

IN THE SUPREME COURT OF OHIO

STATE, EX REL. NORTHWESTERN : CASE NO. **08-1069**
OHIO BUILDING & CONSTRUCTION :
TRADES COUNCIL, ET AL, :
Relators - Appellants, : On Appeal from the
v. : Ottawa County
OTTAWA COUNTY IMPROVEMENT : Court of Appeals,
CORP., ET AL, : Sixth Appellate District
Respondents - Appellees. : Court of Appeals Case
No. 07-07-017

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
AMICUS CURIAE MECHANICAL CONTRACTORS ASSOCIATION OF OHIO**

JOSEPH M. D'ANGELO (0063348)
COSME, D'ANGELO & SZOLLOSI CO.,
L.P.A.
The CDS Building
202 M. Erie Street
Toledo, Ohio 43604
(419) 244-8989
(419) 244-8990 - fax
jdangelo@cdslaw.net

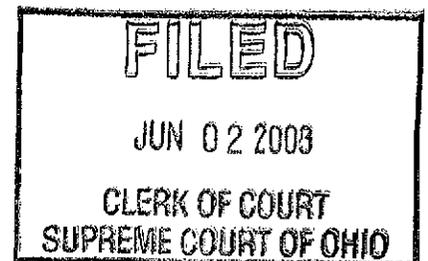
Counsel for Relators - Appellants

PETER A. ROSATO (0068026)
STANLEY J. DOBROWSKI (0016805)
CALFEE, HALTER & GRISWOLD, LLP
1100 Fifth Third Building
21 East State Street
Columbus, Ohio 43215-4243
(614) 621-1500
(614) 621-0010 - fax
prosato@calfee.com
sDOBrowski@calfee.com

Counsel for Amicus Curiae
Mechanical Contractors Association of Ohio

VINCENT ATRIANO (0041084)
DAVID S. FARKUS (0076033)
MATTHEW L. SAGONE (0063281)
SQUIRE SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2783
(614) 365-2499 - fax
msagene@ssd.com

MARK E. MULLIGAN (0024891)
Ottawa County Prosecutor
OTTAWA COUNTY PROSECUTING
ATTORNEY'S OFFICE
Ottawa County Courthouse
315 Madison Street, Second Floor
Port Clinton, Ohio 43452
(419) 734-6845
(419) 734-3842 - fax



GARY A. KOHLI (0021896)
KOHLI & CHRISTIE
142 West Water Street
Oak Harbor, Ohio 43449-1332
(419) 898-2671
(419) 898-3327 - fax

Counsel for Respondents - Appellee
Ottawa County Improvement Corporation
and Ottawa County Board of Commissioners

NICK A. NYKULAK (0075961)
ROSS, BRITTAIN & SCHONBERG CO.,
L.P.A.
6000 Freedom Square Drive
Suite 540
Cleveland, Ohio 44131-2547

Counsel for Respondent - Appellant
Fellhauer Mechanical Systems, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

STATEMENT OF THE CASE AND FACTS1

THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST2

 The Court of Appeals’ ruling subverts the General Assembly’s statewide plan to prevent
 the undercutting of employee wages in the private construction sector.2

ARGUMENT2

Amicus Curiae’s Proposition of Law No. 1:2

 Ohio’s Prevailing Wage Law applies to projects financed with expenditures from
 institutions in whole or in part2

CONCLUSION.....7

CERTIFICATE OF SERVICE8

STATEMENT OF THE CASE AND FACTS

Respondent-Appellee Fellhauer Mechanical Systems, Inc. ("Fellhauer") is an electrical contractor. Fellhauer operated out of the building it leased at 2435 Gill Road in Port Clinton, Ohio. The project at issue encompasses Fellhauer's acquisition and renovation of this building in order to expand its business operations. Approximately half of the Project was funded by public funds received from two sources. One was a loan (approximately \$300,000) from Respondent-Appellee the Ottawa County Board of Commissioners. The funds for the loan came from the Ohio Department of Development's Economic Development Program, and were originally Federal Small Cities Community Development Block Grant funds. The other source was a loan (approximately \$36,750) from Respondent-Appellee the Ottawa County Improvement Corporation (the "CIC"), a non-profit corporation created under R.C. Chapter 1724. CIC is almost entirely publicly funded. The total value of the loans equaled approximately \$336,750, which was 48.5% of the estimated \$695,000.00 project.

Respondents have not complied with Ohio's Prevailing Wage laws. Relators requested the County Prosecutor to take all legal actions necessary to bring Respondents into compliance with the prevailing wage law with regard to the Project. The Prosecutor failed and refused to seek to enjoin the misapplication of public funds and the execution and performance of illegal contracts by respondents. Relators brought this case as a tax payer's action under the common law and R.C. 309.13.

Ultimately, the Court of Common Pleas found that both funding sources were public authorities under R.C. 4115.03(A). In its application of R.C. 4115.03(C), however, the Court of Common Pleas held that the Fellhauer project was not for the benefit of the public authority, and therefore was not "for the public authority." As a result, the Court of Common Pleas found that

the prevailing wage law did not apply to the Fellhauer project. The Court of Appeals affirmed on different grounds holding that the CIC was not an institution and that Ohio's prevailing wage laws did not apply because the public funds were spent on building and land acquisition and other costs of the project, but not on construction.

THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The Court of Appeals' ruling subverts the General Assembly's statewide plan to prevent the undercutting of employee wages in the private construction sector.

Amicus Curiae Mechanical Contractors Association of Ohio has approximately five hundred (500) members located throughout the State of Ohio. Its members are mechanical contractors who regularly pay prevailing wages. The decision below involves the application of Ohio's prevailing wage statutes. If the lower court's decision is not reversed, contractors throughout the State of Ohio will lose opportunities to compete fairly for projects supported by public funds.

In *State, ex rel Evans v. Moore* (1982) 69 Ohio St. 2d 88, 91, this Court stated:

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.

The mechanism chosen by the General Assembly to accomplish this aim was to “level the playing field” for public improvements, i.e. the prevailing wage law prevents unfairness in bids for public improvements by requiring all bidders to use the same labor rates. *Mershman v. Eneritech Corp.* 120 Ohio Misc. 2d, 70, 2001 Ohio 4733. When persons are permitted to avoid the application of prevailing wages to a project the members of amicus curiae Mechanical Contractors Association of Ohio are put at a disadvantage in obtaining contracts for that project. As a result, their workers and all Ohio construction workers lose a part of the comprehensive framework intended by the General Assembly.

ARGUMENT

Amicus Curiae’s Proposition of Law No. 1:

Ohio’s Prevailing Wage Law applies to projects financed with expenditures from institutions in whole or in part.

The Court of Appeals correctly stated that “Ohio’s prevailing wage law applies to all projects that qualify as public improvements.” *Harris v. Cincinnati* (1992) 70 Ohio App. 3d 163, 169. Instead, however, of then examining whether the project at issue was a “public improvement,” the Court veered off course to consider whether a “public authority” was involved and whether the CIC was an “institution.” The Court should have analyzed the definition of “public improvement,” which would have provided context for the analysis of “public authority” and “institution.”

In general, under R.C. 4115.03(C) a public improvement must be constructed (1) pursuant to a contract with a public authority and (2) for a public authority. *Episcopal Retirement Homes, Inc v. Ohio Department of Industrial Relations* (1991) 61 Ohio St. 3d 366, 369. Appellants have argued that the definition of “public improvement” in R.C. 4115.03(C) is

not applicable here because that division only applies when a “public authority of the State or a political subdivision” is involved, and not when, as here, an “institution” is involved. Appellants’ argument is based on the language in R.C. 4115.03(A) which states that “[sections 4115.03 to 4115.16 of the Revised Code] apply to expenditures of such institutions made in whole or in part from public funds.” Amicus curiae Mechanical Contractors Association of Ohio adopts, incorporates and supports that argument.

In fact, the Court of Appeals apparently conceded Appellants’ argument that R.C. 4115.03(C) need not be met by an institution, but concluded that “[u]nfortunately for appellants, their success with regard to this assignment of error does nothing to alter the result in this case.” In essence, the Court of Appeals concluded that prevailing wages must be paid for projects which meet the “pursuant to a contract with a public authority” and “for a public authority” requirements in R.C. 4115.03(C), but that prevailing wages need not be paid for projects which do not have to meet those requirements. Logically, the opposite should be true. If the limits imposed by the definition of “public improvement” are removed, projects which otherwise would not be subject to prevailing wages become subject to them. See R.C. 1.47(C). (In enacting a statute, [a] just and reasonable result is intended.) Moreover, the Court of Appeals’ conclusion fails to give any effect to the language in R.C. 4115.03(A) cited above in violation of R.C. 1.47(B). (In enacting a statute, [t]he entire statute is intended to be effective.) As applied here, the result of Appellants’ argument would give effect to the entire statute, making the project at issue subject to prevailing wages.

Another approach to the analysis may help to clarify this result. As noted above, in most situations where a public authority does not construct a project with its own forces, R.C. 4115.03(C) defines “public improvements” to include “all buildings * * * and all other structures

or works constructed by * * * any person who, pursuant to a contract with a public authority, constructs any structure for a public authority * * *.” Essentially, R.C. 4115.03(A) defines a “public authority” to mean (1) the state, (2) a political subdivision or (3) an “institution supported in whole or in part from public funds.” Assuming for the moment, that the CIC is an institution, then it would initially appear that R.C. 4115.03(C), as applicable here, would define a “public improvement” to be a project constructed by any person pursuant a contract with the institution and for the institution.

It is precisely at this point, however, that the final clause of R.C. 4115.03(A), which provides that “[sections 4115.03 to 4115.16 of the Revised Code] apply to expenditures of such institutions made in whole or in part from public funds,” becomes applicable. In short, this final clause excepts expenditures of public funds by institutions from the requirements in R.C. 4115.03(C). As applicable to institutions, R.C. 4115.03(C) should be read as follows:

“Public improvement” includes all buildings * * * and all other structures or works constructed * * * by any person with expenditures of an institution made in whole or in part from public funds.”

Further, nothing in the definition of “construction” in R.C. 4115.03(B) indicates that it does not include all costs of a project, including acquisition of land, building, equipment or furnishing or even “soft costs” such as architectural services. In fact, any implication would be to the contrary in light of the use of the term “total overall project costs” in both R.C. 4115.03(B)(1) and (2). The conclusion seems inescapable that when the “public authority” involved is an institution, any expenditure by the institution of public funds for the project requires that any construction involved in the project be subject to prevailing wages.

This conclusion is also supported by R.C. 4115.033 which prohibits subdividing “a public improvement project into component parts or projects” in order to avoid the threshold amounts in the definition of “construction.” (Emphasis added.) R.C. 4115.033 indicates that the analysis to be made should be whether the project, taken as a whole, includes any expenditures of public funds by an institution, not whether a project can be divided into components or separate projects in an effort to avoid application of prevailing wages.

For the same reasons, the Court of Appeals is also mistaken when it cites O.A.C. 4101:9-4-02(BB)(1)(d) for purposes of exclusion instead of inclusion. O.A.C. 4101:0-4-02(BB)(1)(d) provides:

“Public improvement” means:

(1) All buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works which are:

* * *

(d) Constructed in whole or in part from public funds by an institution supported in whole or in part by public funds.

When any part of a project is financed with public funds from an institution, it is constructed in whole or in part by public funds. See OAG No. 82-096 reaching the same conclusion about expenditures of proceeds of industrial revenue bonds under R.C. 4115.032 and R.C. 165.03.

The Court of Appeals was similarly mistaken in its conclusion that the CIC was not an institution. The word “institution” is not defined in R.C. 4115.03 to 4115.16, but is defined in the Ohio Administrative Code Rules promulgated under those statutes. O.A.C. 4101:9-4-02(P) provides that “institution” means “any society or corporation of a for-profit, not for-profit, public

or private character established or organized for any charitable, educational or other beneficial purpose.” The CIC is a corporation not-for-profit of a public character. R.C. 1724.01. The CIC is organized for the beneficial purpose of promoting economic development. R.C. 1724.01. See Ohio Constitution Article VIII, Section 13 which states that improving the economic welfare of the people of the State of Ohio is “in the public interest and a proper public purpose.”

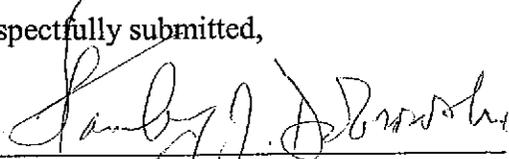
In addition, it is evident from the record below that the CIC is almost entirely publicly funded and, therefore, is “an institution supported in whole or in part by public funds” as required by R.C. 4115.03(A). See O.A.C. 4101:9-4-02(HH) which provides that “supported in whole or in part by public funds” means “any payment or partial payment directly or indirectly from funds provided by loans, grants, taxes, or any other type of payment from public funds of the federal government or of the state as defined in division level 4101:9 of the Administrative Code.”

In summary, the project at issue here is subject to prevailing wage rates under R.C. 4115.03 to 4115.16. Either the project need not be a public improvement under R.C. 4115.03(C) because that division applies only to public improvements of the state or political subdivisions or because the project is a public improvement which is excepted from the requirements of being constructed pursuant to a contract with a public authority and for a public authority by the final clause of R.C. 4115.03(A).

CONCLUSION

For the above reasons, this Court should grant review and reverse the judgment of the Court of Appeals.

Respectfully submitted,



PETER A. ROSATO (0068026)
STANLEY J. DOBROWSKI (0016805)
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 East State Street
Columbus, Ohio 43215-4243
(614) 621-1500
(614) 621-0010 - fax
prosato@calfee.com
sdobrowski@calfee.com

Counsel for Amicus Curiae
Mechanical Contractors Association of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Amicus Curiae Mechanical Contractors Association of Ohio was served by U.S. mail this 2nd day of June, 2008, upon the following counsel:

JOSEPH M. D'ANGELO (0063348)
COSME, D'ANGELO & SZOLLOSI CO.,
L.P.A.
The CDS Building
202 M. Erie Street
Toledo, Ohio 43604
(419) 244-8989
(419) 244-8990 - fax
jdangelo@cDSLAW.net

Counsel for Relators - Appellants

VINCENT ATRIANO (0041084)
DAVID S. FARKUS (0076033)
MATTHEW L. SAGONE (0063281)
SQUIRE SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2783
(614) 365-2499 - fax
msagene@SSD.COM

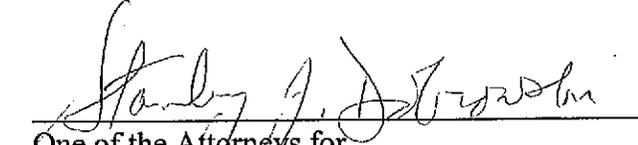
MARK E. MULLIGAN (0024891)
Ottawa County Prosecutor
OTTAWA COUNTY PROSECUTING
ATTORNEY'S OFFICE
Ottawa County Courthouse
315 Madison Street, Second Floor
Port Clinton, Ohio 43452
(419) 734-6845
(419) 734-3842 - fax

GARY A. KOHLI (0021896)
KOHLI & CHRISTIE
142 West Water Street
Oak Harbor, Ohio 43449-1332
(419) 898-2671
(419) 898-3327 - fax

Counsel for Respondents - Appellee
Ottawa County Improvement Corporation
and Ottawa County Board of Commissioners

NICK A. NYKULAK (0075961)
ROSS, BRITTAIN & SCHONBERG CO.,
L.P.A.
6000 Freedom Square Drive
Suite 540
Cleveland, Ohio 44131-2547

Counsel for Respondent - Appellant
Fellhauer Mechanical Systems, Inc.


One of the Attorneys for
Amicus Curiae Mechanical
Contractors Association of Ohio