ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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AMICUS CURIAE BRIEF OF THE OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLEES

ALAN G. ROSS* (0011478)
**Counsel of Record*
NICK A. NYKULAK (0075961)
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd., Suite 35
Cleveland, Ohio 44131
216-447-1551; 216-447-1554 (fax)
alanr@rbslaw.com

Counsel for Appellants, Northern Ohio Chapter of Associated Builders & Contractors, Inc., et al.

JAMES T. DIXON* (0077547)
**Counsel of Record*
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114
216-515-1660; 216-515-1650 (fax)
jdixon@frantzward.com

Counsel for Appellee, Mr. Excavator

ALEXANDRA T. SCHIMMER* (0075732)
Chief Deputy Solicitor General
**Counsel of Record*
LAURA EDDLEMAN HEIM (0084677)
Deputy Solicitor
WILLIAM C. BECKER (0013476)
JON C. WALDEN (0063889)
JAMES E. ROOK (0061671)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 (fax)
alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Appellee, Ohio School Facilities Commission

TAMZIN KELLEY O'NEIL* (0071883)
**Counsel of Record*
PATRICK S. VROBEL (0082832)
McGown, Markling & Whalen Co., L.P.A.
1894 North Cleveland-Massillon Road
Akron, Ohio 44333
330-670-0005; 330-670-0002 (fax)
toneil@servingyourschools.com

Counsel for Appellee, Barberton City Schools Board of Education

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SUPREME COURT OF OHIO

CHRISTIAN M. WILLIAMS* (0063960)
**Counsel of Record*
GLENN D. WAGGONER (0022129)
MARK J. JACKSON (0080913)
Pepple & Waggoner, Ltd.
Crown Centre Building
5005 Rockside Road, Suite 260
Cleveland, Ohio 44131-6808
216-520-0088; 216-520-0044 (fax)
cwilliams@pepple-waggoner.com

Counsel for Amicus Curiae, Ohio School Boards Association

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 5

Ohio School Boards Association's Proposition of Law No. 1:

A taxpayer and resident of a school district who pays property taxes levied pursuant to a bond levy of the school district does not have a "special interest" sufficient to confer standing to file a common law taxpayer lawsuit challenging the school district's expenditure of such funds, where the taxpayer does not allege damage to themselves different in character from that generally sustained by the public residing in the school district. 5

A. The Taxpayers Have No "Special Interest" Different in Character From That Affecting Other Taxpayers in the Taxing District. 6

B. Taxpayers Have Not Contributed to a "Special Fund" Sufficient to Confer Standing for a Common Law Taxpayer Lawsuit. 9

CONCLUSION 12

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Page(s)

Cases

Baker v. Carr (1962), 369 U.S. 186, 82 S.Ct. 691 5

Brinkman v. Miami University, 2007-Ohio-4372 11

Brown v. Columbus City Schools Bd. of Edn., 2009-Ohio-3230 10

Clay v. Harrison Hills City School Dist. Bd. of Edn. (1999), 102 Ohio Misc.2d 13 8

Cummings v. Shorey (R.I., 2000), 761 A.2d 680 7

East Liverpool City School Dist. ex rel. Bonnell v. East Liverpool City School Dist. Bd. of Edn., 2006-Ohio-3482 11

Gildner v. Accenture, L.L.P., 2009-Ohio-5335 11

Hein v. Freedom from Religion Found Inc. (2007), 551 U.S. 587 8

Lanham v. Franklin Twp., 2004-Ohio-2071 7

North Broward Hospital Dist. v. Fornes (Fla.1985), 476 So.2d 154 8

North Canton v. Canton, 114 Ohio St.3d 253, 2007-Ohio-4005 5

Ohio Contrs. Assn. v. Bicking, 71 Ohio St.3d 318, 1994-Ohio-183 5

Racing Guild of Ohio, Local 304, Serv. Employees Intern. Union v. Ohio State Racing Comm. (1986), 28 Ohio St.3d 317 9

School Bd. of Volusia County v. Clayton (Fla.1997), 691 So.2d 1066 7-8

State ex rel. Dann v. Taft, 110 Ohio St.3d 252, 2006-Ohio-3677 ..... 7, 9-11

State ex rel. Masterson v. Ohio Racing Comm. (1954), 162 Ohio St. 366 ..... 6-9, 11-12

State ex rel. Paul v. Ohio State Racing Com'n. (1989), 60 Ohio App. 3d 112 6

Warth v. Seldin (1975), 422 U.S. 490, 95 S.Ct. 2197 5

Statutes, Rules and Constitutional Provisions

O.R.C. Chapter 3313 2

O.R.C. §3313.01 2

O.R.C. Chapter 4115 3-4

INTRODUCTION

Amicus curiae, the Ohio School Boards Association ("OSBA") is a nonprofit corporation dedicated to assisting members to more effectively serve both the cause of public education, and the needs of Ohio students and the larger society they are preparing to enter. OSBA was founded in 1955 to encourage and advance public education through local citizen responsibility. Membership is open to all public boards of education in Ohio. Nearly 100% of the board members in all of the various city, local, exempted village, educational service centers, and joint vocational school districts throughout the State of Ohio are members of OSBA, whose activities include extensive informational support and consulting activities such as board development and training, legal information, labor relations representation, and policy analysis.

Appellee Barberton City School District Board of Education (the "Board") asks this Court to affirm the decision of the Summit County Court of Appeals finding that Appellants Jason Antill and Dan Villers (the "Taxpayers") were without standing to bring their Amended Verified Complaint as a common law taxpayer action. OSBA similarly urges the Court to affirm the Court of Appeals' decision, as failure to do so would permit any Ohio school district taxpayer to use the courts as a weapon to challenge any expenditure of their school district, without regard to whether such taxpayer has a special interest in such expenditures. Rather than the current system where elected members of a board of education are tasked with exercising their discretion in determining which employees to hire, which textbooks to purchase, or which school programs to fund, every school district instead would be subject to a heckler's veto, where any resident could assert that his payment of property taxes, alone, is sufficient for him to seek judicial intervention in second-guessing the actions of a board of education. Ohio's

legislature plainly did not contemplate such a system of local governance of Ohio's boards of education when it established Ohio's school districts under O.R.C. Chapter 3313.

As such, OSBA's members have a strong interest in this question of common law taxpayer standing. Accordingly, OSBA submits that the Court should not accept Taxpayers' invitation to expand the narrow basis upon which common law taxpayer standing currently exists under Ohio law, and should instead affirm the decision of the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

A complete discussion of the facts and procedural history of this matter can be found in Barberton's Merit Brief. However, OSBA directs the Court's attention to the following facts for purposes of the arguments asserted in its *Amicus Curiae* Brief.

The Board is a public school district board of education, organized under the laws of the State of Ohio pursuant to O.R.C. §3313.01 *et seq.* (App-12, ¶11.) The Board is party to an agreement with Appellee Ohio School Facilities Commission ("OSFC") to construct new classroom facilities (the "Project") within the Barberton City School District ("District") pursuant to the OSFC's Classroom Facilities Assistance Program. (App-12, ¶¶1, 12, 18, 19.) The OSFC is a state commission created by Senate Bill 102 to administer financial assistance to Ohio school districts for the acquisition or construction of classroom facilities. (App-12, ¶¶12, 19.)

In or about March, 2008, the electorate within the District passed a 5.2 mill bond levy to fund the Board's forty percent share of the Project costs. (App-12, ¶¶1, 18.) Every property tax payer in the District is responsible for paying the millage to be collected under the March, 2008 bond levy. These same taxpayers also pay the millage levied by the District for its general fund.

OSFC will pay the remaining 60% of the cost of the Project with state taxpayer monies. (App-12, ¶19.)

The Taxpayers allege they are taxpayers of the City of Barberton and Summit County, Ohio. (App-12, ¶5.) Each further alleges that they reside within the City of Barberton. (App-12, ¶5.) Neither, however, specifically alleges that he resides within the District, or that he pays any taxes levied by the Board, including the 5.2 mill bond levy passed in 2008. (*See* App-12.) Further, neither alleges that he is a parent of a child attending school within the District, an employee of the District, a volunteer for the District, a member of any committee run by the District, or that he otherwise has any special interest in the operation of the District. (*See* App-12.)

On or about March 3, 2009, the Board advertised for sealed bids for site work for the Project. (App-12, ¶15.) The specifications for work included the requirement that the successful bidder pay "prevailing wages" pursuant to O.R.C. Chapter 4115. (App-12, ¶20.) The Board, in the exercise of its discretion, had included the specification regarding prevailing wages at the recommendation of OSFC and its resolution 07-08, adopted on July 26, 2007. (App-12, ¶34.) On or about April 1, 2009, the Board awarded the contract for the site work for the Project to the lowest responsible bidder, Appellee Mr. Excavator. (App-12, ¶23.)

On or about April 3, 2009, the Taxpayers, along with Appellants Fechko Excavating, Inc. ("Fechko") and the Northern Ohio Chapter of Associated Builders and Contractors, Inc. ("ABC") (collectively, "Appellants") filed the instant action in the Summit County Court of Common Pleas seeking (1) a declaratory judgment that the Board abused and exceeded its statutory authority by including the requirement that bidders pay prevailing wages pursuant to O.R.C. Chapter 4115, and (2) an injunction restraining the Board and OSFC from awarding any

contract that requires compliance with O.R.C. Chapter 4115 and the payment of prevailing wages. (App-12, p. ¶15.) On July 31, 2009, the Trial Court dismissed Appellants' Amended Verified Complaint, finding that the Taxpayers lacked standing to bring the claims set forth therein. In dismissing the Amended Verified Complaint, the Trial Court found that neither Taxpayer had a special interest different in character from any other taxpayer in the District affected by the 5.2 mill bond levy. The Trial Court further held that, even if the Taxpayers had standing to pursue their claims, the Board's adoption of the prevailing wage criteria was neither unlawful nor an abuse of its discretion, and that nothing in the law barred the Board from including the prevailing wage criteria in its bidding specifications.

On April 23, 2010, the Trial Court's dismissal of the Amended Verified Complaint was affirmed by the Summit County Court of Appeals, which held, "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." (App-78, ¶21.) The Court of Appeals further held that Taxpayers could not establish standing under the theory that they are taxpayers who had contributed to a "special fund", as a property tax that is levied generally upon the taxpayers of a taxing district such as the 5.2 mill bond levy is not a "special fund". (App-78, ¶23.) Finally, the Court of Appeals determined that since the Taxpayers did not have standing to bring their claims, any review of the Trial Court's determination that the Board could lawfully exercise its discretion to include the prevailing wage bidding criteria was moot. (App-78, ¶26.)

On June 6, 2010, Appellants filed a notice of appeal with this Court, assigning four separate propositions of law for review. The Court only accepted review of Appellants' first proposition of law – whether the Taxpayers had standing to bring the instant action – and

rejected Appellants' other propositions of law, including whether the Board exceeded its authority and abused its discretion by including the prevailing wage criteria in the bid specifications for the Project. (App-93.)

ARGUMENT

Ohio School Boards Association's Proposition of Law No. 1:

A taxpayer and resident of a school district who pays property taxes levied pursuant to a bond levy of the school district does not have a "special interest" sufficient to confer standing to file a common law taxpayer lawsuit challenging the school district's expenditure of such funds, where the taxpayer does not allege damage to themselves different in character from that generally sustained by the public residing in the school district.

The Court should affirm the Court of Appeals' dismissal of the Amended Verified Complaint, as the Taxpayers have failed to allege facts demonstrating they have standing to bring the instant action. Even if the Court were to overlook the Taxpayers' failure to allege that they are residents or taxpayers of the District as opposed to the City of Barberton, the Court should still find the Taxpayers lack standing to pursue this action as they have not alleged any special interest in the expenditure of the bond levy funds different in character from any other taxpayer in the District affected by the bond levy.

"A party must have standing to be entitled to have a court decide the merits of a dispute." North Canton v. Canton, 114 Ohio St.3d 253, 2007-Ohio-4005, ¶11. *See also*, Ohio Contrs. Assn. v. Bicking, 71 Ohio St.3d 318, 320, 1994-Ohio-183, ¶1. Such an inquiry involves both constitutional limitations on a court's jurisdiction and prudential limitations on its exercise. Warth v. Seldin (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 2205. Under the doctrine of standing, a party seeking relief must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Baker v. Carr (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 703.

Further, the requirement that a litigant have standing to pursue a claim challening governmental action "is designed to prevent the interference of government operation by someone who, without asserting legal injury, merely seeks to air his grievances regarding the conduct of government." State ex rel. Paul v. Ohio State Racing Com'n. (1989), 60 Ohio App. 3d 112, 115. Under the facts alleged in the Amended Verified Complaint, it is clear that the Taxpayers lack any personal stake in the Board's expenditure of its bond levy funds sufficient to confer standing upon them to pursue their common law taxpayer action under the relevant Ohio precedent.

A. The Taxpayers Have No "Special Interest" Different in Character From That Affecting Other Taxpayers in the Taxing District.

Taxpayers herein assert they have standing to bring the instant action under the common-law theory of taxpayer standing set forth in State ex rel. Masterson v. Ohio Racing Comm. (1954), 162 Ohio St. 366. In Masterson, the relator instituted an action in his capacity as a taxpayer to restrain the Racing Commission from expending funds of the State or issuing permits to conduct horse racing in the State. Id. at 366. In finding relator lacked standing, this Court stated, "Even in the absence of legislation, a taxpayer has a right to call upon a court of equity to interfere to prevent the consumation 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." Id. at 368 (emphasis added.)

The Court continued, "It is equally fundamental that at common law and apart from statute, a taxpayer can not bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he had some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that

sustained by the public generally." Id. The Masterson standard has often been referred to as the "special interest" requirement for taxpayer standing. *See* State ex rel. Dann v. Taft, 110 Ohio St.3d 252, 2006-Ohio-3677, ¶10.

Here, the Taxpayers have not alleged an injury or other special interest in the expenditure of the bond levy funds different from that of any other taxpayer in the District. Rather, the Taxpayers argue their interests should be compared against all other taxpayers in the State, not just other District taxpayers. Specifically, the Taxpayers claim that since not all taxpayers in the State pay property taxes pursuant to the District's bond tax levy, their injury differs from any other injury sustained by the public in the State generally. The Taxpayers' position, however, is directly contrary to this Court's determination in Masterson that the relevant inquiry in determining standing in a common law taxpayer is through comparing the plaintiff's alleged interest to those "other property holders of the taxing district." Id. *See, also*, Lanham v. Franklin Twp., 2004-Ohio-2071, ¶18. As such, the Summit County Court of Appeals correctly applied Masterson when it found that it is the comparison of the Taxpayers' interests to other taxpayers in the District, as opposed to other taxpayers in the State of Ohio, that determines whether they can demonstrate standing sufficient to pursue this action. (App-78, ¶21.)

Jurisdictions with similar requirements to Ohio for common law taxpayer standing require a particularized interest or injury separate in comparison to others within the taxing district. For instance, in Rhode Island, "[a] taxpayer [only] has standing if the individual has a 'personal stake beyond that shared by all other members of the public at large or the taxpayers of the town.'" Cummings v. Shorey (R.I., 2000), 761 A.2d 680, 684. Similarly, in Florida, a taxpayer must allege either a constitutional violation or special injury to achieve standing and the taxpayer's "special injury" must be distinct from other taxpayers in the taxing district. School

Bd. of Volusia County v. Clayton (Fla.1997), 691 So.2d 1066, 1067-1068. *See also*, North Broward Hospital Dist. v. Fornes (Fla.1985), 476 So.2d 154. Both Rhode Island's and Florida's requirement that the taxpayer be compared with others in the taxing district is similar and consistent with Ohio's "special interest" standard for common law taxpayer standing.

If the Court were to adopt the Taxpayers' argument that the relevant group of taxpayers to be examined for determining whether a litigant has a "special interest" for common law taxpayer standing are those generally residing within the State, rather than those residing within the taxing district, the result would be that every school district taxpayer would have standing to challenge any school district expenditure regardless of whether the taxpayer had any particularized injury. There are 613 public school districts in the State, each of which is funded by tax dollars paid by residents of those districts. Further, each such district annually makes hundreds, if not thousands of decisions regarding the expenditure of those tax dollars. If simply being a taxpayer of a school district was sufficient to confer upon that taxpayer a "special interest" for purposes of standing for a common law taxpayer lawsuit, "courts would cease to function as courts of law and would be cast in the role of general complaint bureaus." Hein v. Freedom from Religion Found Inc. (2007), 551 U.S. 587, 593. Further, such a determination would invite the judiciary to sit as a "super board of education" and second-guess the wisdom of the educational policies of superintendents of schools and boards of education in managing the public schools, a policy which Ohio's courts explicitly have rejected. *See, i.e.*, Clay v. Harrison Hills City School Dist. Bd. of Edn. (1999), 102 Ohio Misc.2d 13, 27.

Accordingly, OSBA urges the Court to apply its determination in Masterson that, in determining common law taxpayer standing, the litigant's interests should be compared to those within the taxing district levying the taxes, and not the interests of the taxpayers of the State of

Ohio generally. Under such a standard, the Taxpayers have failed to allege that they have any interest in the expenditure of the funds from the 5.2 mill bond levy that is separate or distinct from any other taxpayer of the District, requiring dismissal of the Amended Verified Complaint for lack of standing.

B. Taxpayers Have Not Contributed to a "Special Fund" Sufficient to Confer Standing for a Common Law Taxpayer Lawsuit.

Taxpayers have alleged no facts supporting their claim that they have standing to pursue the instant suit on the basis that their presumed payment of property taxes levied by the Board pursuant to the 2008 5.2 mill bond levy constitutes payment into a "special fund". In Racing Guild of Ohio, Local 304, Serv. Employees Intern. Union v. Ohio State Racing Comm. (1986), 28 Ohio St.3d 317, this Court held that where the taxpayer pays into a "special fund" separate from a fund generally paid into by other taxpayers of the public, and further alleges illegal action by the public officers managing such special funds, that "alone is sufficient to satisfy the Masterson requirement of a special interest in the relevant fund." Id., at 321-22.

This Court further explained this concept of standing in State ex rel. Dann v. Taft, 110 Ohio St.3d 252, 2006-Ohio-3677. In Dann, relator sought disclosure of certain records of Goveror Bob Taft under a common law taxpayer lawsuit. Relator alleged he had standing to bring his lawsuit, as (1) he paid taxes into the State's general fund; (2) he paid gasoline taxes used to finance the operation of the State's highways, and (3) he was an employer who paid into the State's Workers' Compensation Fund ("WCF"). The Court rejected the taxpayer's claim to standing by virtue of his paying general revenue and gasoline taxes, finding:

> * * * **Dann's status as a taxpayer who paid taxes into the general fund and paid gasoline taxes is shared by nearly all adult Ohio citizens. There is nothing particularized about a need asserted on that basis.** Nor would the fact that Dann may be contemplating the filing of a taxpayer suit alleging unspecified

> misconduct on the part of government officials demonstrate a particularized need, because, in the absence of statutory authority, a taxpayer in his position lacks standing to file a taxpayer suit. State ex rel. Masterson v. Ohio State Racing Comm. (1954), 162 Ohio St. 366, 55 O.O. 215, 123 N.E.2d 1. **Ohio law does not authorize a private Ohio citizen**, acting individually and without official authority, **to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes, including the gasoline tax.**

Id., at ¶9 (emphasis added.) The Court further found that the taxpayer "arguably" had a special interest in the management of the WCF due to his payments as an employer into the WCF, but failed to state a credible theory that he has standing to initiate a taxpayer action based upon his speculations of misconduct of other agencies. Id., at ¶10.

Here, the Board's 2008 5.2 mill bond levy is assessed upon all property taxpayers residing in the District, no different from any other any other special, emergency, continuing, or other property tax levy assessed by the District upon its residents. Taxpayers' presumed payment of bond levy property taxes is simultaneously collected with their payment of other general revenue property taxes levied by the District. Taxpayers have not, and cannot, allege that their payment of the District's bond levy taxes is in any way different from the payment of such taxes by any other property tax paying resident of the District. As such, the 5.2 mill bond levy is more akin to the payment of the State's gasoline tax which the Court in Dann held did not support taxpayer standing, rather than payment as an employer into the WCF which the Court in Dann held only arguably supported taxpayer standing. As the Franklin County Court of Appeals recently explained in Brown v. Columbus City Schools Bd. of Edn., 2009-Ohio-3230, ¶13:

> * * *Appellants have not suffered and are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Appellants alleged only that they were taxpayers in the city of Columbus. Appellants do not allege they are students in the Columbus City Schools system or are parents of students in the school system. If the merits of their

> action were to be unsuccessful, they could show no personal harm or damage that would result as separate from any harm suffered by the general taxpaying public. In other words, if the present system of allocating funds between Columbus City Schools would remain as is, appellants would suffer no individual injury. **Appellants merely contributed to the school district's funding as other citizens in the district generally contributed, as opposed to contributing to some special fund, thereby failing to demonstrate the funding method used by Columbus City Schools affected their pecuniary interests differently than the general taxpaying public. Therefore, we find appellants lacked private standing to challenge Columbus City Schools' method of funding within the school system.** (Emphasis added.)

See also, Brinkman v. Miami University, 2007-Ohio-4372, ¶¶40-43; Gildner v. Accenture, L.L.P., 2009-Ohio-5335, ¶¶18-24.

Taxpayers cite no authority to support their argument that payment of taxes resulting from a school district's bond levy constitutes payment into a "special fund" sufficient to confer standing for purposes of pursuing a common law taxpayer lawsuit. Taxpayers' reliance upon East Liverpool City School Dist. ex rel. Bonnell v. East Liverpool City School Dist. Bd. of Edn., 2006-Ohio-3482 in this regard is misplaced. The Bonnell Court solely addressed whether the plaintiff was entitled to attorneys' fees, and did not examine whether the plaintiff had standing to bring a common law taxpayer suit, as the issue of standing was left unresolved due to a stipulated dismissal of the case at the trial court prior to any ruling by the trial court on the defendants' pending dispositive motions. Further, even if the Bonnell decision could be construed as finding Bonnell had common law taxpayer standing, it is clear that Bonnell's only allegations therein – that he is a resident of and taxpayer in the East Liverpool City School District – are wholly insufficient under Masterson, Dann, Brown, and Brinkman, *supra* to confer common law taxpayer standing, as there was no allegation of any special interest held by Bonnell separate

from any other resident of the East Liverpool City School District, or any allegation that Bonnell contributed to a special fund.

As Taxpayers have failed to contribute to any "special fund", they cannot establish common law taxpayer standing sufficient to bring the instant action. Accordingly, the Court should affirm the decision of the Court of Appeals and dismiss the Amended Verified Complaint.

CONCLUSION

OSBA's member school districts are held to account every day by their residents, be it in the classroom, at a public board meeting, in the media, or at the ballot box. With rising performance expectations and declining revenue to meet those expectations, Ohio's school districts can hardly afford to expend their scarce resources litigating their every funding decision in court. The long-standing precedent of this State and others has been that taxpayers cannot challenge a public body's expenditure of funds absent a particularized injury that is separate and distinct from that generally sustained by the public. This Court should not expand what has been a very narrow and limited concept of standing permitting certain taxpayers with a special interest the right to seek judicial redress for the funding decisions of a public body. Rather, OSBA urges the Court to follow the well reasoned decisions of Masterson, *et al.*, and continue to recognize the narrow bounds within which a taxpayer may acquire standing to challenge a board of education's funding decisions.

Accordingly, and for all these reasons, OSBA respectfully requests that the Court affirm the decision of the Summit County Court of Appeals, and dismiss the Amended Verified Complaint for lack of standing.

Respectfully submitted

CHRISTIAN M. WILLIAMS* (0063960)
*Counsel of Record
GLENN D. WAGGONER (0022129)
MARK J. JACKSON (0080913)
Pepple & Waggoner, Ltd.
Crown Centre Building
5005 Rockside Road, Suite 260
Cleveland, Ohio 44131-6808
216-520-0088; 216-520-0044 (fax)
cwilliams@pepple-waggoner.com

Counsel for Amicus Curiae, Ohio School Boards Association

CERTIFICATE OF SERVICE

I hereby certify that on the 17th of January, 2011, a copy of the foregoing *Amicus Curiae* Brief of the Ohio School Boards Association was sent by regular U.S. mail, postage prepaid, to the following:

Alan G. Ross, Esq.
Nick A. Nykulak, Esq.
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd., Suite 35
Cleveland, Ohio 44131

Counsel for Appellants, Northern Ohio Chapter of Associated Builders & Contractors, Inc., et al.

James T. Dixon, Esq.
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114

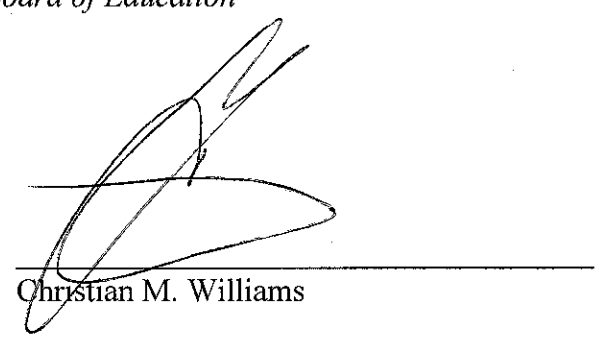
Counsel for Appellee, Mr. Excavator

Alexandra T. Schimmer,
Chief Deputy Solicitor General
Laura Eddleman Heim,
Deputy Solicitor
William C. Becker, Esq.
Jon C. Walden, Esq.
James E. Rook, Esq.
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for Appellee, Ohio School Facilities Commission

Tamzin Kelley O'Neil, Esq.
Patrick S. Vrobel, Esq.
McGown, Markling & Whalen Co., L.P.A.
1894 North Cleveland-Massillon Road
Akron, Ohio 44333

Counsel for Appellee, Barberton City Schools Board of Education



Christian M. Williams