IN THE SUPREME COURT OF OHIO

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33,	:	On Appeal From the Medina County Court of Appeals, Ninth Appellate District
Appellee,	:	Court of Appeals Case No. 06CA0104-M
v.	:	Medina County Court of Common Pleas, Case No. 05-CIV-1249
GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.	:	08-0780
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.

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FILED
APR 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

It has been nearly ten years since the Ohio Supreme Court decided any issue relating to the enforcement or interpretation of Ohio's Prevailing Wage Law. In accordance with Article IV Section 2 of the Ohio Constitution, this Court may review judgments of a Court of Appeals – "in cases of public or great general interest." Appellant presents this Court with two issues that will detrimentally affect the way every manufacturer, construction contractor, and governmental entity conducts its business in the State of Ohio, thereby satisfying the Constitutional test for review.

This cause presents two critical issues regarding the construction of public improvement projects subject to Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16: (1) whether the labor performed in off-site manufacturing[1] of all materials to be "used in or in connection with" a public improvement project are to be paid at prevailing wage rates pursuant to R.C. 4115.05; and (2) whether a labor organization has standing as an "interested party" to represent all employees who worked on a public improvement project when only one employee, who never even performed work on jobsite of the project, had authorized a labor organization to represent him pursuant to R.C. 4115.03(F) and R.C. 4115.16.[2]

On March 10, 2008, the Ninth District Court of Appeals in a two to one decision (Judge Slaby dissenting), held that all persons performing off-site manufacturing of "materials to be used in or in connection with" a public improvement project are subject to the requirements of

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[1] When the term "manufacturing" is used in this brief, it is intended to include all types of fabricating or preparing of materials "used in or in connection" with a public works project.

[2] Utilization of the Legislature's creation of interested party status has caused an explosion of litigation activity by unions. At our law firm alone, we are involved in twenty-two (22) lawsuits in fourteen (14) different counties, representing twenty-eight (28) employers, all of which are lawsuits invoked by unions as an interested party.

Ohio's Prevailing Wage Law, including the payment of applicable prevailing wages. The Ninth District also held that a labor organization, pursuant to R.C. 4115.03(F) and 4115.16, has standing as an "interested party" under Ohio's Prevailing Wage Law to represent all employees who performed work in connection with the "entire" public improvement project, even though only one employee had signed a written form authorizing only his own representation.

The Ninth District Court of Appeals decision is contrary to two well established Ohio Supreme Court decisions,[3] undermines the intent of the legislature, and ignores the precise language of the prevailing wage statute, as well as 74 years of statutory interpretation, enforcement and industry practice. The drastic economic effects of the Ninth District's decision are injurious to Ohio businesses, public authorities and publicly funded projects.

The Ninth District is the first Court in the State of Ohio in 74 years to determine that a one sentence amendment to Ohio General Code Section 17-4a in 1935 (present day R.C. 4115.05), had *legislatively superseded* the Ohio Supreme Court's long standing holding in *Clymer v. Zane* which held that off-site work was not subject to the requirements of Ohio's Prevailing Wage Law. Since the holding in *Clymer* in 1934, no Court or administrative agency, including the Ohio Department of Commerce ("the Department"), who is currently charged with the enforcement of Ohio's Prevailing Wage Law, or its predecessors, OBES and the Bureau of Industrial Relations, have ever held to the contrary, or required prevailing wages to be paid for the off-site manufacturing of materials used in a public works projects. Because Ohio's Prevailing Wage Law contains a two year statute of limitations, every contractor, manufacturer, and public authority who has worked on, or authorized construction projects in the last two years, is subject to liability for the underpayment of wages to any employee who has

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[3] See *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125 and *Sheet Metal Workers Local Union 33 v. Mohawk Mechanical,* 86 Ohio St.3d 611, 1999-Ohio-209, 716 N.E. 2d 198.

manufactured any material that was "used in or in connection" with a public improvement project.

The erroneous holding of the Ninth District is of great general interest and public concern to all manufacturing business and construction contractors doing work in Ohio. Because of the holding of the Ninth District, the following "materials" manufactured in different industries for public projects are all now subject to prevailing wages which were never subject to this law before including, but not limited to:

> (1) Steel: All formation and fabrication of steel used in buildings, including cutting and welding of structural steel to size and specifications that is used to frame buildings. This would also include pre manufactured steel buildings, storage sheds, or other modular units.
>
> (2) Wood: All millwork performed for the moldings or trim used in public projects which will also include manufacturing of pre-hung doors, pre-hung windows and the fabrication of cabinetry and wood countertops to be installed on the project. The law would also cover the cutting and sizing of wood studs used to frame interior and exterior walls and floors, as well as roof trusses. The manufacturing of all modular buildings, pre manufactured walls and floors.
>
> (3) Concrete: All batch plants, gravel pits, quarries and all ready mix suppliers which supply materials to make concrete or asphalt will all be subject to prevailing wages for all road work projects, parking lots, sidewalks, foundations and the like. (*Clymer* specifically excluded gravel pits from coverage).
>
> (4) Sheet Metal: All sheet metal duct work manufactured for a public improvement project including parts of heating, ventilation and cooling units manufactured by companies such as Carrier and Trane. The law would also cover the manufacturing of architectural sheet metal used as capping on building as well as gutters and metal roofing systems.
>
> (5) Plumbing and Fire Protection: The formation of pipe, the cutting and threading of pipe, the manufacturing of plumbing fixtures and sprinkler heads.
>
> (6) Electrical: The preassembly of breaker boxes and other electrical equipment to be installed on a project, the cutting or fabrication of stock materials such as wire and conduit.
>
> (7) Masonry: The cutting and manufacturing of block, brick and stone, including prefabrication of stone countertops and other decorative stone products.

(8) Glass: The manufacturing and cutting of glass for windows or doors.

(9) Elevators: The construction of elevator cars and other pre assembled parts.

(10) Painting: The painting, staining and preparation of any paintable materials or the mixing of paint at a local hardware store.

(11) Landscaping: Nurseries and tree farms who supply plants for installation.

(12) Roofing: The manufacturing of all roofing materials including shingles, roof liners and compounds.

The decision of the Ninth District would also include the payment of prevailing wages for persons delivering such materials to the public project as the delivery would be considered "upon any material to be used in or in connection with a public work."

Numerous additional reasons make this a case of public and great general interest. Requiring prevailing wages to be paid for the manufacturing of off-site materials would make the cost of public improvement projects skyrocket in Ohio, placing a further strain on Ohio's dwindling economy and tax base. Because this interpretation affects the cost of public improvements and Ohio's ability to affordably maintain its infrastructure, this case is a matter of great public interest and broad general significance to the State's population as a whole.[4]

Also affected by this holding are suppliers of manufactured materials. Currently, a contractor can purchase precut wood, sheet metal, doors, etc. . . . which are specifically manufactured for a project or are stock items which are sold at a later date to contractors working on public projects. Because these stock materials are "to be used in or in connection with" the

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[4] The cost of road construction alone would dramatically increase if employees working in gravel pits and batch plants as were the employees in Clymer, *supra*, are now required to be paid prevailing wages. Governmental entities currently struggling to complete public projects would either have to raise taxes to fund the projects or indefinitely postpone road repairs and other needed construction projects because they would not be able to afford the increased costs of construction.

prevailing wage project, the Ninth District's holding would require the companies which manufactured the materials to have paid their employees prevailing wages when the work was performed. As Judge Slaby in his dissent correctly points out, how could the Department of Commerce ensure Ohio's Prevailing Wage Law was complied with when the playing field has broadened from the jobsite to every nook and cranny of every supplier/manufacturer who mixed a bucket of paint or made cabinets, months or years ago.

It was simply not the intent of the legislature to include all "materials used in or in connection with" a public improvement project to be subject to Ohio's Prevailing Wage Law. If it were the legislature's intent, then one would question why this statutory section has not been enforced against manufacturers in 74 years. Without a doubt, the legislature or court or the administrative agency enforcing the law would have taken action sometime in the last 74 years to impose the Ninth District's novel ruling. The effect of this ruling on the Department, which only employs fifteen investigators who are responsible for ensuring prevailing wage <u>and</u> minimum wage compliance throughout Ohio, will place upon it a massive investigative burden. It might take more than fifteen investigators just to identify employees manufacturing stock items years ago that were recently installed on a public project. Such a task would appear to be an ongoing nightmare for both the Department and the manufacturers.

In addition, it is of great interest that the extensive recordkeeping requirements of Ohio's Prevailing Wage Law would now also apply to Ohio manufacturers, including the preparation and filing of certified payroll reports identifying the employees manufacturing materials for public projects and documenting that they were paid prevailing wages. As Judge Slaby observed in his dissent, employers would have to keep track of their employees' time in fractional increments, just in case the materials were to be used on a prevailing wage project. Judge Slaby

surmised that there is simply no limit to the reach of the majority's interpretation of the law, even questioning if the machinery used to fabricate materials would be also subject to prevailing wages.

The Ninth District's interpretation of R.C. 4115.05 will inevitably lead to contractors using out of state companies over Ohio manufactures, since Ohio law is unenforceable in other states. By avoiding application of this law through use of out of state manufacturers, this will reduce costs and gain a competitive advantage in bidding for contractors who cease using Ohio manufacturers. This would result in the loss of jobs and opportunities for untold numbers of Ohio workers.

Furthermore, after communicating with officials from the Department charged with the enforcement of Ohio's Prevailing Wage Law, the Department has presently taken the position that the requirement of prevailing wages to be paid for the off-site manufacturing of all materials to used in or in connection with a public work is only controlling law in the Ninth District, which covers Lorain, Medina, Summit and Wayne Counties. Outside of these Counties, the payment of prevailing wages for off-site work will not be enforced by the Department. Hence, there will be contractors seeking manufacturing companies or suppliers located outside of these Counties in order to avoid the effects of the Ninth District's decision causing conflicts between Ohio's 88 counties.

As this Court held in *State, Ex Rel. Evans v. Moore*, 69 Ohio St.2d 88, 91-92, 431 N.E.2d 311, Ohio's Prevailing Wage Law is a general law which has significant extraterritorial effect and evidences a legislative intent to provide a comprehensive <u>uniform</u> framework that transcends local boundaries thus demonstrating a statewide concern for compliance with and enforcement of

the prevailing wage law. This Court should accept review of this case in order to avoid the unequal application of a general law of this State to just four Counties.

The second proposition presented to this Court for review regarding "interested party" standing under R.C. 4115.03(F) and R.C. 4115.16 is also of great and general interest public as well. The Ninth District improperly held that a labor organization has the right to represent every employee who worked on a public improvement project and/or now who manufactured materials for the project when just one employee had authorized the union to represent that employees' own interest. As Chief Justice Moyer stated in his dissent in *Mohawk Mechanical*, "the execution of authorization forms such as those used in the case is analogous to the creation of an attorney-in-fact relationship, and sufficient to satisfy subsection (F)(3), if the forms are executed before the union takes an action on behalf of the employees." (*Id.* at 616). This creation of an "attorney-in-fact" relationship should only apply to the individual employee(s) who authorized the labor organization to represent them. By expanding the definition of interested party, the Ninth District's decision is injuring and impinging upon the rights of Ohio workers performing work on public improvement projects. This is so because any employee, without a labor organization, can file a prevailing wage complaint with the Department and the Director must investigate the claim and pursue collection, if warranted.

Mohawk Mechanical does not impose representation by a union upon employees who neither requested such representation and/or who prefer to represent themselves or select their own attorney. Now, unions are given license to undermine this statutory scheme by inserting themselves so that there is a grave potential that the union may proceed with litigation or resolve it on terms that are in the union's best interests and not the affected employees. This issue

should be accepted for review in order to limit union representation to only those employees who have chosen to appoint the Union as their "attorney-in-fact."

In view of the foregoing, Appellant respectfully submits that the Constitutional standard for review has been met.

II. STATEMENT OF THE CASE AND FACTS

The Appellee Sheet Metal Workers' International Association, Local Union 33, (hereinafter referred to as "Local 33"), filed an interested party prevailing wage complaint pursuant to R.C. 4115.16(B) against Appellant Gene's Refrigeration, Heating & Air Conditioning, Inc., (hereinafter referred to as "Gene's"), alleging Gene's violated Ohio's Prevailing Wage Law, R.C. 4115.03 *et seq.*, while performing work on the Granger Fire Station Project located in Medina County, Ohio (hereafter referred to as the "Project"). The public work subject to Ohio Prevailing Wage Law Project at issue is located in Medina County. Gene's is a construction contractor founded in 1959 that performs plumbing, heating, ventilation, and air conditioning work and manufacturing work related thereto for both residential and commercial customers and performed such work at the Project involved. Gene's has a shop on its premises where manufacturing work is performed, including the fabrication of metal duct work. To complete this Project, Gene's fabricated and purchased sheet metal duct work (materials) for the Project. Gene's employed several full-time employees to fabricate duct work not only for this Project but for other private construction projects, as well as for sale to other construction contractors and the public. Gene's did not pay any employee who worked in its fabrication shop prevailing wages. Moreover, Gene's does not fabricate all of the duct work that will be used on any construction project and frequently purchases fabricated duct work and most specialty items

from other Ohio manufacturing companies such as Pulliam & Associates, Ohio Air, and Famous Supply.

Local 33 is a labor organization whose jurisdiction includes Medina County, Ohio. Mr. Elie Cherfan was an employee of Gene's, employed exclusively in Gene's off-site fabrication shop and performed no work on the jobsite of the Project at issue. Mr. Cherfan signed a written form authorizing Local 33 to represent him for purposes of bringing an "interested party" prevailing wage complaint pursuant R.C. 4115.16 alleging he should have been paid prevailing wages applicable for Medina County for any sheet metal duct work he fabricated that was used for the Project. Mr. Cherfan fabricated some duct work that was used on the Project at issue.

The Magistrate granted Gene's Motion for Summary Judgment and held Local 33 only had standing as an "interested party" to sue on behalf of Mr. Cherfan, and further held that since the materials he fabricated off-site that were installed on the Project were not subject to the provisions of Ohio's Prevailing Wage Law, the Complaint was dismissed. On November 29, 2006, the trial court adopted the Magistrate's Decision. As the prevailing party, Gene's requested attorney's fees and costs pursuant to R.C. 4115.16(D); the trial court denied the Motion.

Local 33 filed a Notice of Appeal with the Medina County Court of Appeals challenging the trial court's order granting summary judgment in favor of Gene's. On December 22, 2006, Gene's filed a Notice of Cross-Appeal from the trial court's order denying Gene's Motion for Attorneys' Fees and Costs. On March 10, 2008, the Court of Appeals reversed the decision of the trial court and held (1) Local 33 had standing to represent all employees on the "entire" Project, even though only one employee who never worked on the Project authorized the Union to represent only him, in contravention of this Court's holding in *Sheet Metal Workers Local*

Union 33 v. Mohawk Mechanical, 86 Ohio St.3d 611, 1999-Ohio-209, 716 N.E2d 198;[5] and (2) that the off-site manufacture of all materials to be used in or in connection with a public improvement project is subject to Ohio's prevailing wage law, surmising that this Court's long standing ruling in *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125, must have been legislatively superseded by the amendment to R.C. 4115.05 in 1935, even though this statutory section has not been interpreted or enforced by any Court or administrative agency to give this effect in over 73 years.

The Court of Appeals erred in both of its rulings, ignoring two of this Court's decisions. First, in holding that off-site manufacturing of materials to be used in or in connection with a public improvement project are subject to Ohio's Prevailing Wage Law. Second, the Court of Appeals erred by allowing Local 33 to have standing as an interested party to represent not only all of Gene's employees, but all employees on the "entire project," when only one employee signed a written authorization for Local 33.

In support of its position on these issues, Appellant presents the following argument.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The off-site manufacturing of materials to be Used in or in Connection with a Public Improvement Project is Not Subject to Ohio's Prevailing Wage

[5] "This Court finds, upon consideration of the Supreme Court's discussion in *Mohawk* and the statute's definition of "interested party" within the context of "a particular public improvement," [**13] that Mr. Cherfan's written authorization to allow Local 33 to represent him in this prevailing wage action was sufficient to impute standing to Local 33 to file a prevailing wage complaint with respect to the entire project and any and all violations with respect to any and all of Gene's employees. The Supreme Court did not specify that Local 33 only had standing to pursue a complaint on behalf of those specific employees who signed the authorization forms. Rather, the high court expressly stated that the statute does not require that any specific percentage of employees must authorize representation before the union may file a prevailing wage complaint. In fact, it appears that it is merely the affirmative act of an employee's authorizing representation which substantiates jurisdiction and imputes interested party status to the union." (*Id.* at ¶ 22) (Emphasis added).

Law Because the Requirements of Ohio's Prevailing Wage Law Only Applies to Work Performed at and Upon the Jobsite of the Public Improvement Project.

In 74 years since this Court's decision in *Clymer v. Zane*, research reveals that not a single Ohio Court, Administrative Agency, or any other authoritative source, has held that manufacturers or contractors are required to pay their employees prevailing wages for off-site fabrication work pursuant to R.C. 4115.05. The Ninth District simply ignored the fact that for 74 years no court or administrative body has ever imposed this law on off-site work and ignored the practice firmly embedded in and relied upon by the construction industry and every public authority that such off-site work is not covered, and instead held that this Court's 1934 holding *Clymer v. Zane* was *legislatively superseded* by in 1935 by Am.S.B. No. 294 by virtue of the addition of the following sentence to the Section 17-4a of the General Code,

> The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash.

There is no legislative history available to explain the legislature's amendment in 1935, only 74 years of non-enforcement of this provision upon off-site work. All the while the legislature has continued to make amendments to the prevailing wage statute which has grown from just four paragraphs to over sixteen statutory sections, with a full complimentary administrative code. See R.C. 4115.03 to 4115.16, and 4115.99; O.A.C. 4101: 9-4-01 to O.A.C. 4101: 9-4-28. Nothing in the administrative code even hints at this issue.

It is fundamental that prevailing wages must be paid for time spent performing work on the <u>jobsite</u> of the public improvement. This notion is demonstrated through various provisions contained in Ohio's Prevailing Wage Law. For example, R.C. 4115.10(A) states, that **"[a]ny**

employee upon any public improvement who is paid less than the...[prevailing wage] may recover . . ." (Emphasis added). Even R.C. 4115.05 which contains the added sentence provides that "[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, **or other person about or upon such public work,** shall be paid the prevailing rate of wages provided in this section." (Emphasis added).

The Ohio Supreme Court's decision in *Clymer v. Zane* was never "legislatively overruled" as the Ninth District held. To the contrary, various Ohio Courts including this Court, as well as other State Courts have continued to cite *Clymer*, none have ever indicated this case has been *legislatively superseded.* [6] In fact, the decision in *Clymer* became a focal point for other state courts took notice of the decision and adopted the same reasoning for excluding employees who prepare materials off-site for use on public improvement projects from being paid prevailing wages.[7]

The Ninth District's holding regarding prevailing wages to be paid for off-site fabrication and manufacturing of material used in or in connection with a public improvement project is unreasonable, unworkable, and without foundation.

Proposition of Law No. 2: A Labor Organization that Obtains Written a Authorization from an Employee Who has Worked on a Project Subject to the Requirements of Ohio's

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[6] See *Dean v. Seco Electric Co.* (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837; *Wadsworth v. Dambach* (1954), 99 Ohio App. 269, 133 N.E.2d 158; *State ex. rel. Corrigan v. Barnes* (1982), 3 Ohio App. 3d 40, 443 N.E.2d 1034; *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848; *Callaway v. NDB Downing Co.* (1961), 172 A.2d 260, at 264-266, 1961 Del. Super. LEXIS 100. Moreover, Shepard's Citation Service on Lexis-Nexis is unaware of any negative feedback regarding *Clymer.*

[7] See *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848 (the Kentucky Court of Appeals specifically adopted the reasoning of the Ohio Supreme Court in *Clymer v. Zane* and held that work performed in the production of materials used in the construction of a public project is not work on the project itself).

Prevailing Wage Law Only has Standing as an Interested Party to Pursue Claims Only on Behalf of the Employee who Expressly Authorized the Representation

Ohio's Prevailing Wage Law, pursuant to R.C. 4115.03(F) and R.C. 4115.16, grants standing to an "interested party" to file a complaint on behalf of an employee to enforce his rights. However, contrary to Ninth District holding, Ohio's Prevailing Wage Law does not allow an interested party to pursue claims on any employee's behalf who had not "authorized" such action. To allow an "interested party" to pursue and enforce the claims on behalf of other Gene's employees who did not authorize the action violates this Court's holding in *Mohawk Mechanical,* the legislature's intent, and the right of every non-union employee to select his/her own "attorney-in-fact." In *Mohawk*, three employees of Mohawk Mechanical, a non-union contractor, signed "authorization forms" that expressly granted authority to Local 33 pursuant to R.C. 4115.03(F) to file a prevailing wage complaint "on their behalf" with regard to alleged underpayments for work they performed <u>on</u> a public improvement project. *Id.* at 613. After the lawsuit was filed, three other Mohawk employees who also worked "on the public project" signed Local 33's authorization forms. *Id.* After sixty days elapsed without a ruling from the Ohio Bureau of Employment Services, Local 33 filed its prevailing wage complaint on behalf of these three employees in the trial court. *Id.* at 613.

Shortly thereafter, Mohawk Mechanical filed a motion for summary judgment challenging Local 33's "interested party" standing pursuant to R.C. 4115.03(F), alleging Local 33 "was not authorized to represent" Mohawk employees because Mohawk was not signatory to a collective bargaining agreement with Local 33. *Id.* at 614. The Ohio Supreme Court disagreed and held that certain employees of Mohawk "took affirmative acts to authorize Local 33 to file a complaint **<u>on their behalf</u>**...within sixty days of the filing of the complaint, three Mohawk employees had given **written authorization** to Local 33 **<u>to represent them</u> in the prevailing**

wage action." *Id.* at 614 (emphasis added). In reading *Mohawk*, it is clear that the Ohio Supreme Court permitted Local 33 to file a complaint on behalf of only those Mohawk employees who signed authorization cards, not on behalf of all employees who worked on the public project at issue.

The Court's reasoning in *Mohawk* for limiting Local 33's representation to only those employees who authorize the union to file suit on their behalf is sound.[8]

Following the same logic and reasoning employed in *Mohawk* and *Ohio Bridge Corp.*, Local 33 only has standing as an "interested party" to file a prevailing wage complaint on behalf of the single Gene's employee who signed an authorization form. It is undisputed that Local 33 only obtained one authorization form from Mr. Cherfan, a Gene's employee who worked exclusively in Gene's off-site fabrication shop. Mr. Cherfan never worked on the jobsite of the public improvement Project at issue. To allow the Ninth District's interpretation of R.C. 4115.03(F) to stand, would allow an authorization from a single employee, in a construction company with one hundred or more employees to become the attorney in fact for numerous potentially unwilling employees. Based upon the holding in *Mohawk*, and the language used in the stature, Ohio Law is clear and it is logical that a labor organization only has standing as an interested party to pursue a prevailing wage complaint on behalf of the employee who authorized the action.

If the Ninth District's interpretation of *Mohawk* and the statute are correct, why did this Court even bother mentioning the three Mohawk Mechanical employees who authorized Local 33's representation after the lawsuit was filed? Why did the Court continuously use the terms "on

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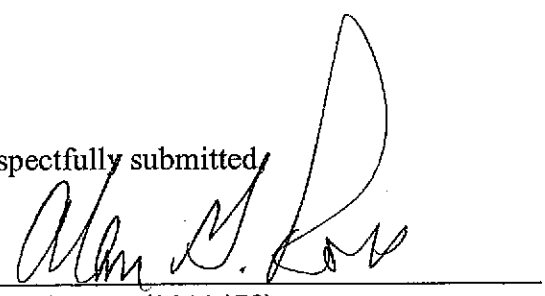
[8] The Third District Court of Appeals in *International Asso. of Bridge, etc. Local Union 290 v. Ohio Bridge Corp.* (1987), 32 Ohio App. 3d 18, 20, 513 N.E.2d 358, likewise reasoned that labor organizations under Ohio's Prevailing Wage Law are only "authorized" to represent employees who have specifically authorized the representation.

their behalf" and "to represent them," when describing the prevailing wage complaint authorized by six Mohawk employees? Given the content of the dissent in *Mohawk Mechanical* by Chief Justice Moyer, with Judges Cook and Lundberg Stratton concurring, most assuredly that dissent would have included a dissent to the majority opinion if that majority opinion had also held that a single employee authorization grants the union standing and authority to represent all other employees without their explicit authorization. The holding by the Ohio Supreme Court purposefully articulates that a union only has standing to represent employee(s) who affirmatively authorize such representation.

IV. CONCLUSION

For the foregoing reasons, this case involves a matter of great public and general interest. Appellant Gene's Refrigeration requests this Court grant jurisdiction to review the ruling of the Ninth District Court of Appeals.

Respectfully submitted,



Dated: April 23, 2008

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, Appellant Gene's Refrigeration Memorandum in Support of Jurisdiction, was served via ordinary U.S. mail, postage prepaid, upon the following:

Joseph M. D'Angelo, Esq.
Cosme, D'Angelo & Szollosi Co., L.P.A.
The CDS Building
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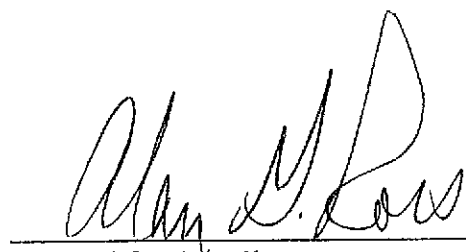
this 23rd day of April, 2008.



Counsel for Appellant

APPENDIX

STATE OF OHIO)
) ss:
COUNTY OF MEDINA)

COURT OF APPEALS
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KATHY FORTHEY
MEDINA COUNTY COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33

Appellant/Cross-Appellee

v.

GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.

Appellee/Cross-Appellant

C. A. No. 06CA0104-M

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 05-CIV-1249

DECISION AND JOURNAL ENTRY

Dated: March 10, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant/cross-appellee, Sheet Metal Workers' International Association, Local Union No. 33 ("Local 33") appeals from the judgment of the Medina County Court of Common Pleas, which granted summary judgment in favor of appellee/cross-appellant Gene's Refrigeration, Heating & Air Conditioning, Inc. ("Gene's"), thereby dismissing the union's complaint. Gene's cross-appeals from the judgment of the Medina County Court of Common Pleas,

which denied its motion for attorney fees. This Court reverses the judgment of the trial court, which granted summary judgment in favor of Gene's.

I.

{¶2} Gene's is a contractor which submitted a bid for a public improvement, the Granger Fire Station Project, located in Medina County, Ohio. The parties agree that this project was construction within the meaning of the Ohio Prevailing Wage Law and governed by R.C. 4115.03 to 4115.16. Gene's was awarded a contract for the project. Gene's participated in both site construction work and off-site fabrication of duct work. Some of the duct work fabricated by Gene's in its off-site workshop was installed in the project. Elie Cherfan was an employee of Gene's. Mr. Cherfan worked exclusively in the off-site workshop. Gene's paid Mr. Cherfan, and all other off-site workshop employees, at their regular non-prevailing wage rates, which were lower than the prevailing wage rates.

{¶3} Local 33 is a bona fide organization of labor, which exists in whole or in part for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees. On July 12, 2005, Local 33 filed an interested party administrative prevailing wage complaint pursuant to R.C. 4115.16(A) with the Director of the Ohio Department of Commerce, Division of Labor and Workers' Safety, Bureau of Wage and Hour, asserting violations of the Prevailing Wage Law. The director did not rule on the

merits of the administrative complaint within sixty days. On September 16, 2005, Local 33 filed an interested party prevailing wage enforcement action in the Medina County Court of Common Pleas, pursuant to R.C. 4115.16(B). Local 33 alleged project-wide underpayment and other violations, exceeding the claims regarding only Mr. Cherfan. Gene's timely answered.

{¶4} Gene's filed a motion for summary judgment, arguing that (1) Local 33 lacks standing to sue on behalf of anyone other that Mr. Cherfan, (2) off-site workshop employees are not subject to Ohio's Prevailing Wage Law, and (3) Gene's is entitled to attorney fees.

{¶5} Local 33 filed a cross-motion for partial summary judgment, arguing that (1) the union has standing to sue to enforce the prevailing wage law on the entire project, and (2) workshop employees who work on materials to be used in or in connection with the project are entitled to receive the prevailing wage rates. Local 33 also filed a motion to strike exhibits B, C, D, E, F, H and I, attached to Gene's motion for summary judgment. The parties then filed a series of responses and replies.

{¶6} On March 7, 2006, the trial court denied the motion to strike and both motions for summary judgment. On March 27, 2006, the parties filed a joint motion to reconsider, appending joint stipulations of fact. The matter was referred to the magistrate, who issued a decision on April 27, 2006, granting Local 33's motion to strike the exhibits; denying Local 33's motion for partial summary

judgment; and granting Gene's motion for summary judgment, thereby dismissing the union's complaint. The magistrate did not address the issue of attorney fees.

{¶7} Local 33 timely filed objections to the magistrate's decision, objecting to the magistrate's findings that (1) Local 33 has standing to pursue the action only on behalf of Mr. Cherfan, (2) the off-site shop work performed by Mr. Cherfan is not subject to the prevailing wage law, and (3) Gene's is entitled to summary judgment in its favor. Gene's also timely objected to the magistrate's decision, objecting to the magistrate's striking of exhibits B, C, D, E, F, H and I, attached to Gene's motion for summary judgment.

{¶8} On June 9, 2006, the trial court affirmed the magistrate's decision, ordering that Local 33's motion to strike Gene's exhibits is well taken, that the union has standing to pursue this action only on behalf of Mr. Cherfan, and that the off-site shop work performed by Mr. Cherfan is not subject to the prevailing wage law.

{¶9} On June 14, 2006, Gene's filed a motion for attorney fees. On June 29, 2006, Local 33 filed a notice of appeal. The next day, Local 33 filed a motion to vacate the hearing regarding attorney fees, and alternatively, its opposition to an award of attorney fees to Gene's.

{¶10} On August 4, 2006, this Court dismissed the appeal for lack of a final, appealable order, because the trial court failed to independently enter judgment as to the parties' motions for summary judgment. *Sheet Metal Workers'*

Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc., 9th Dist. No. 06CA0053-M.

{¶11} On November 22, 2006, the trial court issued a journal entry in which it denied Gene's motion for an award of attorney fees. On November 29, 2006, the trial court issued a judgment entry in which it overruled all objections to the magistrate's decision; granted Gene's motion for summary judgment, but denied its motion for attorney fees; and denied Local 33's cross-motion for summary judgment. Local 33 timely appealed, raising two assignments of error for review. Gene's cross-appealed, raising one assignment of error for review.

II.

LOCAL 33'S FIRST ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED WHEN IT ADOPTED THE MAGISTRATE'S LEGAL CONCLUSION THAT LOCAL 33 WAS NOT AN 'INTERESTED PARTY' WITH RESPECT TO A PARTICULAR PUBLIC IMPROVEMENT WHERE LOCAL 33 WAS 'AUTHORIZED TO REPRESENT EMPLOYEES OF A PERSON' WHO SUBMITTED A BID ON THE PUBLIC IMPROVEMENT."

{¶12} Local 33 argues that the trial court erred by adopting the magistrate's decision, which granted summary judgment in favor of Gene's by finding that Local 33 has standing to pursue its prevailing wage law complaint only on behalf of Elie Cherfan. Local 33 argues that, as an interested party, it has standing to file suit on behalf of more than Mr. Cherfan and to pursue more than underpayment violations of Ohio's Prevailing Wage Law. This Court agrees.

{¶13} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶14} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶15} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶16} Both Gene's and Local 33 relied on the Ohio Supreme Court case *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, in support of their respective motions for summary judgment. Gene's argued in its motion for summary judgment that *Mohawk* stands for the proposition that a labor union may represent only those employees in a prevailing wage action who have signed an authorization for representation form. Gene's asserted that a union has no standing as an interested party to represent any other employee who has not expressly authorized such representation. Local 33, on the other hand, argued in its motion for summary judgment that the *Mohawk* court held that a union attains standing, i.e., interested party status, to sue regarding any violation of the prevailing wage law arising out of an entire public improvement project so long as any employee working on the project has authorized representation.

{¶17} Ohio's Prevailing Wage Law is set out in R.C. 4115.03 through 4115.16. R.C. 4115.16 authorizes an "interested party" to file a complaint alleging a violation of the prevailing wage law with the director of commerce, or in the court of common pleas, if the director has not ruled on the merits of the complaint within sixty days. R.C. 4115.16(A) and (B).

{¶18} R.C. 4115.03(F) defines "'interested party,' with respect to a particular public improvement," as

"(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

"(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

"(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;

"(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section."

{¶19} The parties stipulated that Gene's submitted a bid and was awarded a contract for construction of the public improvement. The parties further stipulated that Local 33 in a bona fide organization of labor which exists, in whole or in part, for the purpose of negotiating with employers concerning wages, hours, or terms and conditions of employment of employees. In addition, the parties stipulated that Elie Cherfan, an employee of Gene's during the relevant time, authorized Local 33 to represent him.

{¶20} In the *Mohawk* case, Mohawk was a subcontractor whose employees worked on a public improvement project. The project was exempt from the competitive bidding requirements normally associated with public works pursuant to R.C. 3313.372. Mohawk did not pay its employees the prevailing wages under the belief that the prevailing wage laws did not apply to this project. At the time, Mohawk's employees were not members of Local 33; rather, Local 33 was involved in a labor organization and representation drive with those employees.

After finding that the prevailing wage law applies in non-competitive bid situations, the Supreme Court considered whether Local 33, which was not a party to a collective bargaining agreement with the employer, could still be an "interested party" pursuant to R.C. 4115.03(F). The Supreme Court found that it is enough that the union "in its normal course concerns itself with the stuff of the prevailing wage statute." *Mohawk*, 86 Ohio St.3d at 614.

{¶21} The Supreme Court further held that "[t]he statute does not require that a majority of employees authorize the representation." Id. The *Mohawk* court continued:

> "Employees of Mohawk took affirmative acts to authorize Local 33 to file a complaint on their behalf. Local 33 claims that the union received oral authorization from Mohawk employees to represent them in the prevailing wage complaint. While verbal authorization may be enough under the terms of the statute to allow a union to file a complaint, the record is devoid of any evidence of such authorization. However, within sixty days of the filing of the complaint, three Mohawk employees had given written authorization to Local 33 to represent them in the prevailing wage action. That action cured any jurisdictional defect that may have been present."[1] Id.

{¶22} This Court finds, upon consideration of the Supreme Court's discussion in *Mohawk* and the statute's definition of "interested party" within the

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[1] Chief Justice Moyer, joined by Justices Cook and Lundberg Stratton, dissented, finding that the union did not have standing as an interested party, because the subcontractors' employees had not executed authorization forms until after Local 33 filed its complaint. The dissent did not address the issue of whether the execution of authorization forms only authorizes a union to file suit on behalf of those employees who affirmatively authorized representation.

context of "a particular public improvement," that Mr. Cherfan's written authorization to allow Local 33 to represent him in this prevailing wage action was sufficient to impute standing to Local 33 to file a prevailing wage complaint with respect to the entire project and any and all violations with respect to any and all of Gene's employees. The Supreme Court did not specify that Local 33 only had standing to pursue a complaint on behalf of those specific employees who signed the authorization forms. Rather, the high court expressly stated that the statute does not require that any specific percentage of employees must authorize representation before the union may file a prevailing wage complaint. In fact, it appears that it is merely the affirmative act of an employee's authorizing representation which substantiates jurisdiction and imputes interested party status to the union.

{¶23} Neither party cites any other case law which has addressed this issue, and, in fact, this Court has found none. This Court has found three law review articles which cite the *Mohawk* case, including one authored by Chief Justice Moyer who dissented in *Mohawk*; however, none illuminates the issue before us.

{¶24} Based on the above discussion, this Court finds that Gene's failed to meet its initial burden under *Dresher* to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law on the issue of Local 33's standing as an interested party to file a prevailing wage claim on behalf of

any or all of Gene's employees and in regard to any or all violations of the prevailing wage law. Accordingly, the trial court erred by granting summary judgment in favor of Gene's on this issue. Local 33's first assignment of error is sustained.

LOCAL 33'S SECOND ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED WHEN IT ADOPTED THE MAGISTRATE'S LEGAL CONCLUSION THAT TIME SPENT BY GENE'S EMPLOYEES WORKING ON MATERIALS USED IN OR IN CONNECTION WITH A PARTICULAR PUBLIC IMPROVEMENT, I.E., SHOP TIME, WAS NOT COMPENSABLE AT THE PREVAILING WAGE RATES APPLICABLE IN THE JOB SITE'S LOCALITY."

{¶25} Local 33 argues that the trial court erred by adopting the magistrate's decision, which granted summary judgment in favor of Gene's upon finding that shop work performed by an employee off-site from the public improvement project is not subject to Ohio's Prevailing Wage Law. This Court agrees.

{¶26} This Court has set out our standard of review of summary judgments above.

{¶27} In its motion for summary judgment, Gene's relied on a 1934 decision of the Ohio Supreme Court, *Clymer v. Zane* (1934), 128 Ohio St. 359. The *Clymer* case involved a contractor's employees who worked in an off-site gravel pit to provide sand and gravel for concrete to be used in a public improvement project. The applicable prevailing wage law at the time was codified in Section 17 of the General Code. Section 17-4, General Code, provided for the

payment of "a fair rate of wages to be paid by the successful bidder to the employees in the various branches or classes of the work." Section 17-6, General Code, provided for fines and penalties for any contractor/subcontractor who violated the wage provisions of the contract. In addition, that section provided for the recovery by "[a]ny employee upon any public improvement" of a penalty sum from the constractor/subcontractor.

{¶28} The issue before the Supreme Court was whether "the men who worked in the gravel pit [were] employees *upon a public improvement*?" (Emphasis in original.) Id. at 362. The *Clymer* court held:

> "A private enterprise, separate in time and in space, is not necessarily a part of a public improvement because owned and operated by the contractor in charge of the public improvement, and workmen employed in such private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such enterprise is used in the public improvement." Id. at paragraph three of the syllabus.

The Supreme Court reasoned:

> "To extend the provisions of the statute to all employees who prepare material for a public improvement would be to include within the provisions of the law the employees of a cement factory which makes cement for a public improvement, and the employees of a brick plant which makes paving brick for a public highway, if such cement plant or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely lead to conflicts with regulations and 'codes' governing wages of other industries. Clearly it was not the intention of the Legislature to extend the provisions of section 17-6 so far. It can be safely assumed that the intention of the Legislature is accurately stated in the section of the law which imposes the penalty. From its position in the series of sections and from its very nature we must conclude that it determines the legislative intent. And because it is a

> penal section it must be construed in favor of the person against whom it assesses the penalty." Id. at 363-64.

{¶29} Local 33 argues that the holding in *Clymer* was superseded when the legislature enacted legislation the next year in 1935 to "amend sections 17-3, 17-4 and 17-5 of the General Code and to enact supplementary sections 17-4a and 17-5a pertaining to prevailing rate of wages on public improvements." Am.S.B. No. 294. Section 17-4a, General Code, was supplemented to provide in relevant part:

> "The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash."

{¶30} The Ohio Supreme Court has stated that "a legislative body in enacting amendments is presumed to have in mind prior judicial constructions of the section[.]" *State ex rel. Cty. Bd. of Edn. of Huron Cty. v. Howard* (1957), 167 Ohio St. 93, 96 (holding that prior Supreme Court case law interpreting a statutory provision was still authoritative law even though the legislature had amended the statute many times since, because the legislature never changed the particular phraseology at issue). The Supreme Court has further held that "legislative inaction in the face of longstanding judicial interpretations of [a] section [of a statute] evidences legislative intent to retain existing law." *State v. Cichon* (1980), 61 Ohio St.2d 181, 183-84.

{¶31} It has been said:

> "The intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislature's will, without any regard to their own views as to the wisdom or justice of the particular enactment. *** It is dangerous to attempt to be wiser than the law, and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. And courts should adhere to the cardinal rule that the judicial functions are always best discharged by an honest and earnest desire to ascertain and carry into effect the intention of the law-making body." *Beck v. Commrs. Of Medina Cty.* (1883), 9 Ohio Dec.Reprint 108.

{¶32} The Ohio Supreme Court has recognized the legislature's authority to modify the law:

> "The law itself, as a rule of conduct, may be changed at the will *** of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Leis v. Cleveland Ry. Co.* (1920), 101 Ohio St. 162, 165.

{¶33} In this case, this Court finds that the legislature, presumed to have been aware of the holding in the *Clymer* case, took swift and affirmative actions to supplement the prevailing wage law to require the payment of the prevailing rate to "laborers, workmen or mechanics upon any material to be used upon or in connection [with public works]." Am.S.B. No. 294. The amended statute expressly addressed the issue of an off-site employee's right to be paid at the prevailing rate. The current version of the statute mirrors the same intent of the legislature to include off-site employees within the purview of the prevailing wage

law. R.C. 4115.05 provides for the prevailing rate of wages to be paid to laborers, workers, or mechanics upon public works. That section further expressly provides:

> "The prevailing rate of wages to be paid for a legal day's work, to laborers, workers, or mechanics, upon any material to be used in or in connection with a public work, shall be not less than the prevailing rate of wages payable for a day's work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used."

{¶34} R.C. 4115.10(A) mandates that no entity that constructs a public improvement with its own forces shall violate Ohio's Prevailing Wage Law, R.C. 4115.03 to 4115.16. That section further prescribes a penalty for any such entity "who fails to pay the rate of wages so fixed[.]" R.C. 4115.10(A). Although this section provides an express recovery for "[a]ny employee upon any public improvement" who has not been paid the fixed rate, a reading of this provision in its entirety indicates that the penalty provision is applicable for any violation of the wage provisions, necessarily including R.C. 4115.05 regarding workers upon materials to be used in or in connection with the public work.

{¶35} Our view also comports with the purposes behind the prevailing wage law, enunciated by the Ohio Supreme Court:

> "The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, inter alia, worker rights and remedies vis-à-vis private contractors, subcontractors and materialmen engaged in the construction of public improvements in this state. *** Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining

> process by preventing the undercutting of employee wages in the private construction sector." *Internatl. Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1988), 36 Ohio St.3d 74, 78.

{¶36} In addition, this Court finds support for our position in Judge Zimmerman's dissent in *Clymer*. The dissent opined that the "intimate connection between the gravel pit and the road construction work, geographically and otherwise," entitled the gravel pit workers to receive the prevailing rate of wages in that case. *Clymer*, 128 Ohio St. at 365. This idea is mirrored in the legislature's 1935 amendment to the prevailing wage law, which required the payment of the prevailing wage to workers upon materials to be used in or in connection with a public improvement. The legislature has maintained that same requirement within the current version of the statute.

{¶37} The requirement that the work be done "upon any material to be used in or in connection with a public work," mandates such an "intimate connection," thereby foreclosing Gene's argument that a break from the holding in *Clymer* would create unwieldy results. Gene's speculated that it would be a logistical nightmare to track all materials used in a public improvement to ensure that those off-site fabricators were paid the correct wage. The statute, however, includes a presupposition that the materials at issue must be fabricated specifically "to be used" in regard to the project, rather than pre-fabricated materials made in the ordinary course of business by suppliers. This Court surmises that it would not be difficult to trace materials made specifically for a particular public

improvement to determine which off-site workers would be subject to the prevailing wage law.

{¶38} R.C. 4115.05 is also clear in its mandate of which prevailing rate must be paid to off-site workers. The statute expressly states that the rate of wages shall be that in the location "where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used." Accordingly, Gene's argument that it would be too cumbersome to determine which prevailing wage is applicable is unfounded.

{¶39} Based on the above reasoning, this Court finds that the Ohio Supreme Court's holding in *Clymer*, that off-site workers are not entitled to receive the prevailing wage, has been superseded by the legislature in its amendment and express supplementing of the prevailing wage law. The statute now expressly provides for the payment of the prevailing rate of wages to employees who fabricate materials to be used in or in connection with a public work. Accordingly, this Court finds that Gene's failed to meet its initial burden under *Dresher* to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law on the issue of whether an off-site shop worker who fabricates materials to be used in or in connection with a public improvement is subject to the prevailing wage law. Accordingly, the trial court erred by granting summary judgment in favor of Gene's on this issue. Local 33's second assignment of error is sustained.

GENE'S CROSS-ASSIGNMENT OF ERROR

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO R.C. 4115.16(D), AND FINDING THAT PLAINTIFF'S ACTION WAS NOT UNREASONABLE OR BROUGHT WITHOUT FOUNDATION."

{¶40} Gene's argues that the trial court abused its discretion by denying its motion for attorney fees and costs pursuant to R.C. 4115.16(D).

{¶41} R.C. 4115.16(D) provides:

"Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and courts costs to the prevailing party. In the event that court finds that no violation has occurred, the court may award court costs and attorney fees to the prevailing party, other than to the director or the public authority, where the court finds that action brought was unreasonable or without foundation, even though not brought in subjective bad faith."

{¶42} Based on our disposition of Local 33's two assignments of error, Gene's is no longer "the prevailing party." Accordingly, this Court need not reach the merits of Gene's cross-assignment of error as it is now rendered moot. App.R. 12(A)(1)(c).

III.

{¶43} Local 33's two assignments of error are sustained. We decline to address Gene's cross-assignment of error. The judgment of the Medina County Court of Common Pleas is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee/cross-appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

SLABY, P. J.
DISSENTS, SAYING:

{¶44} I would affirm the decision of the trial court in its entirety and respectfully dissent from the majority's resolution of both assignments of error.

{¶45} With respect to the Union's first assignment of error, I conclude that R.C. 4115.03(F)(3) does not contemplate that an employee organization may file a complaint on behalf of all employees as an "interested party" based solely on a written authorization of representation granted by one. As the majority notes, R.C. 4115.03(F)(3) defines an interested party, in part, as "[a]ny bona fide organization of labor which has as members or is authorized to represent employees" of a person referenced in R.C. 4115.03(F)(1) or (F)(2). To conclude that one employee – let alone one employee whose work is offsite and whose involvement in the public improvement is speculative, at best – to effect an authorization of legal representation goes far beyond what the legislature intended.

{¶46} In *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, the Supreme Court of Ohio addressed the representation requirements of R.C. 4115.03(F)(3) and concluded that, on the facts of that case, the written authorizations of several employees were effective. In that case, the Union had engaged in an organizational drive with the employer's employees, but did not yet represent the employees for purposes of collective bargaining. At issue in that case was whether R.C. 4115.03(F)(3)

required the Union to be the employee representative for purposes of collective bargaining in order to be an interested person under that subsection, which also provides that an employee organization must "exist[], in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees[.]" *Mohawk*, 86 Ohio St.3d at 613. Six employees signed written authorizations at one point or another during the dispute, and the Union filed a complaint alleging violations of the prevailing wage statute. The Court concluded that it was sufficient for purposes of R.C. 4115.03(F)(3) "that the labor organization in its normal course concerns itself with the stuff of the prevailing wage statute [because] [b]argaining about wages and hours just has to be something that the labor organization normally does." Id. at 614. Accordingly, the Court determined that R.C. 4115.03(F)(3) did not require the existence of a collective bargaining agreement or an affirmative vote by a majority of employees in order for the Union to qualify as an interested party.

{¶47} Significantly, the *Mohawk* decision was limited to these threshold issues. It does not address the scope of the Union's representation. Indeed, there is nothing in the opinion that would indicate that the Union's participation as an interested party related to any employees other than those who provided written authorizations of representation. Justice Moyer's dissent is illustrative on this point. While agreeing with the majority's statement of the law, the dissent parted ways with the majority on the issue of the timing of the authorizations, concluding

that an authorization must be signed before a complaint under the prevailing wage statute is filed by the purportedly interested party. As the dissent explained:

> "In my view, the execution of authorization forms may be used to authorize a union to stand in the place of non-member employees in regard to alleged prevailing wage claims. *Execution of authorization forms such as those used in the case is analogous to the creation of an attorney-in-fact relationship, and sufficient to satisfy subsection (F)(3), if the forms are executed before the union takes an action on behalf of the employees.* *** In order to demonstrate its standing as an interested party pursuant to R.C. 4115.03(F)(3) based on the execution of authorization forms by non-union members, a labor union should be required to demonstrate that the persons it represents are, in fact, employees of the company accused of violating prevailing wage laws." (Emphasis added.) *Mohawk* at 616-17, Moyer, C.J., dissenting.

{¶48} It appears more than likely that the representation at issue in *Mohawk* related to the employees whose authorizations were at issue – not to employees at large, whether or not they had authorized it.

{¶49} *Mohawk* does not stand for the proposition that once a single employee authorizes representation under R.C. 4115.03(F)(3), a labor organization has carte blanche authority to represent the interests of all. The majority's inference to the contrary is unwarranted, and I would overrule the Union's first assignment of error on this basis.

{¶50} I also disagree with the majority's resolution of the Union's second assignment of error and would affirm the judgment of the trial court granting summary judgment to Gene's because the language of R.C. Chapter 4115 and, in particular, R.C. 4115.05, when considered in its totality, is consistent with the

Supreme Court of Ohio's decision in *Clymer v. Zane* (1934), 128 Ohio St. 359. The majority attempts to limit the practical effects of its holding, but one might fairly ask at what point the fabrication process achieves the "intimate connection" that the majority envisions. When a contractor produces duct work in the normal course of its business for its own use in construction activities, is the connection established when some of its materials are used in relation to a public improvement? Must the fabricator of materials that are incorporated in machines used in job assembly pay the prevailing wage because the machine is ultimately used "in connection with a public work"? When certain off-site employees are paid for fabrication of materials, how is the fraction of their time spent on those items that become part of a public improvement to be determined and compensated out of an entire working day? Must a contractor now record those fractions of working time spent by off-site employees whose work bears a tangential relationship to material used in public improvements? Simply put, the rule is unworkable.

{¶51} I respectfully dissent.

APPEARANCES:

RYAN K. HYMORE and JOSEPH M. D'ANGELO, Attorneys at Law, for appellant/cross appellee.

ALAN G. ROSS and NICK A. NYKULAK, Attorneys at Law, for appellee/cross-appellant.