IN THE SUPREME COURT OF OHIO

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33,	:	Ohio Supreme Court Case No. 2008-0780
Appellee,	:	On Appeal From the Medina County Court of Appeals, Ninth Appellate District
v.	:	Court of Appeals Case No. 06CA0104-M
GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.	:	Medina County Court of Common Pleas, Case No. 05-CIV-1249
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICUS CURIAE*, OHIO CHAMBER OF COMMERCE, DAYTON AREA CHAMBER OF COMMERCE, COUNCIL OF SMALLER ENTERPRISES, GREATER AKRON CHAMBER OF COMMERCE, YOUNGSTOWN/WARREN REGIONAL CHAMBER, AND TOLEDO REGIONAL CHAMBER OF COMMERCE

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FILED
APR 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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I. INTRODUCTION

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The Dayton Area Chamber of Commerce was formed in 1907 as a leader in economic development, public policy and business advocacy for the Dayton area business community. The Dayton Chamber continues to lead public policy initiatives and economic development projects that foster a business friendly environment for Dayton area businesses. Through the Dayton Chamber's membership services and networking opportunities businesses are able to connect and grow in the Dayton region, and support the Dayton area's history of innovation and entrepreneurial success.

The Council of Smaller Enterprises, (COSE), is Northeast Ohio's largest small business support organization. COSE strives to help small businesses grow and maintain their independence. Comprised of more than 17,000 member companies, COSE has a long history of fighting for the rights of all small business owners, whether it's through group purchasing programs in healthcare, workers' compensation, payroll services, or shipping, or advocating for specific changes in legislation or regulation.

The Greater Akron Chamber is a regional chamber of commerce and economic development organization serving the Northeast Ohio counties of Medina, Portage, and Summit. For 101 years, the Greater Akron Chamber has been committed to continual improvement of it's community, our economy, and our quality of life. For it's more than 1,500 member companies, the Greater Akron Chamber offers the best bottom-line, result-producing benefits; networking

and marketing opportunities; small business support; public representation; and information services.

The Youngstown/Warren Regional Chamber is a private, non-profit organization formed in 1993 (a merger of the Youngstown, Warren and Niles chambers of commerce) that provides leadership and business services to promote the growth of it's nearly 3,000 members—representing more than 150,000 employees in the Mahoning Valley.

Since 1894, the Toledo Regional Chamber of Commerce has been making an impact for business in Northwest Ohio. The Chamber has built a solid membership of over 3400 businesses, spanning from Fortune 500 companies to small businesses with only one employee. The Chamber's mission is to make its members more competitive by saving them time and money and providing opportunities for business growth and development.

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

This matter presents two critical issues regarding the construction of public improvement projects that are 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 of all materials to be "used in or in connection with" a public improvement project is to be paid at prevailing wages 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 performed work on the jobsite of the project, had authorized a labor organization to represent him pursuant to R.C. 4115.03(F) and R.C. 4115.16.

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

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 any other trade or craft on the public improvement project, even though only one employee had signed a written form authorizing just his own representation.

The Ninth District Court of Appeals decision is contrary to two well established Ohio Supreme Court decisions,[1] 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 1934 holding in *Clymer*, no Court or administrative agency, including the Ohio Department of Commerce, the state department currently charged with enforcement of Ohio's Prevailing Wage Law, or its predecessors, the Ohio Bureau of Employment Services and the Bureau of Industrial Relations, have ever held to the contrary, or required prevailing wages to be paid for the off-site preparation, manufacture or fabrication 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

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[1] 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.

underpayment of wages to any employee who has 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 businesses and construction contractors doing work in Ohio, many of whom are members of *Amicus Curiae*. For example, because of the holding of the Ninth District, work performed on the following "materials" manufactured in different industries would now be subject to prevailing wages even though it was never subject to this law before:

> (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 would 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, and pre manufactured walls and floors.
>
> (3) Concrete: Batch plants, gravel pits, quarries and all ready mix suppliers that supply materials to make concrete or asphalt would all be subject to prevailing wages for all road work projects, parking lots, sidewalks, foundations and the like.
>
> (4) Sheet Metal: All sheet metal duct work manufactured for a public improvement project including heating, ventilation and cooling units manufactured by companies such as Carrier and Trane that could be used on a public project. 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, sprinkler heads, and fire detection devices.
>
> (6) Electrical: The pre-assembly of breaker boxes and other electrical equipment to be installed on the project, the fabrication of stock materials such as wire and conduit used on the project.

(7) Masonry: The cutting and manufacturing of block, brick and stone used on public projects, including prefabrication of stone countertops and other decorative stone products.

(8) Glass: Manufacturing and fabrication of glass for windows or doors on public projects.

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

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

(11) Landscaping: Nurseries and tree farms that supply plants for installation on public projects.

(12) Roofing: The manufacture of all roofing materials used on public projects including shingles, roof liners and compounds.

The decision of the Ninth District would also require prevailing wages to be paid 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."

The Ninth District's decision also would cause the cost of public improvement projects to skyrocket, placing a further strain on Ohio's already beleaguered 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 and to the members of *Amicus Curiae*.

The Ninth District's decision imposes additional substantial and costly burdens upon members of *Amicus Curiae* never intended by the legislature in that it:

(1) Affects suppliers of manufactured materials who will have to track items manufactured for a public project or stock items which are sold at a later date to contractors working on public projects and pay prevailing wages;

(2) Imposes the extensive record keeping requirements related to Ohio's Prevailing Wage Law on Ohio manufacturers, including the preparation and filing of certified payroll reports identifying the employees manufacturing or preparing materials for public projects and documenting that they were paid prevailing wages;

(3) Results in the loss of jobs and opportunities for untold numbers of Ohio workers because contractors would use out-of-state companies rather than Ohio manufacturers and fabricators since Ohio law is unenforceable in other states.

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 of great public concern 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 manufactured materials for the project when just one employee had authorized the union to represent that employee's own interest. As 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 would injure and impinge 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 Ohio Department of Commerce and the Director must investigate the claim.

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. The Ninth District's decision would give unions the license to insert themselves in a manner that undermines this statutory scheme and results in the 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." The legislature only intended to allow labor unions to bring interested party actions on behalf of their own members or those employees who expressly authorize the unions to do so.

III. 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 the 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/fabrication 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 fabrication and manufacturing work is performed, including the fabrication of metal duct work. To complete this Project, Gene's fabricated/manufactured 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/manufacturing shop prevailing wages. However,

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 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 the purpose 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 prefabricated and manufactured 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 the one Gene's employee who signed the union authorization card, and further held that the materials fabricated off site and used on the Project by the one individual who authorized Local 33 to file a prevailing wage complaint are not subject to the provisions of Ohio's Prevailing Wage Law. 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 of Gene's employees who worked on the Project, even though only one employee, who never worked on the Project,

authorized the Union to represent 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; and (2) that the off site fabrication 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 the Ohio's Supreme 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 fabrication and 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 all of Gene's employees when only one employee signed a written form giving Local 33 standing to file a prevailing wage complaint only on his behalf.

In support of its position on these issues, *Amicus Curiae* present the following argument.

IV. 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 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, every public authority, and members of Amicus Curiae that off-site work is not covered, and held that this Court's 1934 holding in *Clymer v. Zane* was *legislatively superseded* in 1935 by Am.S.B. 294 by virtue of the addition of the following sentence to 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, and for 74 years no court has interpreted this as requiring the payment of prevailing wages on off-site work. All the while the Legislature 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 of 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 <u>upon</u> 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, **<u>or other person about or upon such public work,</u>** 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 held by the Ninth District. To the contrary, various Ohio Courts including the Ohio Supreme Court, as well as other State Courts have continued to cite *Clymer* for various reasons; none have ever indicated this case has been *legislatively superseded.* [2]

The Ninth District's holding regarding prevailing wages to be paid for off-site fabrication and manufacture 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 Authorization from an Employee Who has Worked on a Project Subject to the Requirements of Ohio's 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 the 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 would violate 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 on a public improvement project. *Id.* at 613.

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[2] 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*.

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 six 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 **on their behalf**...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.**" *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.

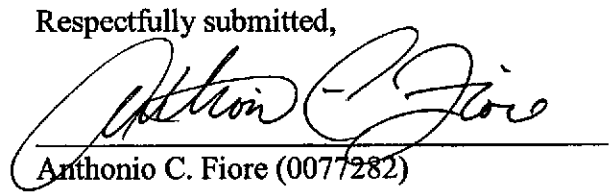
The Ohio Supreme Court's reasoning in *Mohawk* for limiting Local 33's representation to only those employees who authorized the union to file suit on their behalf is sound and correctly interprets the Legislature's intent. The Third District Court of Appeals in *International Asso. of Bridge, etc. Local 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. The Ninth District's decision is contrary to *Mohawk Mechanical* and the Legislature's intent. The Court should grant jurisdiction to not only prevent the proliferation of litigation that will surely follow if the Ninth District's decision is allowed to stand, but to also protect the rights of

employees to be free to authorize whomever they wish to represent them, not a union that is thrust upon them because of a single employee authorization.

IV. CONCLUSION

In view of the foregoing, and for the reasons stated in the brief of *Amicus Curiae*, this case involves a matter of great public interest and it is respectfully requested that this Court grant jurisdiction to review the ruling of the Ninth District Court of Appeals.

Respectfully submitted,



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Dated: April 24, 2008

CERTIFICATE OF SERVICE

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

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