

IN THE SUPREME COURT OF OHIO

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

Appellee

v.

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

Appellant

* On Appeal from the Medina County
Court of Appeals, Ninth Appellate
* District

* Supreme Court Case No. 08-0780

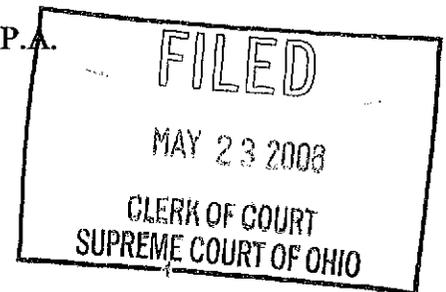
* Court of Appeals
Case No. 06CA0104-M

*
Court of Common Pleas
* Case No. 05-CIV-149

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**MEMORANDUM IN RESPONSE OF APPELLEE SHEET
METAL WORKERS' INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 33**

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This Court should either decline jurisdiction or summarily affirm the Ninth District Court of Appeals' March 10, 2008 decision. Whether this case raises an issue of public or great general interest is of no consequence because the issues raised by Gene's Refrigeration can be resolved summarily on the merits.

I. STATEMENT REGARDING WHETHER THIS CASE PRESENTS ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

Sheet Metal Workers' Local Union No. 33 ("Local 33") does not contest the general statement that issues affecting Ohio's Prevailing Wage Law are issues of public or great general interest. But it does oppose the needless reiteration of settled law. As to the First Proposition of Law, the Legislature clearly declared its intention that time spent upon materials to be used in or in connection with a public improvement, otherwise known as "shop time," is to be compensated at the prevailing rate of wages. As to the Second Proposition of Law, the Legislature clearly drafted, and this Court clearly construed, R.C. 4115.03(F) and R.C. 4115.16 to permit a statutorily defined interested party to seek redress for all violations of Ohio's Prevailing Wage Law across an entire public improvement.

Appellant Gene's merely speculates on the wide impact the Ninth District's decision could have. Its musings and policy arguments are better suited as fodder for lobbying the General Assembly, than as purported legal argument to this Court. Accordingly, this Court should conserve its limited resources and decline jurisdiction, or alternatively accept jurisdiction and summarily affirm the Ninth District's decision.

The parties stipulated all of the operative facts.¹ The Granger Fire Station project (“Project”) in Medina County was subject to Ohio’s prevailing-wage law.² Gene’s bid for, and performed HVAC work on the Project.³ Gene’s also fabricated ductwork at its offsite shop to be installed on the Project. Gene’s admitted that its shop employees were paid less than prevailing wages,⁴ despite the fact that the employees fabricated duct that was exclusively made for and installed in the Project.⁵ Local 33 is a bona fide organization of labor that exists to negotiate with employers concerning wages, hours, and terms and conditions of employment.⁶ And Local 33 was authorized to represent an employee of a person who submitted a bid on the project.⁷

Local 33 filed an R.C. 4115.16(A) administrative complaint.⁸ After sixty-plus days without a determination,⁹ Local 33 invoked R.C. 4115.16(B) and brought the prevailing-wage investigation into court.¹⁰ Local 33 alleged several violations of R.C. 4115.03 to 4115.16,¹¹ including certified-payroll-report violations, underpayments, misclassifications, shop-time related reporting and underpayment violations, journeyman-to-apprentice ratio violations, and overtime violations.¹²

¹ (Joint Mot. Reconsider, Stip. Fact).

² (*Id.* at ¶¶ 2-4, 21).

³ (Joint Mot. Reconsider, Stip. Fact ¶¶ 9-10).

⁴ (Joint Mot. Reconsider, Stip. Fact ¶ 18).

⁵ (Joint Mot. Reconsider, Stip. Fact ¶¶ 11, 14, 15, 17).

⁶ (*Id.* at ¶¶ 5-6).

⁷ (*Id.* at ¶¶ 12-13).

⁸ (*Id.* at ¶ 19).

⁹ (Joint Mot. Reconsider, Stip. Fact ¶ 20).

¹⁰ (*Id.* at ¶¶ 22, 24).

¹¹ (*Id.* at ¶ 23).

¹² (Compl. ¶ 14A-F).

Shortly after suit was filed Gene's sought summary judgment, requesting dismissal.¹³ Local 33 opposed, and filed a cross motion for partial summary judgment.¹⁴ The parties entered into a comprehensive stipulation of facts to support the motions.¹⁵ They were referred to a magistrate,¹⁶ who entered findings of fact and conclusions of law denying Local 33's motion, and granting Gene's motion.¹⁷ Both parties objected.¹⁸ The trial court adopted the magistrate's decision in full.¹⁹ Local 33 appealed. Gene's cross-appealed the court's denial of its request for attorneys' fees and costs. The Ninth District reversed the decision of the trial court and held:

- (1) based upon the Supreme Court's discussion in *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, and the statute's definition of "interested party" within the context of "a particular public improvement," an interested party has standing 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;²⁰ and
- (2) based upon the Legislature's 1935 Amendment to the Prevailing Wage Law overruling *Clymer v. Zane* (1934), 128 Ohio St. 359, Ohio's Prevailing Wage Law "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."²¹

¹³ (Def.'s Mot. Summ. J.).

¹⁴ (Cross-Mot. Partial Summ. J. & Response Def.'s Mot. Summ. J.).

¹⁵ (Joint Mot. Reconsider).

¹⁶ (Br. Appellant Ex. 2, SMW0003, 3/28/06 Magistrate's Order; Br. Appellant Ex. 3, SMW0004, 3/30/06 Amended Magistrate's Order).

¹⁷ (Br. Appellant Ex. 4, SMW0005-0010, 4/27/06 Magistrate's Decision Summ. J.).

¹⁸ (Pl.'s Objections Magistrate's Decision; [Def.'s] Written Objections Magistrate's Decision Strike Certain Exs.)

¹⁹ (Br. Appellant Ex. 5, SMW0011, 6/9/06 J. Entry).

²⁰ *Sheet Metal Workers' Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & AirConditioning, Inc.*, 2008-Ohio-1005, at ¶22.

²¹ *Sheet Metal Workers' Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & AirConditioning, Inc.*, 2008-Ohio-1005, at ¶39.

IV. ARGUMENT AS TO PROPOSITIONS OF LAW

Gene's 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.

Local 33's Contrasting Proposition of Law No. 1: R.C. 4115.05 requires that employees performing work on materials to be used in or in connection with a public improvement shall be compensated at the prevailing rate of wages.

Gene's jurisdictional brief raises no issues worthy of this Court's consideration. Appellant raises only unfounded policy arguments that are better reserved for lobbying the legislature to amend the prevailing wage law. Even the occasional legal argument is purely conclusory, and incognizant of the appellate court's well reasoned opinion. A case in point is Gene's baseless claim that the General Assembly did *not* overrule the 1934 Supreme Court decision in *Clymer v. Zane*.²² The timing of events coupled with the content of the new enactments directly establish that the Ninety-first General Assembly did, in fact, legislatively overrule *Clymer*.²³

The *Clymer* Court ruled that the prevailing wage law did not apply to off-site work. This decision was based on the then existing statutory language, which permitted recovery only for "[a]ny employee upon any public improvement." Within months of this decision, the Ninety-first General Assembly added a

²² *Clymer v. Zane* (1934), 128 Ohio St. 359, 364, *legislatively superseded by* S. 294, 91st Gen. Assem., Reg. Sess. (Ohio 1935). *See also* 1935 Ohio Laws 206, 207 (1935).

²³ *E.g.*, *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 302 (recognizing the General Assembly may supersede an Ohio Supreme Court opinion). *See Hearing v. Wylie* (1962), 173 Ohio St. 221, 223 (recognizing the General Assembly may supersede an Ohio Supreme Court opinion even where the General Assembly does not explicitly say it is doing so), overruled on other grounds by *Village v. General Motors Corp.* (1984), 15 Ohio St.3d 129, 131.

“supplementary section” to the prevailing-wage statute.²⁴ The supplemental section required employees to be paid prevailing wage rates for work on “material to be used upon or in connection” with a public improvement.²⁵ Specifically, the General Assembly enacted “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, supplemented the existing statutory scheme with the following:

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.

As the Ninth district recognized, the Legislature has the authority to supersede judicial decisions, and modify the law.²⁶ Based on that deference, the Ninth District found:

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.²⁷

Currently this same operative language is in R.C. 4115.05, which states:

²⁴ 1935 Ohio Laws 206, 206-07.

²⁵ *Id.* at 207; S. 294, 91st Gen. Assem., Reg. Sess. (Ohio 1935).

²⁶ *Sheet Metal Workers' Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & AirConditioning, Inc.*, 2008-Ohio-1005, at ¶30-32. See also, *State ex rel. Cty. Bd. of Edn. Of Huron Cty. v. Howard*, (1957), 167 Ohio St. 93, 96; *Beckv. Commrs. Of Medina Cty.* (1883), 9 Ohio Dec.Reprint 108. *Leis v. Cleveland Ry. Co.*, (1920) 101 Ohio St. 162, 165.

²⁷ *Sheet Metal Workers' Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & AirConditioning, Inc.*, 2008-Ohio-1005, at ¶33.

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.

Local 33's shop-time claim focuses on Gene's employees who worked in the shop fabricating materials used in the Project.²⁸ And based on the foregoing, such off-site work is covered by the law. Accordingly, the Ninth District Court of Appeals was correct in holding that shop time is compensable at prevailing wage rates.

Besides, allowing non-union contractors to use often much lower, non-prevailing wage shop rates in preparing their bids creates an unfair advantage that the prevailing-wage law was designed to alleviate.²⁹ Thus the policy behind the prevailing wage law dictates that hours logged by Gene's employees for fabrication of material used in the Project are compensable at Medina County's prevailing wage rates for sheet metal workers.

Gene's Proposition of Law No. 2: A Labor Organization that Obtains Written a (sic) 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.

Local 33's Contrasting Proposition of Law No. 2: A statutorily defined interested party is authorized to file any complaint contemplated by R.C. 4115.16 for any and all violations of Ohio's Prevailing Wage Law across the entire particular public improvement at issue.

²⁸ (Joint Mot. Reconsider, Stip. Fact ¶ 11, 12, 14-18).

²⁹ *Id.*; *Harris v. Bucy & Hill, Inc.* (May 13, 1987), 4th Dist. No. 1614, 1987 WL 12248, at *2 (observing that prevailing wage rates "are designed to equalize the cost of labor between union and non-union bidders on a public works project").

Gene's completely disregards the clear statutory language in R.C. 4115.03(F) and R.C. 4115.16 in formulating its second proposition of law. "Given the purpose of the prevailing wage law,³⁰ labor organizations have standing to ensure that contractors pay the prevailing wage on public improvements."³¹ To invoke this standing, a labor organization must meet the definition of an "interested party" in R.C. 4115.03(F). This Court has expressly rejected reading additional restrictive requirements into the statutory definition.³² The statute is clear and unambiguous:

(F) "Interested party," *with respect to a particular public improvement*, means:

(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.³³

³⁰ The purpose of the prevailing wage law is to preserve the integrity of the collective bargaining process by preventing the undercutting of employee wages on public projects. *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 431 N.E.2d 311, syllabus.

³¹ *Ohio St. Assoc. of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Johnson Controls, Inc.* (1997), 123 Ohio App.3d 190, 195.

³² *See Sheet Metal Worker's International Association, Local Union No. 33 v. Mohawk Mechanical* (1999), 86 Ohio St.3d 611, 614 (stating "[s]ince a competitive bid situation is not an element of R.C. 4115.03(F)(1), [the contractor] meets the requirements of a "person" under division (F)(1)."

³³ R.C. 4115.03(F) (emphasis added).

It is undisputed that Local 33 is an “interested party” under R.C. 4115.03(F)(3). The parties stipulated that Local 33 is a bona fide organization of labor that exists to negotiate with employers concerning employees’ wages, hours, and terms and conditions of employment.³⁴ The parties further stipulated that Local 33 was authorized to represent an employee of a person who submitted a bid on the project.³⁵ Therefore, Local 33 is an interested party as defined in R.C. 4115.03(F). R.C. 4115.16(B) creates the interested party prevailing wage enforcement action. It provides:

An interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code.

* * *

If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred... Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code.³⁶

This Court’s prior precedent makes clear that an interested party in an enforcement proceeding may pursue all violations across the public improvement. In *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, the Court held

³⁴ (Joint Mot. Reconsider, Stip. Fact at ¶¶ 5-6).

³⁵ (*Id.* at ¶¶ 12-13).

³⁶ R.C. 4115.16(B).

the director could sue to enforce all claims for underpayments on behalf of all employees who do not pursue their claims through R.C. 4115.10(A) or (B). In doing so, the Court reasoned that the General Assembly's intent in adding enforcement mechanisms—like interested-party standing—“is to enforce claims for prevailing wage violations, even where the affected worker fails to act.”³⁷

In *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.*,³⁸ this Court wrote “[w]hile the statute requires that the labor organization ‘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,’ it does not require that it perform that function for the employees at issue.”³⁹ In so holding, the Court reasoned,

The statute states that the labor organization must exist, in whole or in part, for the purpose of negotiating with *employers*, not “the employer in question.” The statute speaks in a general sense, ensuring that the labor organization in its normal course concerns itself with the stuff of the prevailing wage statute. Bargaining about wages and hours just has to be something that the labor organization normally does. This provision ensures that employees will have their rights defended by an organization with some expertise.”

Id.

The legislature defined an interested party “with respect to a particular public improvement.”⁴⁰ It necessarily follows that the standing established by R.C. 4115.03(F), and the corresponding cause of action to enforce the law set forth in R.C. 4115.16(B), extend to the entire public improvement. Accordingly, once a labor organization satisfies the requirements of R.C. 4115.03(F), it is an

³⁷ *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 27.

³⁸ (1999), 86 Ohio St.3d 611

³⁹ *Mohawk Mechanical*, 86 Ohio St.3d at 614.

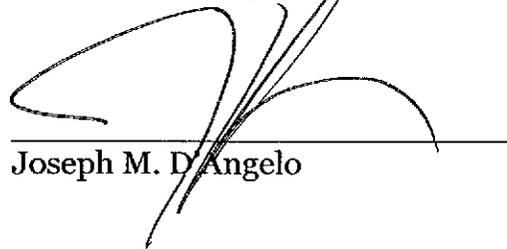
⁴⁰ R.C. 4115.10(F).

interested party with respect to the public improvement at issue, and it may pursue project-wide, all violations of the prevailing wage law on that public improvement.

V. CONCLUSION

For the foregoing reasons, this Court should either decline jurisdiction or summarily affirm the Ninth District Court of Appeals' March 10, 2008 decision.

Respectfully submitted,
By Cosme, D'Angelo & Szollosi Co., LPA

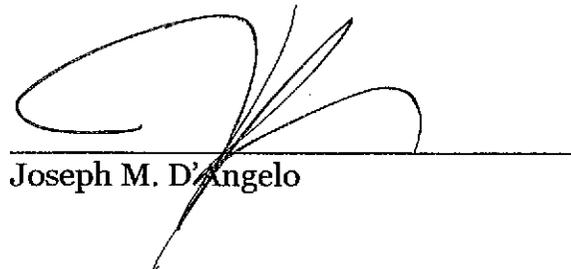


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following this 22nd day of May 2008 via Regular U.S. Mail:

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