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 Ninth District Court of Appeals Case No. 06CA0104-M
v.	:	Summit County Court of Common Pleas Civil Case No.: CV-2009-04-2636
BARBERTON CITY SCHOOL BOARD OF EDUCATION, *et al.*,	:	
Appellees.	:	

REPLY BRIEF OF APPELLANTS NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC., JASON ANTILL, DAN VILLERS, AND FECHKO EXCAVATING, INC.

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I. INTRODUCTION

The Ninth District Court of Appeals decision did not "erect a new barrier" to common law taxpayer lawsuits, it has completely eviscerated the doctrine altogether. Although both the Board and the OSFC argue that the Ninth District's decision is consistent with this Court's holdings in *Masterson*, *Racing Guild* and *Taft*,[1] they fail to provide one example of when a taxpayer would actually have common law taxpayer standing under the Ninth District's Decision to bring a lawsuit; that is because there is none. If the Ninth District's decision is permitted to stand, then the only situation when a taxpayer would have common law taxpayer standing to file a lawsuit would be when the exact facts of *Racing Guild* or *Taft* are replicated.

Appellants would agree that a resident and property taxpayer of the City of Cleveland would have no common law taxpayer standing to file a lawsuit challenging bid specifications contained in a construction contract for the Barberton School District. A taxpayer in the City of Cleveland does not pay for or contribute to the 5.2 mill bond levy passed by Barberton taxpayers, nor are the Cleveland resident's property taxes encumbered or affected by the levy. Indeed, the Cleveland taxpayer suffers no injury whatsoever because his/her property tax and property values are not "placed in jeopardy" at all. However, unlike the Cleveland taxpayer, the Barberton taxpayer does suffer an actual injury as his/her property taxes and property values are "placed in jeopardy" because they are directly affected by the levy and unlawful actions subsequently made by the Board in how to expend those funds.

Both the OSFC and the Board repeatedly cite to this court's decision in *Masterson*, 162 Ohio St. at 368, where this Court provides that taxpayers must suffer an injury "different in

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[1] *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, *State ex rel. Dann v. Taft,* Ohio St. 3d 252; 2006-Ohio-3677, 853 N.E.2d 263.

character from that sustained by the public generally," but both fail to properly interpret what that this quotation actually means. The Board, OSFC and the Ninth District improperly interpreted this quotation to mean "other Barberton taxpayers," however the result of this interpretation eliminates common law taxpayer standing. The analysis would require a court to narrow the down the class of taxpayers until all taxpayers are similarly situated and then declare no one has "a direct and concrete injury" which differs in "a manner or degree...from that suffered by the public in general," because the injuries suffered by the class of taxpayers are the same. Indeed, in *Racing Guild*, had this Court espoused to the Appellees' reasoning, it would have found that the none of the clerks therein had standing because each clerk's injury was no different from any other clerk who paid into the special fund.

Appellants offer the only rational analysis where taxpayer standing can be achieved in accordance with the Court's long standing holdings. The injury suffered by Barberton taxpayers in this case clearly differs from that of the "public in general," specifically other taxpayers situated generally in the State of Ohio. In other words, Barberton Taxpayer's injury differs from the property taxpayers situated in other school districts whose property taxes and home values are not encumbered by the levy. In affirming this holding, there will be no proverbial "Armageddon" as claimed by the Board and the OSFC where school district taxpayers would all suddenly bring lawsuits to challenge each and every decision made by school boards. Indeed, research for this case reveals that only a handful of common law taxpayer lawsuits have ever been filed against the OSFC and school boards. Such lawsuits are certainly not free and any taxpayer willing to spend his/her own funds to vindicate a public right or to prevent unlawful expenditures of public funds should be commended, not condemned.

To this end, the Appellants in this case are not involved in any kind of "policy dispute," "spat," "disagreement," nor are they attempting to use this Court to lodge a "generalized grievance" against the Board or the OSFC regarding the application of prevailing wage requirements to school construction projects. The underlying merits of this case involve whether or not either entity has actual authority to mandate the payment of prevailing wages on school projects when specific statutes provide they cannot. See R.C. 4115.04(B). To be involved in a "policy dispute," the Board and the OSFC would first have to have the actual authority under the law to act, and only then could they exercise their "discretion" to do so. This case does not involve the exercise of any "discretion," being that both entities are creatures of statute and both lack any authority under the law to act regarding the application of prevailing wage requirements to a school construction project. See *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; See *Hamilton Local Bd. of Educ. v. Arthur*, 1973 Ohio App. LEXIS 1777; *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, (2002) 96 Ohio St. 3d 250, 259-260; *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379, 71 Ohio Op. 2d 366, 329 N.E.2d 693. A brief discussion of the underlying merits of this case in Appellants' Merit Brief underpins the Taxpayers injury in this case.

II. LAW AND ARGUMENT

A. This Case is Properly Before this Court.

The Taxpayers do not "admit" or "concede" that the Ninth District reached the merits of their underlying claims regarding the application of prevailing wage requirements to school projects. Appellants have merely pointed out to this Court what the Ninth District stated in its

decision and made arguments regarding those findings. See *State ex rel. Northern Ohio Builders & Contractors v. Barberton City School Bd. of Edn.* 188 Ohio App.3d 395, 408-409, 2010 Ohio 1826 at ¶31. This Court can read and determine for itself what the Ninth District held when denying Appellants the right to amend their complaint to include additional facts obtained from the depositions of the Board's President and Vice-President. Hence, the propriety of whether the Ninth District should have reached, decided or commented on the merits of Appellants' case is for this Court to decide, given that the Ninth District dismissed the case because all Appellants lacked standing to even assert a claim. Indeed, the OSFC has argued that this Court should not accept review of Appellants' Propositions of Law No. 3 and No. 4 based on the fact that the case was dismissed for lack of standing. (See OSFC Response Brief in Opposition to Jurisdiction at pp. 1, 6 and 10-11). The fact that the OSFC is arguing both sides of the same issue in the same case is not only improper, but entirely superfluous.

Appellants submit that this Court accepted Appellant's Proposition of Law No. 1 involving taxpayer standing because it was improper for the Ninth District to decide or comment of the merits of the underlying claims after determining that all Appellants lacked standing in the case. See *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio St. 3d 375, 2007 Ohio 5024, P27, 875 N.E.2d 550; *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St. 3d 59, 2006 Ohio 6499, P22, 858 N.E.2d 330 (Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim.). Hence, if this Court rules that the Ninth District improperly ruled on the merits of the case, the law of the case doctrine would not govern on remand and its comments were merely dicta.[2]

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[2] Appellants have not engaged in any "procedural missteps" as the OSFC claims. Appellants attempted to achieve a stay of execution and requested injunctive relief with the Ninth District and with this Court. It is not necessary to request a stay in the trial court if requesting the stay

B. The Barberton Taxpayers have Standing.

The Taxpayers in this case have standing because they suffered a concrete and particularized injury that differs from the "public generally." The "public generally" should be a comparison with taxpayers generally situated in the State, not a comparison to taxpayers similarly situated in Barberton. The Taxpayers here are property owners, freeholders and contributors to a special fund, namely the 5.2 mill levy passed by Barberton Taxpayers to pay for bonds issued by the Board to fund various school construction projects in Barberton. This levy is assessed in the form of increased property taxes for Barberton property owners and collected by the County. This 5.2 mill levy along with funding from the OSFC will pay for the construction of the various school projects in Barberton, all of which will include an unlawful prevailing wage requirement. It is undisputed that the OSFC and the Board are co-owners of the school projects until the projects are complete.

The Board and the OSFC claim that Barberton Taxpayers here do not suffer an injury different than any other Barberton property owners whose property taxes are also encumbered by the levy. Because all of the Taxpayers are suffering from the same unlawful act and misapplication of public funds, namely the requirement to pay prevailing wages for work performed on school projects, no Barberton Taxpayer has standing to challenge the Board or OSFC's actions. (OSFC Brief at p. 1). The argument is simply unworkable and fundamentally unfair for any taxpayer. It is no different than arguing that a taxpayer action could not be brought against a school board official to enjoin him from awarding lucrative construction

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would be "not practicable." See App. R. 7(A) ("A motion for such relief...may be made to the court of appeals or to a judge thereof, but, except in cases of injunction pending appeal, the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has, by journal entry, denied an application, or failed to afford the relief which the applicant requested"). Respectfully, given the trial court's "strong worded ruling" it would have been futile to request a stay before requesting the same from the Ninth District.

contracts to all of his friends, because the taxpayer funds he was misappropriating and spending equally belonged to all taxpayers residing in the district, and the official's unlawful conduct injured all district taxpayers equally. According to Appellees, the taxpayers remedy for such conduct would be to wait until the school board official was up for re-election and then vote him out of office.

The Board and the OSFC misapply the "special interest" component explained by this Court in *Racing Guild* and *Taft*. The Board and OSFC argue that the bond levy is not a tax paid into a "special fund," but is just one component of the general property tax levied on all Barberton Taxpayers. In arguing this point, the Board and OSFC fail to set forth the actual language contained in *Racing Guild*, where this Court held, ". . . 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. Surely, the 5.2 mill levy constitutes a "special fund" where "taxes, fees or other monies" are being contributed to pay-off "bonds and notes issued by the Board of Education" to construct the project. (Board Brief at p. 8). Simply because the taxes from the 5.2 mill levy are being collected by the County through the payment of property taxes, or because the OSFC has also contributed state funds to the project, does not invalidate the analysis or eliminate that a "special fund" exists to pay off the bonds issued by the Board to construct the project. The Board and the OSFC have never presented any facts or evidence in this case that the 5.2 mill levy did anything but fund the pay-off of the bonds issued by the Board to the construct the school project.

Indeed, the Taxpayers have asserted not only injunctive relief, but also a declaratory judgment action against the OSFC regarding Resolution 07-98, dated July 26, 2007, which supposedly allows school boards the "authority" to "elect" to apply prevailing wage

requirements on OSFC funded projects in contravention of R.C. 4115.04(B)(3) and other Ohio laws. (Supp. 274-277). Certainly, it would be ridiculous and insurmountable, as the OSFC argues, to require a taxpayer to prove that his/her *individual property tax dollar(s) went to fund an unlawful or objectionable requirement on the project.* (OSFC Brief at p. 2 and 10-12). In other words, the OSFC would require a taxpayer to establish his/her standing by proving that his/her 5.2 mill levy assessment actually paid prevailing wages to a worker on the project. However, here it is undisputed that the OSFC and the Board are co-owners of the project paying a sixty/forty share of the construction costs. Further, it was never alleged that taxpayer money would be allocated to pay for certain aspects of the project, in other words, that the Board's share would pay for material costs while the OSFC funding would pay for labor costs.[3] The OSFC's argument is not supported by any decision of this Court and is without merit.

Moreover, Appellants submit that the Board's reliance on *Brown v. Columbus City Schools Bd. of Edn.*, 2009-Ohio-3220 is irrelevant and misplaced. First, the correctness of the decision in *Brown* conflicts with this Court's decisions in *Taft* and *Racing Guild*. The analysis utilized by the Tenth District Court of Appeals is the same flawed analysis used by the Ninth District, wherein both Courts narrowed the taxpayer group until all were similarly situated and then declared none had standing because they all suffered the same injury. To the extent the cases do differ on their facts, the Tenth District did not find that the taxpayers in question

[3] The OSFC and the Board repeatedly claim that Appellants only challenged the early site work contract and the project is now complete. However, a review of Appellants Amended Complaint clearly reveals that Appellants also sought a declaratory judgment and injunctive relief against the Board and the OSFC that the application of prevailing wage on a school project is unlawful encompassing the any contract for any project. (Amended Complaint 15). Appellants also directly challenged the propriety of the OSFC Resolution 07-98. Id. Indeed, the Eleventh District Court of Appeals held that a declaratory and injunctive relief action against OSFC Resolution 07-98 would not be moot as it is capable of repetition, yet evading review. See *Enertech Electrical v. Ashtabula Area City Schools*, 2010 Ohio 2815 at ¶30. The Board and the OSFC continue to perform and/or award projects subject to prevailing wage requirements.

contributed to a "special fund." In other words, the taxpayers in *Brown* were not paying into a "special fund," namely a 5.2 mill bond levy to pay-off construction bonds and notes to construct a school. Hence, *Brown* could coexist with this Court's holdings in *Racing Guild* and *Taft*, because it is based on the fact that the taxpayers in *Brown* were not paying into a "special fund," i.e. the 5.2 mill levy, to construct a school.

Also, the Board and the OSFC offer no rational explanation as to why injury to the taxpayers cannot be presumed in cases where, among other things, taxpayers allege "...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." *See State ex. rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44, 47-48, 455 N.E. 2d 1331, citing 74 American Jurisprudence 2d 190, Taxpayers' Actions, Section 4. The decision in *Conners* was rendered after *Masterson*, actually citing to *Masterson*, and does not conflict with this Court's subsequent holdings as the OSFC claims, but simply provides additional rationale in support for common law taxpayer standing. Specifically, this Court held in *Masterson*, "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, supra* at 368.

Inexplicably, when disposing of Appellants arguments, the Ninth District ignored other instances cited by Appellants in *Conners* where a taxpayer injury may be "presumed," and conveniently focused only on only one factor, when a public authority awards a contract in

violation of statutory provisions requiring that such contract be awarded to the lowest bidder.[4] The Ninth District concluded this was done in this case by holding the contract was properly awarded to Mr. Excavator, the purported lowest bidder. However, in reaching this conclusion, the Ninth District first assumed that the Board and the OSFC acted lawfully, and had authority to mandate the payment of prevailing wages on a school construction project. Likewise, the Board and the OSFC cannot argue that Appellants lack standing by assuming their actions were lawful or that injury or the damages caused by their actions are somehow "conjectural." (Board Brief at p. 12). This would cause a court to conclude that a plaintiff had no standing because the exact amount of damages or the extent of the injury suffered could not be determined exactly at the time the case was filed. One fact is certainly not "speculative" or mere "conjecture," prevailing wage requirements increase the costs of school construction.[5]

Furthermore, both the Board and the OSFC attack the propriety of *East Liverpool City Sch. Dist. ex rel. Bonnell v Bd. of Edn.* 2006 Ohio 3482, where the Seventh District held that a taxpayer had standing to enjoin the execution of a school construction contract. Both claim that the Seventh District did not sufficiently scrutinize common law taxpayer standing, but the Court's decision simply belies this assertion. Id. at ¶21. Although the majority of the Seventh District's decision did focus on whether the taxpayer was entitled to an award of attorney's fees, clearly the court considered the taxpayer's standing before entering into this analysis. The Court clearly held that Bonnell was a resident and taxpayer of the school district which established his

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[4] The Ninth District did not hold that any part of *Conners* was overruled by this Court's subsequent decisions in *Masterson*, *Racing Guild* or *Taft*, and, instead, the Court merely ignored the other factors cited by the Tenth District regarding when taxpayer standing may be presumed.

[5] See May 20, 2002, Legislative Service Commission Report No. 149, which concluded that an aggregate 10.7% savings on school construction costs was attributable to NOT applying prevailing wage requirements on school projects, saving Ohio taxpayers 487.9 million dollars in construction costs in just the five-year period of the study. (Supp. pp. 196-197).

special interest and standing to bring the lawsuit. Id. No argument made by the OSFC or the Board can change what the Court stated. Appellants' submit that *Bonnell* is on point to the facts presented here, and was decided correctly regarding taxpayer standing.

Last, the OSFC attacks the merits of Appellants underlying claims by citing to the majority decision of the Eleventh District Court of Appeals in *Enertech Electrical v. Ashtabula Area City Schools*, 2010 Ohio 2815. This case was appealed to this Court and this Court declined jurisdiction 4-3. A brief summation of Appellants' arguments is detailed in the dissent authored by Judge Grendell. However, it is important to note that the majority's opinion in that case turned upon an opinion letter issued by Senator Voinovich regarding his understanding of R.C. 4115.04(B)(3), rather than the Ohio law cited by Appellants. While Appellants will be prepared to argue the merits of their underlying claims at oral argument, this Court has not invited a detailed discussion of the merits of the case at this time.

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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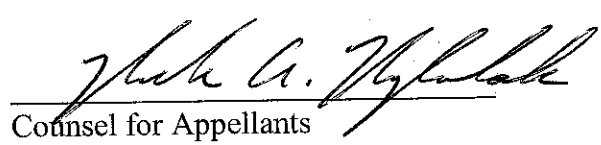

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