

# **The Construction Conversation**

## **Ohio's Legislative, Administrative, and Judicial Two-Way Newsletter**

January, 2023

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### **Legislative: New House Speaker Stephens**

The Ohio House elected Representative Jason Stephens as the new Speaker of the House, on an historical bipartisan vote of only 22 Republicans and all 32 Democrats. (Cont'd p. 2.)

### **Legislative: Eliminating Competitive Bids**

Senate Bill 23 would allow any Ohio political subdivision to avoid competitive bidding for construction merely by joining with another subdivision that participates in a "joint purchasing program" operated by a trade association. (Cont'd p. 2.)

### **Judicial: Agency Deference Rule Gone**

In an historic decision, the Ohio Supreme Court ruled that Ohio has no "administrative deference" doctrine, by which lower courts defer to governmental decisions unless unreasonable or without any supportive evidence. (Cont'd p. 3.)

### **Administrative: Apprentice Ohio Training Grants**

The Ohio Department of Job and Family Services announced that March 31, 2023 is the deadline for Ohio sponsors and employers to apply for training and tool grants for registered apprenticeship programs. (Cont'd p. 3.)

### **Legislative: Construction Bonds at Risk**

Former State Representative Mike Curtin (D, Grandview) warns that a

Republican House initiative to raise Constitutional amendment passage requirements to 60% could end Ohio's issuance of state construction bond issues. (Cont'd p. 3.)

### **Judicial: No Right to Cure**

A Court of Appeals held that a contractor had no right to cure a construction defect absent an express term in the construction contract. (Cont'd p. 4.)

### **Judicial: Arbitration Appeal Limited**

An arbitrator rejected a construction contractor's statutory right to add pre- and post-judgment interest to the award. On appeal, the claim was denied as not fitting the limited bases for arbitration appeal. (Cont'd p. 4.)

### **Judicial: Long-Arm Jurisdiction Denied**

An out-of-state developer for an out-of-state project failed to pay an Ohio architect and engineer, who sued in Ohio on personal guarantees. (Cont'd p. 4.)

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## **Legislative: New House Speaker Stephens (Cont'd)**

The House further elected veteran Scott Oelslager (R, Canton) as Speaker Pro Tempore, with 14 Republicans voting against him.

Speaker Stephens began serving in the House by appointment in 2019, and will not be term-limited until 2026.

He lives on a farm in Kitt's Hill outside of Ironton on the Ohio River. His district includes Gallia, Jackson, and Lawrence Counties.

By profession, Stephens is a licensed insurance agent, and previously served as Lawrence County Auditor and Commissioner.

Traditionally, the majority caucus meets behind closed doors to select the Speaker, then votes unanimously to assure the choice of the caucus. In this instance, the Republican House Caucus chose Representative Derek Merrin (R, Monclova), who is term limited.

When the vote went to the floor, a third of Republicans voted for Stephens instead, opening the opportunity for Democrats to join.

The State Republican Party voted to censure the House Republicans who voted for Stephens. The GOP Resolution stated that the vote "dishonors the historic brand of the Republican Party", instead voting "to defeat the dangerous and perverse Democratic Party Caucus agenda...."

In response, Representative Merrin and his supporters declared him the "Leader of the Republican Caucus."

As the work of legislation primarily takes place in the Committees, traditionally the Speaker appoints loyal chairpersons, to insure control of the agenda. On January 23<sup>rd</sup>, the Speaker appointed his supporters to the all-powerful Finance Committee and 5 of its 7 Subcommittees. Only 10 chairs appointed voted against Stephens for Speaker.

The Speaker's Rules and Reference Committee decides to which Committee any bill is assigned.

## **Legislative: Eliminating Competitive Bids (Cont'd)**

Sponsored by Senator George Lang (R, West Chester), the bill follows prior session Senate Bill 260, giving the rationale in Sponsor Testimony that this would "allow for the efficient, expedited, and professional process of contract administration."

In 2019, the Ohio Attorney General confirmed to the Seneca County Prosecuting Attorney that such a process currently is illegal.

Notwithstanding the Attorney General's opinion, a certain Educational Purchasing Council admits that, "The EPC has bid Design Build and Performance Contracting Services on behalf of our school district members."

The Associated General Contractors of Ohio opposed the prior legislation, noting that, "Cooperative purchasing for construction services will lessen opportunities for Ohio contractors to work on public projects, and undermines Ohio's current open and competitive procurement laws...."

Interestingly, some purchasing

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cooperatives expressed opposition last session, content with current practices.

We await Committee assignment of the legislation.

## **Judicial: Agency Deference Rule Gone (Cont'd)**

The case at bar involved the State Board of Registration for Professional Engineers and Surveyors. An applicant for a Certificate of Authorization proposed that a non-employee, independent contractor could serve as the designated full-time engineer in responsible charge of the professional activities.

The Board insisted that a full-time engineer be a W-2 Employee, denying the Certificate. The Supreme Court reversed, given that the statute does not preclude an independent contractor.

The federal courts follow a strong agency deference policy stated by the U.S. Supreme Court in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

In this recent case, the Ohio Supreme Court held that “only the judiciary has the ultimate authority to interpret the law”, abandoning deference to agencies when applying law to facts.

The Supreme Court’s rationale is that “Ohio’s system of separation of powers precludes any sort of mandatory deference to agency interpretations.” Nor does the Supreme Court find that the legislature delegated any policy-making authority to administrative agencies.

R.C. Chapter 119 hearings are administrative appeals of agency decisions,

testing whether the agency decision “is supported by reliable, probative, and substantial evidence and is in accordance with law.” A subsequent reviewing court on appeal considers the legal interpretation *de novo*, without deference to the agency’s view.

*TWISM Enterprises v State Board of Registration for Professional Engineers and Surveyors*, 2022-Ohio-4677.

## **Administrative: Apprentice Ohio Training Grants (Cont'd)**

The reimbursement grants are available up to \$2,500.00 per apprentice up to 10 apprentices (\$25,000.00) for state and federal-registered programs, to pay for the cost of training and tools

Ohio ranks third in the nation with more than 2,1000 apprentices enrolled statewide. Application for the grants is found at:

[Apprentice.Ohio.gov](http://Apprentice.Ohio.gov)

## **Legislative: Construction Bonds at Risk (Cont'd)**

Historical infrastructure, housing, and the Third Frontier programs would not have passed with that super majority requirement.

Last session, Republicans introduced House Joint Resolution 6 with the stated intent to make it more difficult for voters to amend the Ohio Constitution.

Historically, two-thirds of bond issues since 1980 passed under the proposed 60% threshold. These initiatives typically fund capital improvements and construction.

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The previous House Republican sponsor again has submitted the legislation for the new session, which also would require a signature threshold from all 88 counties, giving any one county an effective veto of any bond funding.

Elected in 2012, Curtin worked as publisher of *The Columbus Dispatch*.

## **Judicial: No Right to Cure (Cont'd)**

The construction contractor resurfaced a homeowner's garage floor with "Nature Stone" Flooring. The homeowner complained of "tackiness" and other defects. The contractor returned to the home several times to correct the defects.

The homeowner sued, and the court found the contractor in breach of contract. On appeal, the contractor argued that he had a right to cure before being found liable, under both common law and the contract warranty.

The Court of Appeals upheld the finding that the contract contained no express right to cure, and that the homeowner did not rely on the warranty relative to breach. The Court further found that the contractor's attempts at a cure exhausted any right, given failure of those efforts.

*Pavlescak v. Ohio Concrete Resurfacing*, 9<sup>th</sup> Dist. Lorain, 20223-Ohio-2

## **Judicial: Arbitration Appeal Limited (Cont'd)**

For an award of interest, the fact-finder must determine the date on which payment first should have been made. In the absence of this date, interest cannot apply. The arbitrator did not determine this date in

his judgment, denying interest as not necessary to make the contractor whole.

Upon review of the record, an arbitration award that does not include prejudgment interest may be modified under R.C. 2711.11(C) because it is "imperfect in matter of form not affecting the merits of the controversy".

But on appeal, a court cannot reverse an arbitration decision merely because the court disagrees with the reasoning.

When agreeing to arbitration, the parties specifically agreed to resolve their dispute with the intent that the process would "result in a final, binding resolution to the matter under dispute." This included the authority to award or to deny prejudgment interest under R.C. 1343.03.

*Becdir Construction v. Lorain County Board of Commrs.*, 9<sup>th</sup> Dist. Lorain, 2022-Ohio-4762.

## **Judicial: Long-Arm Jurisdiction Denied (Cont'd)**

The developer's company sought to develop the main entrance at Mississippi State University. When falling behind on payments to the design professionals, the developers gave individual, personal guarantees of payment.

When the developer still failed to pay, the design professionals sued on the personal guarantees in Cleveland. After successful judgment, the developers appealed.

To successfully assert court jurisdiction against out-of-state individuals, they must have purposely availed themselves of the privilege of conducting

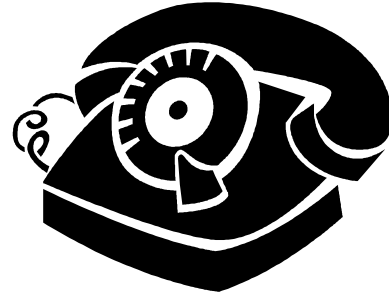
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business in Ohio based on the terms of the contract entered into.

Jurisdiction is proper where a defendant's contacts with Ohio are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant, OR the Ohio court exercises personal jurisdiction over a defendant in a lawsuit arising out of or related to the defendant's specific contacts in Ohio.



In this case, the design professionals failed to demonstrate any such contacts. Accordingly, even though defendants personally guaranteed payment, the Ohio court had no jurisdiction for the litigation.

*Thorson Baker & Assocs. v. Nicholas*, 8th Dist. Cuyahoga, 2022-Ohio-4636.

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Join us in

## The Construction Conversation Call-In

on

**Wednesday, February 15, 2023**

3:30 p.m.

Luther L Liggett is inviting you to a  
scheduled Zoom meeting.

Join Zoom Meeting

<https://us02web.zoom.us/j/85352420084?pwd=UTI1R211V1pod0NjcuUURZE04N0Zadz0>

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Meeting ID: 853 5242 0084

Passcode: 246856

Telephone 646 931 3860

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