the contract price for the work pursuant to sections 153.13 and 153.14 of the Revised Code. The board shall approve and retain the estimates referred to in section 153.13 of the Revised Code and make them available to the auditor of state upon request.

(8) When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

(9) When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected.

(B) Division (A) of this section does not apply to the board of education of any school district in any of the following situations:

(1) The acquisition of educational materials used in teaching.

(2) If the board determines and declares by resolution adopted by two-thirds of all its members that any item is available and can be acquired only from a single source.

(3) If the board declares by resolution adopted by two-thirds of all its members that division (A) of this section does not apply to any installation, modification, or remodeling involved in any energy conservation measure undertaken through an installment payment contract under section 3313.372 of the Revised Code or undertaken pursuant to division (G) of section 133.06 of the Revised Code.

(4) The acquisition of computer software for instructional purposes and computer hardware for instructional purposes pursuant to division (B)(4) of section 3313.37 of the Revised Code.

(C) No resolution adopted pursuant to division (B)(2) or (3) of this section shall have any effect on whether sections 153.12 to 153.14 and 153.54 of the Revised Code apply to the board of education of any school district with regard to any item.

Effective Date: 11-02-1999; 2008 SB268 09-12-2008

4115.04 Determination of prevailing wage - exceptions.

(A)(1) Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the director of commerce determine the prevailing rates of wages of mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. Except as provided in division (A)(2) of this section, that schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. A copy of the bidding blank shall be filed with the director before the contract is awarded. A minimum rate of wages for common laborers, on work coming under the jurisdiction of the department of transportation, shall be fixed in each county of the state by the department of transportation, in accordance with section 4115.05 of the Revised Code.

(2) In the case of contracts that are administered by the department of natural resources, the director of natural resources or the director's designee shall include language in the contracts requiring wage rate determinations and updates to be obtained directly from the department of commerce through electronic or other means as appropriate. Contracts that include this requirement are exempt from the requirements established in division (A)(1) of this section that involve attaching the schedule of wages to the specifications for the work, making the schedule part of those specifications, and printing the schedule on the bidding blanks where the work is done by contract.

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

(1) Public improvements in any case where the federal government or any of its agencies furnishes by loan or grant all or any part of the funds used in constructing such improvements, provided that the federal government or any of its agencies prescribes predetermined minimum wages to be paid to mechanics and laborers employed in the construction of such improvements;

(2) A participant in a work activity, developmental activity, or an alternative work activity under sections 5107.40 to 5107.69 of the Revised Code when a public authority directly uses the labor of the participant to construct a public improvement if the participant is not engaged in paid employment or subsidized employment pursuant to the activity;

(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. of the Revised Code if none of the funds used in constructing the improvements are the proceeds of bonds or other obligations that are secured by the full faith and credit of

the state, a county, a township, or a municipal corporation and none of the funds used in constructing the improvements, including funds used to repay any amounts borrowed to construct the improvements, are funds that have been appropriated for that purpose by the state, a board of county commissioners, a township, or a municipal corporation from funds generated by the levy of a tax, 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.

(5) Any project described in divisions (D)(1)(a) to (D)(1)(e) of section 176.05 of the Revised Code.

Effective Date: 07-01-2000; 04-27-2005; 2006 HB699 03-29-2007; 04-06-2007