

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. :
NORTHWESTERN OHIO BUILDING : CASE NO. 08-1069
& CONSTRUCTION TRADES :
COUNCIL, ET AL., :
Appellants, :
v. :
OTTAWA COUNTY IMPROVEMENT :
CORPORATION, ET AL., :
Appellees. :

On Appeal from the
Ottawa Court of Appeals
Sixth Appellate District

Court of Appeals
Case No. 07-OT-017

MEMORANDUM IN OPPOSITION TO JURISDICTION OF
APPELLEES OTTAWA COUNTY IMPROVEMENT CORPORATION,
OTTAWA COUNTY BOARD OF COMMISSIONERS
AND FELLHAUER MECHANICAL SYSTEMS, INC.

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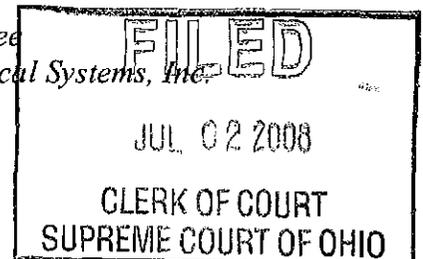


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I. APPELLANTS' APPEAL DOES NOT INVOLVE A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.

Appellants Northwestern Ohio Building & Construction Trades Council and Kevin Flagg seek this Court's discretionary jurisdiction to challenge the Sixth District Court of Appeals' Decision and Judgment Entry of April 18, 2008, which affirmed the trial court's judgment that:

the Fellhauer project does not constitute a "public improvement" under R.C. 4115.03(C), because it does not involve construction "by" or "for" a public authority.

4/18/08 Dec. & Jdgmt. Entry at 4-5.

It is well settled under the clear terms of the Ohio prevailing wage statute, R.C. Ch. 4115, and the controlling precedent of this Court in *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369 (1990), that the prevailing wage statute does not apply in the absence of a "public improvement." However, Appellants never appealed the trial court's ruling that the Fellhauer project was not a "public improvement." As their Reply Brief in the Court of Appeals made absolutely clear:

Appellants' (sic) admit that they did not move to set aside the Magistrate's Order nor did they file objections to the Magistrate's decision when the Magistrate stated that the Project was not a "public improvement" under Section 3(C) [4115.03(C)]. However, **Appellants did not argue then and do not argue now, that the Project was a public improvement under Section 3(C).**

p. 4 (emphasis added).

Because Appellants have conceded that the Fellhauer project was not a "public improvement," this is no longer an issue in this case. *See, e.g., Hamilton v. Dayton Correctional Inst.*, 2007 Ohio 13, ¶10 (10th Dist. Ct. App.) ("Because appellant did not raise this issue in an assignment of error, the issue is not properly before the court and we will not address it.")¹

¹ To the extent *amicus curiae* Ohio State Building and Construction Trades Council, AFL-CIO now attempts to argue that the Fellhauer project is a "public improvement", *see* Ohio St. Bldg. & Constr. Trades Council Memo. Supp. Juris. at p. 9, n. 3, this argument is barred due to

Under such circumstances, Appellees Ottawa County Improvement Corporation (“OCIC”), the Board of Commissioners for Ottawa County (“the County”) and Fellhauer Mechanical Systems, Inc. (“Fellhauer”) respectfully submit that Appellants’ appeal does not present “a question of public or great general interest” so as to merit this Court’s discretionary jurisdiction.²

Appellees respond to each of Appellants’ four Propositions of Law in turn as follows.³

A. Proposition of Law No. 1: Whether OCIC Meets the Statutory Definition of “Public Authority” Is of No Consequence, Because the Project Was Not “By” or “For” OCIC In Any Event.

Appellants’ principal argument is that OCIC constitutes an “institution” as defined by O.A.C. § 4101:9-4-02(P) because it is established for a “beneficial purpose.” Memo. Supp. Juris. at 5. Because OCIC is an “institution,” Appellants argue, it also constitutes a “public authority” as defined in R.C. § 4115.03(A). Even if true, however, this proposition would not subject the Fellhauer project to the prevailing wage law, because this private project was not “by” or “for” OCIC (or any other public authority for that matter) and therefore was not a “public improvement.” *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369 (1990).

Appellants apparently have forgotten the nature of their “institution” argument before the Court of Appeals. Rather than claiming that *OCIC* was the “institution” as that term is used in

Appellants’ failure to challenge the trial court’s adverse judgment on this issue. *See, e.g., Granzow v. Bureau of Support*, 54 Ohio St. 3d 35, 38 (Ohio 1990) (“This argument was not raised in the court of appeals and therefore is not properly before us.”) (*citing State v. Williams*, 51 Ohio St. 2d 112 (1977)); *State ex rel. Gutierrez v. Trumbull County Bd. of Elections*, 65 Ohio St. 3d 175, 177 (1992), (“Appellant cannot change the theory of his case and present these new arguments for the first time on appeal.”) (*citing Republic Steel Corp. v. Cuyahoga Cty. Bd. of Revision*, 175 Ohio St. 179 (1963)).

² Appellants do not contend that their appeal involves a “substantial constitutional question.”

³ The following responds as well to the arguments in support of jurisdiction advanced by *amici curiae* Mechanical Contractors Association of Ohio and the Ohio State Building and Construction Trades Council, AFL-CIO.

the statutory definition of “public authority,” Appellants’ original assignment of error claimed that *Fellhauer* was the “institution” and therefore the “public authority” under the statute. Appellants made this far-fetched claim because they realized that the project was undertaken both “by” and “for” *Fellhauer*, and no one else.

As the Court of Appeals noted, Appellants initially raised this argument as their fourth assignment of error, which read:

The trial court erred in finding that *Fellhauer*’s was not a public authority for the Project even though it was supported in part by public funds.

Dec. Jdgmt. Entry at 5, n. 1. However, Appellees pointed out that Appellants had admitted in their Post-Trial Brief to the trial court that “*Fellhauer* is a private for-profit corporation engaged in electrical, plumbing and heating contracting.” p. 1. When confronted with their prior contrary admission, Appellants were forced to withdraw this fourth assignment of error in their Reply Brief. *See* Dec. Jdgmt. Entry at 5, n. 1.

Indeed, there would have been no reason for Appellants to argue in the appellate court that OCIC was an “institution” so as to constitute a “public authority,” because the trial court had already determined that OCIC and the County each was an “institution” and therefore a “public authority” under the statute:

This court accepts the proposition that each of these two entities, OCIC and the Ottawa County Board of Commissioners, is an institution supported in whole or in part by public funds and, therefore, a Public Authority as set forth in R.C. 4115.03(A).

3/23/07 Jdgmt. Entry at 7. But as the trial court quickly added: “That, however, does not mean that the *Fellhauer* project is automatically a ‘public improvement’ as set forth in R.C. 4115.03(C).” *Id.*

Despite Appellants’ withdrawal of their fourth assignment of error, the Court of Appeals proceeded to address the issue of “whether *Fellhauer* is an institution.” Dec. & Jdgmt Entry at 8.

It noted that “Fellhauer, as a private, for-profit business, ... simply does not meet the definition of institution.” Dec. & Jdgmt. Entry at 9.

As for OCIC, Appellants had referred to it as a “charity” before the Court of Appeals. *See id.* At oral argument, after they were forced to withdraw their fourth assignment of error, Appellants apparently sought to re-cast OCIC as the “institution” in place of Fellhauer, due to the reference to “charitable ... purposes” in the regulatory definition of “institution” under O.A.C. 4101:9-4-02(P). *See id.* ¶31. The Court of Appeals noted the “ambiguous” nature of Appellants’ “institution” argument, which they now apparently intended to apply to OCIC, and proceeded to address it “*arguendo.*” *See id.* The Court rejected Appellants’ apparent suggestion that OCIC was a charity under the regulatory definition of “institution,” noting that “the evidence at trial clearly demonstrated that OCIC is a statutorily-defined ‘community improvement corporation’ under R.C. Chapter 1724” instead. *Id.*

In any event, at no point did Appellants argue in the Court of Appeals that the Fellhauer project was “by” or “for” OCIC, nor do they attempt to make such a claim in their Memorandum in Support of Jurisdiction to this Court. In light of Appellants’ admission that this case involves no “public improvement,” their Proposition of Law No. 1 is of no consequence and offers no justification for this Court to exercise discretionary jurisdiction over their appeal.

B. Proposition of Law No. 2: Not Every Expenditure of a Public Authority is Subject to Prevailing Wage—A “Public Improvement” Must Be Involved.

Appellants’ concession that the Fellhauer project is not a “public improvement” under R.C. § 4115.03(C) dealt a fatal blow to their prevailing wage claims. This Court’s prior rulings on the issue have made clear that the existence of a “public improvement” is the *sine qua non* of prevailing wage. *See, e.g., Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369 (1990) (“By its terms, Ohio’s prevailing wage law applies to all

construction projects that are ‘public improvements’ as defined in R.C. 4115.03(C.)’); *U.S. Corrections Corp. v. Ohio Dept. Indus. Relations*, 73 Ohio St.3d 210, 218 (1995) (“Ohio’s prevailing wage law applies to all construction projects that are ‘public improvements.’”). Were this not so, then a public authority would be unable to pay any wages whatsoever, whether to its secretarial staff or mail clerk, unless it first complied with the litany of prevailing wage requirements in R.C. Ch. 4115.

Unable to claim that the Fellhauer’s private retail project is a “public improvement”, Appellants have backed themselves into a selective interpretation of the prevailing wage statute. They argue, based upon the last clause of R.C. § 4115.03(A)’s definition of “public authority,” that prevailing wage requirements apply *automatically* to *any* expenditure of public funds by “any institution supported in whole or in part by public funds.” Although Appellants concede that this is not so for other defined public authorities, such as “any office, board, or commission of the state,”⁴ they argue that the last clause of R.C. § 4115.03(A) impliedly creates a special rule for “institutions supported in part by public funds” such that “[t]he requirements of 4115.03(C) do not apply.” *See* Memo. Supp. Juris. at 6. Under Appellant’s proposed construction of the statute, the last clause of the “public authority” definition supersedes and renders superfluous the other operative provisions of R.C. Ch. 4115 that refer to “public improvements.”

Appellants’ strained statutory construction does not merit serious consideration. It flies in the face of long-standing tenets of statutory construction set down by this Court. In *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 256, this Court ruled:

A basic rule of statutory construction requires that “words in statutes should not be construed to be redundant, **nor should any words be ignored.**” *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875. Statutory language “must be construed as a whole and given such interpretation as

⁴ *See* Memo. Supp. Juris. at 6.

will give effect to every word and clause in it. **No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.**

(Citations omitted; emphasis added.)

This fundamental principle has been applied specifically to the prevailing wage statute by Ohio courts of appeal. *See, e.g., United Bhd. of Carpenters & Joiners of Am. v. Bell Eng. Ltd., Inc.*, 2006-Ohio-1891, ¶18 (6th Dist. Ct. App.) (“Prevailing case law dictates the guiding principle we must follow to be the plain meaning doctrine. We have no authority to bypass or modify the plain meaning of unambiguous statutory language.”). In that case, the court rejected the appellant’s construction, which sought to disregard the statutory limitation in R.C. § 4115.10(A) limiting its applicability only to those “*who use their own forces in the actual construction of a public improvement project.*” (Emphasis in original.) In so ruling, the court noted that “Appellant’s efforts to judicially expand the scope of the prevailing wage limitation is not rooted in law or statute.” *Id.* at ¶21.

Appellants’ self-serving interpretation of O.R.C. Ch. 4115.03(A) in this case seeks to discard the fundamental statutory requirement of a “public improvement,” which Appellants concede is not met in this case. However, Appellants can offer no explanation of why, if it is so unnecessary, the term “public improvement” appears in nearly every operative section of O.R.C. Ch. 4115, often in tandem with the term “public authority”. *See, e.g.,* §§. 4115.03, 4115.032, 4115.033, 4115.04, 4115.06, 4115.07, 4115.08, 4115.09, and 4115.10.

Accordingly, under the statute’s clear terms, there must be a “public improvement” in order for prevailing wage requirements to apply. Appellants’ attempts to read this fundamental requirement out of the statute simply is untenable.

C. **Proposition of Law No. 3: The Requirement for Publicly-Funded Construction Is Established by Statute, Not by Rule.**

Similarly, Appellants' strained statutory construction has forced them to argue that the last clause of the "public authority" definition in R.C. § 4115.03(A) also supersedes and renders superfluous the statute's clear and repeated limitation that prevailing wage requirements apply only to "construction." This is because the last clause of R.C. § 4115.03(A), which Appellants exalt above all other statutory provisions, refers to "expenditures" by "any institution supported in whole or in part by public funds". Thus, under Appellants' selective statutory construction, *any* "expenditures" by such institutions are automatically subject to prevailing wage, even if such expenditures do not involve "construction" or even the payment of any wages at all. This makes no sense.

The fact that prevailing wage applies only to construction is not open to serious debate. In fact, this was explicitly admitted by Appellants in their TRO Petition filed with the trial court, which conceded that "R.C. Chapter 4115 'applies if a publicly funded institution expends public funds **on construction.**'" TRO Petition. at 8 (emphasis added, citations omitted).⁵

The statutory definition of "public improvement" in R.C. § 4115.03(C), which Appellants struggle so vigorously to read out of the statute, clearly refers to "works *constructed* by ... or ... for a public authority". (Emphasis added.) And R.C. § 4115.04(A), which sets forth operative prevailing wage requirements, explicitly notes that such requirements apply to "construction" of a public improvement. *See also* R.C. § 4115.032 (titled "Construction projects to which provisions apply"). Moreover, this Court has repeatedly recognized that prevailing wage statute

⁵ In fact, this was so clearly understood by Appellants that they originally alleged in their Petition for a Temporary Restraining Order that "Respondent Fellhauer is receiving public funds ... to acquire *and renovate* its principal place of business." TRO Petition at p. 1 (emphasis added). As both the trial court and Court of Appeals ruled, however, not one dollar of public funds was used to finance any renovation or construction whatsoever in connection with the Fellhauer project.

applies only to construction. *See, e.g., Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369 (1990) (“By its terms, Ohio’s prevailing wage law applies to all construction projects that are ‘public improvements’ as defined in R.C. 4115.03(C.)”); *U.S. Corrections Corp. v. Ohio Dept. Indus. Relations*, 73 Ohio St.3d 210, 218 (1995) (“Ohio’s prevailing wage law applies to all construction projects that are ‘public improvements.’”).

Appellants’ argument that O.A.C. 4101:9-4-2(BB)(1)(d), which sets forth the regulatory definition of “public improvement,” somehow conflicts with the statutory language by referring to works “[c]onstructed in whole or in part from public funds” is off-base. As noted above, the statute itself repeatedly notes that prevailing wage requirements apply only to “construction.” The regulation’s reference to construction cannot possibly be in conflict with this fundamental statutory requirement.

As for Appellants’ contention that *any* expenditure of public funds automatically triggers prevailing wage requirements, such an argument was specifically considered and rejected by at least one Ohio appellate court. In *Harris v. Bi Mi Jo, Inc.*, 1991 Ohio App. LEXIS 1869, *4 (9th Dist.) (copy attached), the court of appeals held: “The fact that public funds were involved does not mean *ipso facto* that the construction ... was a public project.” Rather, “[t]he question whether a work is a public work is not to be determined by the mode of payment or by the instruments used in attaining it, but rather by the objects to be accomplished.” *Id.* (citations omitted). In that case, the court determined that the relocation of an intermodal railroad facility was not “for a public authority” despite the fact that it might benefit the public in an indirect way. *Id.* at *5. Accordingly, the court ruled that the project was not subject to the prevailing wage law, even though public funds were involved. *Id.* at *6.

Moreover, it makes no common sense to suggest that prevailing wage requirements could apply to “any expenditures”, including expenditures that do not involve the payment of wages. If an “institution supported in whole or in part by public funds” were to make expenditures to purchase office supplies, for example, how exactly would it go about paying prevailing wage? The absurdity of this example demonstrates that Appellant seek to prove far too much—their argument essentially eviscerates the remaining operative provisions of the prevailing wage statute, and would expand the reach of prevailing wage requirements to areas where it could not possibly apply.

Consequently, Appellants’ argument that the last clause of the “public authority” definition in R.C. § 4115.03(A) automatically subjects *any* “expenditures” by “any institution supported in whole or in part by public funds” cannot withstand scrutiny.

D. Proposition of Law No. 4: There Was No Subdividing to Avoid the Statutory Thresholds of the Prevailing Wage Law.

Finally, Appellants argue that the Fellhauer project was impermissibly subdivided in contravention of R.C. § 4115.033 and O.A.C. 4101:9-4-17(C). R.C. § 4115.033 provides:

No public authority shall subdivide a public improvement project into component parts or projects, the cost of which is fairly estimated to be less than the threshold levels set for the in divisions (B)(1) and (2) of section 4115.03 of the Revised Code, unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority.

Accord, O.A.C. § 4101:9-4-07(C). At the time this case was filed, the biennially-adjusted threshold levels established by the Department of Commerce under R.C. 4115.03(B)(1)&(2) were \$69,853 for “new construction of any public improvement” and \$20,955 for “[a]ny reconstruction, [etc.] ... of any public improvement”, respectively.

This issue is a complete red herring. Appellees have never argued that the Fellhauer project was exempt from R.C. Ch. 4115 for failure to meet the statutory threshold amounts, and

neither the trial court nor the Court of Appeals ruled on this basis. As noted by the Court of Appeals, the amount of the County's CDBG loan was \$300,000, and the amount of the OCIC revolving loan was \$36,750. Dec. & Jdgmt. Entry at 2-3. These amounts obviously would have exceeded the thresholds, had these funds been used for construction of a public improvement. No one ever attempted to "subdivide" the project in order to stay below these thresholds.

Moreover, both R.C. § 4115.033 and O.A.C. § 4101:9-4-17(C) apply solely and expressly to a "public improvement", which Appellants conceded that the Fellhauer project was not. Their reliance on these provisions in support of their position is completely inconsistent with their earlier argument that the statute's provisions relating to a "public improvement" do not apply at all. See Memo. Supp. Juris. at 6.

From these inapplicable provisions restricting (but not prohibiting) the subdividing of a public improvement project in order to avoid statutory monetary thresholds, Appellants jump to the argument that the prevailing wage statute should apply to the Fellhauer project, even though it admittedly was not a public improvement and no public funds were used to finance any construction in connection therewith, simply because Fellhauer used its own private labor for certain rehabilitation activities.

Appellants' argument is unsupported by any statute, regulation or judicial precedent. In *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 370 (1990), this Court ruled that the projects involved were not subject to the prevailing wage statute because, *inter alia*, the private owner "did not use public funds in its renovation and construction projects."

The same was true of the Fellhauer project. As the Court of Appeals noted: "The evidence is undisputed that the renovation portion of the project will be funded with private

monies, not connected with either the CDBG loan or the OCIC revolving loan.” Dec. & Jdgmt. Entry at 3. All of the public monies involved with this project were used solely to partially finance Fellhauer’s acquisition of real property, as expressly required by the terms of the Grant Agreement. *See id.* The Court of Appeals pointed out that “[t]he total cost for the acquisition of real property for the project is estimated to be \$500,000, which, of course, is more than the amount provided by way of the CDBG loan and OCIC revolving loan combined.” *Id.* All of these public monies were used solely for such acquisition—there was no “subdividing” of these funds, as Appellants claim. Thus, not a single dollar of these funds was used for construction, nor to pay any wages whatsoever.

In support of Appellants’ argument, *amicus curiae* Ohio State Building and Construction Trades Council, AFL-CIO (“OSBCTC”) cites O.A.C. § 4101:9-4-19, titled “Special rules for bond projects.” This regulation establishes, as its title indicates, “special rules” applicable “[w]here the Ohio Revised Code specifically designates a project as a public improvement ... because it is financed by certain obligations”. *Id.* As part of these “special rules” for certain bond-financed projects, the regulation purports to automatically impose prevailing wage requirements on such projects, regardless of the dollar amounts involved and regardless of whether the construction involved was financed by the specified bonds. *Id.*

However, OSBCTC’s reliance on this special exception simply proves the general rule. The Fellhauer project is not, of course, a bond-financed project subject to this regulation. No portion of the project was “financed by [the] certain obligations” referenced therein.

Moreover, Appellants abandoned any argument that the Fellhauer project was “deemed” a public improvement under R.C. § 4115.032 or any provision of the Revised Code at the Court of Appeals level. R.C. § 4115.032 provides that certain “construction” projects subject to certain

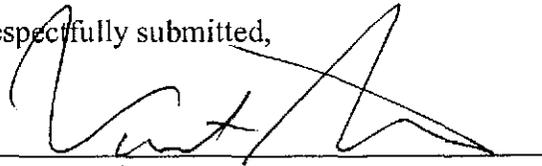
other statutory sections, including R.C. § 166.02, are deemed “public improvements” for purposes of R.C. Ch. 4115. In the trial court, Appellants argued that the Fellhauer project was deemed a public improvement by virtue of R.C. § 166.02. However, Judge Abood expressly ruled that “R.C. 166 does not apply in this case.” Jdgmt. Entry at 6. Once again, Appellants never appealed this adverse ruling. Consequently, the issue of whether the Fellhauer project may be “deemed” a public improvement is no longer an issue in this case. *See, e.g., Hamilton v. Dayton Correctional Inst.*, 2007 Ohio 13, ¶10 (10th Dist. Ct. App.), *supra*.

Likewise, Ohio Attorney General Opinion No. 82-096, upon which OSBCTC also relies, dealt with projects funded by industrial development bonds under R.C. § 165.031, one of the other enumerated statutes listed in R.C. § 4115.032. Because the Fellhauer project was not funded by such bonds (nor was it subject to any other provision in R.C. § 4115.032), this Attorney General Opinion has no bearing on this case.

Indeed, Appellants have conceded that the Fellhauer project was not in fact a public improvement, deemed or otherwise. Therefore, Appellees Ottawa County Improvement Corporation, the Board of Commissioners for Ottawa County and Fellhauer Mechanical Systems, Inc. respectfully submit that the remaining issues in this case do not present “a question of public or great general interest” so as to merit this Court’s discretionary jurisdiction.

Dated: July 2, 2008

Respectfully submitted,

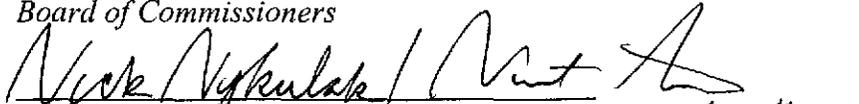


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellees Ottawa County Improvement Corporation, Ottawa County Board of Commissioners and Fellhauer Mechanical Systems, Inc. is being served by regular U.S. Mail this 2nd day of July, 2008 upon the following:

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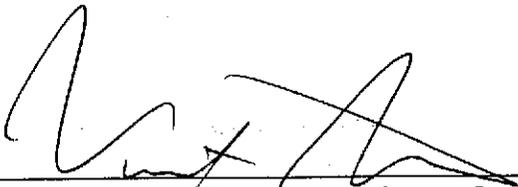
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