

[Cite as *Gildner v. Accenture, L.L.P.*, 2009-Ohio-5335.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Lance A. Gildner et al.,	:	
	:	
Plaintiffs-Appellants/ [Cross-Appellees],	:	
	:	
v.	:	No. 09AP-167
	:	(C.C. No. 2007-05067-PR)
Accenture, L.L.P.,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee/ [Cross-Appellant],	:	
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Ohio Department of Job & Family Services,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on October 6, 2009

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*Bieser, Greer & Landis LP, David C. Greer, James H. Greer, Gretchen M. Treherne and James P. Fleisher, Armistead W. Gilliam, for appellants/cross-appellees.*

*Squire, Sanders & Dempsey L.L.P., John R. Gall, Philomena M. Dane, Aneca E. Lasley, Aaron T. Brogdon and Jessica D. Goldman; Steven K. Dankof, for appellee/cross-appellant.*

*Richard Cordray, Attorney General, Peter E. DeMarco and Randall W. Knutti, for appellee.*

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APPEAL from the Ohio Court of Claims

TYACK, J.

{¶1} Ohio taxpayers, Lance and Joanne Gildner et al. ("the Gildners"), filed suit seeking to invalidate a settlement agreement between defendant-appellee, Ohio Department of Job and Family Services ("ODJFS"), and defendant-appellee, Accenture L.L.P. ("Accenture"). The Ohio Court of Claims rendered summary judgment in favor of Accenture and ODJFS.

{¶2} The procedural and factual background of this case is complex. However, resolution of this appeal turns on a narrow question of law, and therefore an abbreviated history will suffice.

{¶3} Accenture obtained a series of unbid contracts from ODJFS to create and implement a statewide computerized information system known as "Ohio Works." Improprieties in the contract process resulted in the director of what was then known as the Ohio Department of Human Services pleading guilty to having an illegal interest in a public contract. Ultimately, the system itself was completely unworkable and had to be scrapped. Subsequently, Accenture entered into a settlement and release of claims with ODJFS in which Accenture agreed to pay back \$3 million for reimbursement of leased office space and to forego \$2,446,483 for unpaid invoices.

{¶4} The Gildners, as Ohio citizens and taxpayers, filed suit against Accenture in the Montgomery County Court of Common Pleas claiming that the original contracts were entered into as part of a fraudulent conspiracy. The Gildners contended that Accenture had obtained \$60 million for a completely unworkable and unusable disaster. They claimed that the settlement agreement was also the product of fraud. Accenture filed a

counterclaim that included claims against ODJFS. The case was removed to the Ohio Court of Claims.

{¶5} The Ohio Court of Claims determined that the Gildners had standing as taxpayers pursuant to this court's ruling in *State ex rel. United McGill Corp. v. Hamilton* (1983), 11 Ohio App.3d 102. In *United McGill*, this court held that a taxpayer who contributed to the state's general revenue fund had standing to challenge expenditures from that fund. The Court of Claims then dismissed some of the counterclaims, and, after discovery, granted summary judgment to Accenture and the state of Ohio. The basis for the Court of Claims' ruling was that the Gildners could not produce evidence on the issue of fraud in the inducement because there had been no tender back of the consideration to Accenture. The Court of Claims also found that the Gildners could not produce a genuine issue of material fact as to fraud in the factum.

{¶6} This appeal followed with the Gildners assigning the following as error:

[I.] The trial court erred in granting summary judgment in favor of defendant Accenture, LLP by determining as a matter of law that a previous settlement entered into by the defendant Accenture LLP and the Ohio Department of Jobs and Family Services precluded the Plaintiff Taxpayers' claims.

[II.] The Court of Claims erred in failing to remand the case to the Court of Common Pleas for Montgomery County, Ohio because it lacked jurisdiction pursuant to O.R.C. § 2743.03(E).]

[III.] The trial court erred in failing to dismiss the defendant Accenture, LLP's counterclaim in its entirety.

{¶7} In the event this court overruled the Court of Claims, Accenture filed a contingent cross-appeal assigning as error the following:

[I.] The Court of Claims erred in dismissing Accenture's fourth counterclaim seeking damages from the State for failure of consideration where Accenture did not receive the benefit of its bargain in the form of freedom from litigation.

[II.] The Court of Claims erred in dismissing Accenture's contingent fifth counterclaim seeking damages from the State based on negligent misrepresentations regarding the State's authority to enter into the Settlement Agreement.

{¶8} We must begin by addressing the taxpayer standing issue. "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. For purposes of appellate review, a standing question is generally a question of law reviewed under a de novo standard. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶9.

{¶9} The Gildners have argued that Accenture waived the standing issue by not assigning it as error in a cross-appeal. However, standing is an element of the court's jurisdiction and thus cannot be waived. *Rickard v. Trumbull Twp. Zoning Bd. of Appeals*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶35. It can be raised at any time. *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St.3d 216, 218.

{¶10} The leading case regarding taxpayer standing is *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366. *Masterson* was a challenge to the expenditure of money from revenues collected by the Ohio State Racing Commission. No general fund moneys were involved as the revenues from taxes and fees were credited weekly into a special "state racing commission fund." *Id.* at 369. The taxpayers were not in any special class of taxpayers from whom those revenues were collected.

{¶11} The Supreme Court of Ohio held that, in the absence of statutory authority, a taxpayer lacks standing 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. In restating this principle, the court added, "[i]n 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.* at 368. The narrow reading of *Masterson* is that no general fund monies were spent and therefore the taxpayer lacked standing because he did not contribute to the special fund.

{¶12} This court sought to apply that principle in *Andrews v. Ohio Bldg. Auth.* (Sept. 11, 1975), 10th Dist. No. 75AP-121, 1975 WL 181708. In *Andrews*, a taxpayer sought to enjoin the award of the electrical contracting bid on the construction of the State Office Tower in Columbus, Ohio as not being in the interests of Ohio's citizens. The funds for the building project were acquired by a loan from the workers' compensation insurance fund. Although ultimately rental payments by state agencies occupying the tower would come from general revenue funds, the court looked to the time the contract was entered into in deciding that the funds came from a special fund rather than from the general revenue fund of the state of Ohio. The court could find no special interest of the plaintiff that would place her own property rights in jeopardy, and therefore concluded that she lacked standing to bring a taxpayer suit.

{¶13} The dissent in *Andrews* recognized that competing principles were at work in such cases. First is the principle "that government is operated for the benefit of all its citizens, and that any citizen has an interest in compelling public officials to perform their

duties properly." *Id.* The opposing principle is "that public officials should not be subjected to constant judicial interference." *Id.* The compromise position is that "in the absence of a statute conferring such right, private citizens must possess something more than a common concern for obedience to laws before they will be permitted to maintain certain actions against public officials." *Id.*

{¶14} The dissent distinguished *Masterson* by virtue of the fact that there were others directly affected in *Masterson* who had an interest in the fund greater than that of an ordinary taxpayer who simply had an abstract desire to see the law enforced. The dissent would have found that Andrews, as a general taxpayer on behalf of her class, was the only person who had a special interest to raise such the challenge, and that she should not be precluded from maintaining an action because she could not show "a nonexistent special interest not possessed by anyone other than the general taxpayer." *Andrews*.

{¶15} Subsequently, this court rejected the view of the majority in *Andrews* and adopted the reasoning of the dissent in *United McGill Corp.* In *United McGill*, an unsuccessful bidder for the purchase and installation of a pollution control device brought an action to prevent the award of the contracts to the successful bidders. The trial court found standing on the basis of the relator being an unsuccessful bidder, but determined that the relator did not have standing as a taxpayer. Because the relator had standing as an unsuccessful bidder, this court found no prejudice in what it termed an incorrect application of the Supreme court's opinion in *Masterson*. *United McGill* at 103. The court reasoned that because there was no special fund involved, but, instead, only the state's general revenue fund to which the plaintiff had contributed, it met the special interest

requirements of *Masterson*. The court did not address whether the plaintiff had alleged damages different in character from that sustained by the public generally.

{¶16} Recently, this court has moved away from *McGill* in *Ohio Concrete Constr. Assoc.* The court found that the taxpayer had failed to allege any damage distinct from the harm the general public suffered and therefore, had not alleged a property right under *Masterson* to support a finding of standing. *Id.* at ¶22.

{¶17} In *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 324, the dissent took notice of the "damages different in character" requirement of *Masterson*. Justice Wright wrote that the appellees "failed to allege that their damage can be distinguished from the damage that will be sustained by all taxpayers who contribute to the General Revenue Fund. They have, therefore, failed to meet the test of standing imposed under *Masterson*." *Id.*

{¶18} The Supreme Court of Ohio discussed the issue of standing again in *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677. While serving as a state senator, Marc Dann filed an action in mandamus seeking records from the Taft administration. Governor Taft asserted executive privilege over a portion of the records. Dann indicated that he was contemplating filing a taxpayer suit alleging unspecified misconduct. In discussing whether Dann had shown a particularized need for the records sufficient to overcome the privilege, the court stated that "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. The court then discussed the fact that Dann, as an employer, had contributed to the Workers' Compensation Fund and

thereby, arguably, had a special interest in the management of that fund. The court acquiesced to Dann's standing on the basis of his contribution to a special fund, but did not on his claim of general taxpayer status.

{¶19} In *State ex rel. Dann v. Taft*, 110 Ohio St. 1, 2006-Ohio-2947, an earlier case involving the same parties, the Supreme Court of Ohio reiterated the holding of *Masterson*. In that case, at ¶13, the court cited *Masterson* for the proposition that in the absence of statutory authority, a taxpayer lacks legal capacity to institute a taxpayer action unless he has some special interest in the public funds at issue.

{¶20} From these cases it is possible to infer that the Supreme Court of Ohio does not espouse the holding of *United McGill*, that allows a taxpayer who pays taxes into the general fund to have standing to prosecute misconduct or to challenge expenditures from that fund.

{¶21} The Twelfth District Court of Appeals has departed from the reasoning of *United McGill* and the line of cases that followed it. In *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, the plaintiff sought a declaratory judgment that Miami University's policy to provide health benefits to same-sex domestic partners violated the state constitutional ban on same-sex marriage. Section 11, Article XV, Ohio Constitution. The plaintiff argued that he possessed common law taxpayer standing because a portion of his tax dollars were used to pay for the health benefits.

{¶22} The court ruled that a taxpayer who contributes to the state's general revenue fund does not have standing to challenge any general revenue expenditure. *Id.* at ¶43. The court reasoned that such a broad common law standing rule would subject most government actions to taxpayer suits. This would violate the policy espoused by

Judge McCormac in *Andrews* that public officials should not be subjected to constant judicial interference.

{¶23} *Brinkman* was cited with approval in *Brown v. Cols. City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶13. The court rejected the taxpayers' claim of standing on the basis that they had not suffered and were not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general.

{¶24} Our review of the preceding cases has persuaded us that the well-reasoned decision in *Brinkman* has correctly interpreted the doctrine of common law taxpayer standing as espoused by the Supreme Court of Ohio in the *Masterson* and *Dann* cases. We overrule the holding in *United McGill* that states that when the only fund involved is the state's general revenue fund to which a plaintiff contributes as a taxpayer, the plaintiff has met the special interest requirements of *Masterson*.

{¶25} Based on the foregoing, we find that the taxpayers in this case lack standing to pursue this action. We affirm the judgment of the Ohio Court of Claims, albeit on separate grounds, and overrule appellants' three assignments of error as moot. The contingent cross-appeal is also rendered moot by this decision.

*Judgment affirmed.*

McGRATH and CONNOR, JJ., concur.

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