

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ohio Concrete Construction :
Association et al., :
Plaintiffs-Appellants, : No. 08AP-905
v. : (C.P.C. No. 08CVH-09-13867)
Ohio Department of Transportation et al., : (ACCELERATED CALENDAR)
Defendants-Appellees. :

D E C I S I O N

Rendered on May 21, 2009

Zeiger, Tigges & Little, LLP, Marion H. Little, Jr. and John W. Zeiger, for appellants.

Richard Cordray, Attorney General, and *William C. Becker*, for appellee Ohio Department of Transportation.

Frantz Ward LLP, Andrew J. Natale and Aaron S. Evenchik, for appellee John R. Jurgensen Company.

Cooper & Walinski, and *John Czarnecki*, for appellee E.S. Wagner Company.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiffs-appellants, Ohio Concrete Construction Association ("OCCA") and Harper Co. ("Harper") (collectively, "plaintiffs"), appeal from a judgment of the Franklin County Court of Common Pleas granting the motions to dismiss of defendants-appellees, Ohio Department of Transportation ("ODOT") and John R. Jurgensen Co. ("JRJ"), and dismissing plaintiffs' case against ODOT, JRJ, and E.S. Wagner Co. ("Wagner") due to plaintiffs' lack of standing. Plaintiffs assign a single error:

The trial court erred in dismissing, under Rule 12(B) of the Ohio Rules of Civil Procedure, all of Plaintiffs'/Appellants' claims, including their claims for declaratory and injunctive relief, and their claims for violation of the Equal Protection Clause of Ohio's Constitution, on the sole basis that Plaintiffs/Appellants lacked standing to assert their claims.

Because the trial court correctly determined plaintiffs' lack standing, we affirm.

I. Procedural History

{¶2} Plaintiffs' appeal arises out of ODOT's bidding process for a 3.65-mile multi-lane highway construction project in Wilmington, Ohio. All bidders on the project were required to submit alternative bids: one for a concrete-pavement design and another for an asphalt-pavement design. Wagner was one of several companies that submitted alternative bids to serve as prime contractor on the project. Both Harper and JRJ submitted price quotes to Wagner. Harper sought a subcontract for the concrete specification, and JRJ a subcontract for the asphalt specification. On September 19, 2008, ODOT selected Wagner as the prime contractor while also choosing the asphalt specification. As Harper had not submitted a bid for the asphalt specification, Wagner selected JRJ as its subcontractor.

{¶3} Ten days later plaintiffs filed a complaint in the Franklin County Court of Common Pleas seeking declaratory and injunctive relief. The complaint alleged that when ODOT selected asphalt pavement, ODOT intentionally chose a pavement product "more expensive, less efficient, less durable and more intrusive" than concrete. (Complaint, 2.) Plaintiffs alleged that, rather than reaching a proper decision as to which pavement best satisfied the needs of the project, ODOT's "systematic and intentional bias in favor of asphalt over concrete, in violation of ODOT's statutory mandate and the public policy of Ohio," drove ODOT's decision. (Complaint, 2.)

{¶4} The relief plaintiffs sought included a declaration that in resolving the bidding on the Wilmington bypass contract (1) ODOT was obligated to select the pavement design alternative that reflected the lowest competent and responsible bidder, (2) the price adjustment ODOT gave to asphalt and its failure to account for such adjustment as part of its long-term cost analysis is illegal and invalid because it violates the Ohio Revised Code and Ohio public policy, (3) ODOT abused its administrative discretion in providing the asphalt price adjustment, (4) ODOT was required to make a long-term cost assessment and rely upon it when it determined which paving option was preferable for the Wilmington bypass contract, and (5) the asphalt aspect of the Wilmington bypass contract was void because it was illegal, contrary to public policy and an abuse of ODOT's discretion. Finally, plaintiffs sought temporary, preliminary, and permanent injunctive relief to prevent ODOT from enforcing the asphalt portion of the Wilmington bypass contract and instead directing ODOT to use concrete pavement, and to require ODOT, on future projects with a paving component, to assess actual bid prices

pursuant to a life-cycle cost analysis and to compare alternative pavement designs based on such analyses.

{¶5} At the same time plaintiffs filed their complaint, they also filed a motion for a temporary restraining order. JRJ filed a brief in opposition the next day; ODOT very shortly afterward filed both a memorandum opposing plaintiffs' motion for a temporary restraining order as well as a motion to dismiss plaintiffs' case on the grounds that they lacked standing. JRJ later filed its own motion to dismiss premised on plaintiffs' lack of standing. The trial court held a hearing on the temporary restraining order on September 30, 2008. Plaintiffs and Wagner each filed post-hearing memoranda addressing various points made during the hearing, while JRJ filed an answer to the complaint on October 5, 2008. The next day, the trial court filed its decision denying plaintiffs' motion for a temporary restraining order, granting the motions to dismiss of ODOT and JRJ, and terminating the case.

{¶6} Relying on *Treadon v. City of Oxford*, 149 Ohio App.3d 713, 2002-Ohio-5879, the trial court determined Harper lacked standing because Harper did not submit a bid directly to ODOT, but merely submitted price quotes to a potential prime contractor on the project. The trial court noted that, even though ODOT was obligated to accept the lowest competent and responsible bid, a prime contractor was under no such obligation. With that premise, the trial court concluded the lack of "dealings" between ODOT and Harper was fatal to Harper's standing. Because OCCA's standing was predicated on one of its members having standing in its own right, the trial court determined OCCA also lacked standing.

II. Assignment of Error

{¶7} Relying on this court's decision in *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44, plaintiffs contend in their single assignment of error that the trial court erred when it concluded they lack standing to pursue this action.

{¶8} In deciding whether to dismiss a complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶9} "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183, citing *Warth v. Seldin* (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 2205. For purposes of appellate review, a standing question is generally a question of law reviewed under a de novo standard. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Cty. Commrs.*, 2d Dist. No. 22664, 2008-Ohio-6542.

{¶10} *Connors*, the case on which plaintiffs primarily rely, addressed whether the doctrine of sovereign immunity barred an action seeking declaratory and injunctive relief against ODOT regarding a construction contract that contained an allegedly invalid bid condition dealing with minority business enterprises. Determining sovereign immunity was not a bar, *Connors* clarified the groups with standing to bring such an action. *Connors* first stated "a contractors association whose members either are qualified to bid with the

department and who did bid on such construction projects, or whose members sought to obtain work as subcontractors on such projects" could challenge the bid condition. Id. at syllabus by the court. *Connors* next concluded "contractors qualified to bid on department projects who purchased plans and who did bid as prime contractors" had the requisite standing. Id. The third group with standing under *Connors* included "contractors qualified to bid on department projects who purchased plans and sought to obtain contracts as subcontractors." Id. Lastly, *Connors* determined "taxpayers of the state of Ohio who are specially affected by the bid conditions" also had standing. Id.

{¶11} Plaintiffs assert *Connors* confers standing on Harper in either of two ways: by virtue of Harper's status as a subcontractor who sought to obtain work on the project, or because Harper is a taxpayer possessing a special interest in the funds to be expended on the project. Because OCCA only can have standing if its member Harper first establishes standing, we initially address Harper's claims to standing.

A. Subcontractor Standing

{¶12} Plaintiffs maintain *Connors* gives Harper standing to pursue declaratory and injunctive relief because it sought to become the concrete subcontractor on the project. The trial court rejected plaintiffs' argument, concluding *Connors* "has nothing to do with the award of a contract. Rather, it deals with the limited situation where the specifications of the contract are being challenged before a contract is awarded." (Decision, 7.)

{¶13} In the contract specifications at issue in *Connors*, ODOT added a requirement that two percent of the awarded value of the contracts for the project be subcontracted to minority business enterprises qualified to bid with ODOT, a requirement never before included in an ODOT project. The *Connors* plaintiffs challenged the bid

condition dealing with minority contractors, and they obtained a temporary restraining order preventing the opening of any bids. The timing of the challenge made clear the plaintiffs in *Connors* were challenging the contractual requirements, not a decision that excluded them from the list of winning bidders.

{¶14} In contrast, Harper did not challenge the bidding processes or contractual specifications until after the winning bids were selected. Without question, OCCA, during the bidding process and prior to bid selection, requested ODOT to disregard its determination that asphalt was the preferred pavement option on the project and alter its specifications to allow bids for concrete pavement. ODOT, however, complied, requiring all interested prime contractors to submit alternative bids covering both asphalt and concrete as potential pavement material. (See plaintiffs' Exhibit F, at A-326.)

{¶15} Only after the bids were submitted and ODOT opted for asphalt did plaintiffs initiate their litigation against ODOT. The timing places Harper squarely among the disappointed prospective subcontractors who are subject to the general rule that a party must have submitted a bid on the project to have standing to challenge the contract awarded on a public construction project. See *Treadon*, supra, citing *State ex rel. Associated Bldrs. & Contrs. Cent. Ohio Chapter v. Jefferson Cty. Bd. of Commrs.* (1995), 106 Ohio App.3d 176, 182.

{¶16} The same discrepancy in timing also distinguishes *K.S.B. Technical Sales Corp. v. N. Jersey Water Supply Comm.* (N.J.Super.1977), 376 A.2d 203, the other case on which plaintiffs rely to argue Harper has standing to challenge the Wilmington bypass contract. In that case, a subcontractor sought to challenge a "Buy American" addendum

in a public contract. Like the *Connors* plaintiffs, however, the *K.S.B.* plaintiff filed suit before the bids were opened.

{¶17} Plaintiffs nonetheless attempt to bring Harper within the parameters of *Connors*, arguing that ODOT's actions here parallel those in *Connors*. More particularly, plaintiffs contend that as ODOT in *Connors* actively involved itself in subcontractor selection when it specified race-based criteria dictating which subcontractors could receive ODOT work, so here ODOT's bid specifications altered the field to ensure concrete bids were disfavored. The cases differ in a significant aspect: unlike the race-based specifications challenged in *Connors*, the specifications here did not limit the field of prospective successful subcontractors. Indeed, pursuant to OCCA's request, ODOT widened the pool of potential pavement subcontractors by requiring every prime contractor to include a concrete alternative. To the extent plaintiffs contend ODOT's including a concrete alternative was a sham, then, like the plaintiffs in *Connors*, plaintiffs here should have initiated litigation before the winning bids were selected.

{¶18} Because Harper's situation is not analogous to that of the subcontractors determined to have standing in *Connors*, *Connors* does not support Harper's claim to standing in this case. The trial court did not err when, relying upon *Treadon*, it concluded Harper, as a subcontractor, lacked standing.

B. Taxpayer Special Interest Standing

{¶19} Plaintiffs next contend Harper possesses a "special interest" in the funds at issue based on its status as an Ohio taxpayer. Relying again upon *Connors*, plaintiffs maintain a taxpayer's special interest may be presumed when public contracts are awarded in violation of statutory requirements.

{¶20} Plaintiffs' reliance on *Connors* is misplaced. *Connors*, in fact, held a special interest may be presumed in certain circumstances, including when a public contract is not awarded to the lowest bidder despite a statutory requirement that the lowest bidder be given the contract. Such was the situation *Connors* confronted, as ODOT's minority set-aside requirement prevented the potentially lowest bidders from bidding on the contract. By contrast, nothing in the present case prevented ODOT from awarding the contract to the lowest bidder. Indeed, ODOT awarded the contract to the lowest bidder, as ODOT determined the asphalt alternative to be less expensive than concrete. Plaintiffs' circumstances thus do not present a situation like *Connors* where the lowest bidder was not awarded a public contract even though it was statutorily entitled to the work. Accordingly, no special interest is evident in this case.

{¶21} Plaintiffs also contend that Harper, as the subcontractor specifically harmed when ODOT decided to use asphalt over concrete, "clearly has a special interest in the funds at issue." (Plaintiffs' brief, 12.) Plaintiffs' argument relies upon *State ex rel. Masterson v. Ohio Racing Comm.* (1954), 162 Ohio St. 366, syllabus, holding that a taxpayer whose own property rights are jeopardized has standing to initiate an action to enjoin the expenditure of public funds. In defining "property rights in jeopardy," the Supreme Court of Ohio stated that "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. at 368.

{¶22} Plaintiffs contend they fall within the ambit of *Masterson* because Harper suffered a unique injury: Harper submitted the lowest concrete bid to the eventual winning prime contractor. Plaintiffs, however, do not explain how Harper had a right to be awarded

the subcontract. Had Harper been specifically named in the bid or held an enforceable letter of intent, then it would have demonstrated a property right placed in jeopardy when it was not awarded the subcontract. See *Wilson Bennett, Inc. v. Greater Cleveland Reg. Transit Auth.* (1990), 67 Ohio App.3d 812 (determining the standing of subcontractors who challenged the award of a public contract was not an issue where the subcontractors were required to sign letters of intent before the general contractor's bid was considered). Absent allegations in plaintiffs' complaint that the general contractor was bound to offer the subcontract to Harper had the concrete option been selected, plaintiffs failed to allege any damage distinct from the harm the general public suffered. Accordingly, they have not alleged a property right under *Masterson* to support a finding of standing.

{¶23} We nonetheless acknowledge a line of cases beginning with *State ex rel. United McGill Corp. v. Hamilton* (1983), 11 Ohio App.3d 102, that holds the special interest requirement of *Masterson* is satisfied when a taxpayer challenges a public expenditure from the state's general revenue fund. See also *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App.3d 44; *State ex rel. Paul v. Ohio State Racing Comm.* (1989), 60 Ohio App.3d 112; and *Griffin Indus., Inc. v. Ohio Dept. of Admin. Servs.* (Aug. 2, 2001), 10th Dist. No. 00AP-1139. Initially, we note none of the cases addresses the standing of a subcontractor who did not directly submit a bid to the state. More importantly, plaintiffs' complaint does not allege the Wilmington bypass construction project will be funded out of the state's general revenue fund.

{¶24} Indeed, JRJ asserts plaintiffs' own evidence, submitted in connection with their complaint, indicates the project will be funded with federal highway funds. If this be so, our decision in *Ohio Valley Mall v. Wray* (1995), 104 Ohio App.3d 629, resolves the

issue. *Wray* held a taxpayer lacked standing to challenge a highway project funded exclusively from federal gasoline taxes unless the taxpayer could demonstrate a special interest under *Masterson*. In accord with *Masterson*, *Wray* described the special interest as one that jeopardizes the taxpayer's own property rights or causes the taxpayer to sustain damage different in character than that sustained by the public generally. See also *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317 and *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 322-23.

{¶25} Because plaintiffs' complaint does not allege the state's general revenue fund will pay for the bypass, and plaintiffs fail to allege a special interest under *Masterson*, the trial court did not err in concluding Harper lacked standing as a taxpayer.

C. OCCA's Standing

{¶26} OCCA seeks legal redress in this case in its capacity as an association representing concrete construction contractors doing business in Ohio. An association has standing on behalf of its members when its members otherwise would have standing to sue in their own right, the interests it is trying to protect are germane to the organization's purpose, and the participation of individual members is not necessary to either the claim asserted or the relief requested. *Bicking*, at 320, citing *Simon v. E. Kentucky Welfare Rights Org.* (1976), 426 U.S. 26, 40, 96 S.Ct. 1917, 1925. Nonetheless, "to have standing, the association must establish that its members have suffered actual injury." Id. Our determination that Harper lacks standing to bring this action means OCCA also lacks standing, and the trial court did not err in so finding.

{¶27} Plaintiffs' sole assignment of error is overruled. Our resolution of plaintiffs' assignment of error renders moot plaintiffs' renewed motion for injunctive relief. Moreover,

we overrule ODOT's motion to dismiss for mootness, as we lack sufficient information to resolve the issue. Accordingly, both motions are denied, and the judgment of the trial court is affirmed.

*Motions denied;
judgment affirmed.*

FRENCH, P.J., and KLATT, J., concur.
