

IN THE SUPREME COURT OF OHIO

State ex rel. Associated Builders &  
Contractors of Central Ohio, et al.

Appellants,

v.

Franklin County Board of  
Commissioners,

Appellee.

08-1478

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 08AP-301

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS  
ASSOCIATED BUILDERS & CONTRACTORS OF CENTRAL OHIO AND  
THE PAINTING COMPANY**

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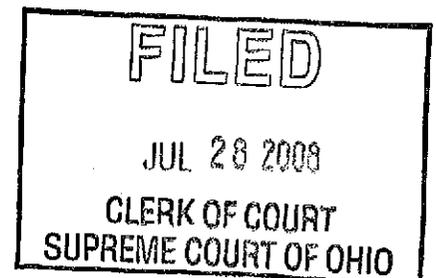


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## JURISDICTIONAL STATEMENT

This case presents three critical issues for the future of commercial regulation in Ohio: (1) whether the state can find a violation of law without an appropriate hearing; (2) whether a settlement agreement signed by the Attorney General agreeing that a violation has not been adjudicated can be considered a “finding” of liability; and (3) whether a county enacting, interpreting, and applying a rule excluding a contractor from public contracts for un-adjudicated prevailing wage determinations is unconstitutional or an abuse of discretion.

The Franklin County Board of Commissioners (the “Commissioners”) passed Quality Contracting Standards (“the Standards”) which guide their determination whether a contractor is responsible. Many public authorities across Ohio have adopted similar or identical provisions. In this case, the Commissioners evaluated The Painting Company was “found by the state” to have violated prevailing wage laws administered by the Department of Commerce. The constitutional issue arose in this case when the Commissioners developed an *ad hoc* rule for interpreting whether the state had “found” a violation. The rule violates this Court’s precedent and undermines the due process rights of all contractors by counting un-adjudicated allegations as per se violations. By upholding the County’s theory that un-adjudicated “determinations” of inadvertent underpayments are findings of violations, the Court of Appeals found that the state can find violations of prevailing wage law without providing a meaningful hearing or the right to an appeal.

The decision below threatens many contractors with exclusion from public projects, effectively debarring them for up to ten years based on un-adjudicated allegations of violations rather than adjudicated findings. Other public authorities applying similar or identical standards may consider un-adjudicated allegations to be violations “found by the state” unless this Court

protects the due process rights of contractors. In addition to the Associated Builders and Contractors, several other prominent contracting and labor organizations, including the Construction Trades Council, the Associated General Contractors of Ohio, and MCA-NOW, NECA filed *amicus* briefs with the Court of Appeals, underscoring the broad significance of and public interest in this case.

Public contracting in Ohio comprises hundreds of millions of dollars in annual awards. The Ohio legislature and this Court have recognized the important public policy favoring fair and open competition for these contracts, which ensures “the best work at the lowest possible price while guarding against favoritism and fraud.” *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 21, 552 N.E.2d 202, 204-205; *see also Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991 at ¶ 9. Any ruling which threatens competition in contracting, as this one does, is therefore of great importance to the public.

Also at stake is the important constitutional question of the process due when a contractor is deprived of its liberty interest in its professional reputation. The U.S. and Ohio constitutions protect contractors from government accusations that impugn their honesty or integrity without due process and causing their bids to be rejected. Here, Appellant was denied a profitable, high-profile stadium contract based solely upon un-adjudicated, preliminary, investigative “determinations” of prevailing wage violation allegations. One Franklin County Commissioner has publicly defended the Commissioners’ actions on the project in a newspaper editorial, stating that a similarly rejected contractor lacked integrity and may have criminally misrepresented being eligible for the contract based on the same rule at issue on this case based on. Contractors should not be left without guidance as to whether the state has found violations or not. The contractor’s professional reputation, a valuable and protected liberty interest, is in peril.

This case will also have a statewide impact on settlements with the State. Under the Court of Appeals decision, the Ohio Attorney General can enter into a settlement agreement to resolve disputed and unsupported allegations of prevailing wage violations only to have the settlement deemed to be a finding of a violation against the contractor. This undermines the integrity of the Attorney General's authority to bind the state in settlements. Contractors and their counsel are left second-guessing the Attorney General's ability to definitively settle administrative cases.

The Court of Appeals decision has a devastating impact on contractors' protected liberty interest. The Department of Commerce, Labor and Worker Safety Division is keeping a list of the contractors that it has determined, without hearings, have violated the law. This amounts to a government grey list, which public authorities are actively using to reject bids. Greylisted contractors have no right to appeal un-adjudicated determinations. Yet the determinations malign their reputations, brand them as law-breakers, cost them contracts, and diminish the value of their business. This is a constitutional issue of vital importance.

If, as the Court of Appeals held, an un-adjudicated determination of underpayment constitutes a finding of a violation, then this Court was wrong when it decided that a determination without adjudication was not a finding. *See State ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198, 201-02, 480 N.E.2d 471. Unless this Court is prepared to abandon that ruling and allow un-adjudicated determinations to be appealed, it must resolve the conflict with the decision below. Action on this question is necessary to clarify the meaning of the prevailing wage statute and to ensure that all Ohio contractors receive due process, union and non-union alike. They are equally at peril in the future, unless this lower court precedence is overturned and the decision in *Harris* is revisited.

## STATEMENT OF THE CASE AND FACTS

This case arises from the disqualification of the low bidder, The Painting Company (“TPC”) on the painting scope of work for the Huntington Park Project (“the Project”). Despite full support and recommendation by the two independent companies paid by Franklin County to evaluate bidder responsibility, the Project Manager, Turner Construction Company and the Owner’s Representative, Nationwide Realty Investment, the Franklin County Commissioners found TPC to be non-responsible and disqualified it from the bid consideration process. It did so based on the county’s Quality Contracting Standards. The Commissioners concluded that: “The Painting Company has been **found by the State of Ohio** to have violated the State’s prevailing wage laws more than three times in a two-year period within the past ten years; therefore, the Painting Company is not eligible for award of this contract.” (Emphasis added).

The support for this conclusion was attached to the Commissioners’ finding and consisted of un-adjudicated determinations by the Department of Commerce, Labor and Worker Safety Division (“the Division”). As previously described by this Court in *Harris*, the Division performs two distinct enforcement roles with respect to Ohio’s prevailing wage law. The Division has the power to investigate complaints and to initiate investigations itself. It also has the power to adjudicate violations by holding formal hearings. If the Division holds a formal hearing, it can order the contractor to pay restitution. Otherwise, it merely issues a “determination” of violation to the contractor and any complaining party. Following an un-adjudicated determination, the contractor has sixty days to pay the determined underpayment amount. Either an underpaid employee or the Division can file suit to collect that amount if the contractor chooses not to pay.

In 2002, the Commissioners adopted the Quality Contracting Standards resolution (“the Standards”). Section 8.2.4.15 of the Standards requires contractors bidding on Franklin County projects to certify that they “have not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years.” The Court of Appeals summarized the Commissioners’ position:

The county has chosen to interpret Section 8.2.4.15 to include any determination of a prevailing wage violation issued by the Department of Labor and Worker Safety, whether those violations were cooperatively settled by a contractor and regardless of whether any finding of intent was made.

In the past ten years, a number of prevailing wage complaints have been filed against The Painting Company. The Division investigated each complaint, but did not formally adjudicate any of them. Several resulted in determinations of no liability, and the rest in determinations of underpayment due to clerical errors. The determinations of inadvertent underpayment resulted in a lawsuit when The Painting Company did not pay the determined amount. That suit was settled through mediation, prior to a verdict, for a fraction of the amount that the Division originally determined. The settlement agreement contained the following clause:

It is understood and agreed by Commerce that this release constitutes a compromise settlement of the disputed claim or claims and that payment by The Painting Company of the above-stated settlement is not to be construed and does not constitute an admission of liability or wrongdoing on the part of The Painting Company. (emphasis added)

It was signed by the Ohio Attorney General. The case was dismissed with prejudice.

The Commissioners made their final rejection of TPC’s bid at their March 4, 2008 meeting. TPC and Associated Builders and Contractors of Central Ohio, a trade association, filed a suit challenging that action. The Franklin County Common Pleas Court upheld the Commissioners’ decision, as did the Court of Appeals of Ohio, Tenth Appellate District. The Court of Appeals found that the bidding specifications were not void for vagueness, the county

did not reject bids based on unannounced criteria, and the specifications were not preempted by R.C. Chapter 4115. Although due process was raised in the form of Appellants' void for vagueness argument, the court did not address questions of procedural due process. The court denied Appellants' requests for injunctive and declaratory relief.

## ARGUMENT

### Proposition of Law No. 1:

Prevailing wage determinations based on investigations without a hearing cannot legally be considered as finding violations of law, because such findings would contradict both statute and precedent and deprive contractors of a liberty interest protected by the United States and Ohio constitutions without procedural due process.

In *State ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198, 480 N.E.2d 471, this Court considered the legal effect of Division determinations based on an investigation without a hearing. In that case, a contractor sought to appeal such a determination in the Court of Common Pleas. *Id.* at 198-99. The defendants moved this Court for a writ of prohibition, arguing that the determination was merely a preliminary finding not subject to appeal. *Id.* at 199. This Court agreed with the Division, distinguishing between the Division's investigatory powers under R.C. § 4115.10 and its adjudicative powers under R.C. § 4115.13. *Id.* at 201-02. The Division can adjudicate complaints by holding formal hearings under R.C. § 4115.13. *Id.* at 202. Decisions based on such adjudications are subject to appeal under R.C. Chapter 119. *Id.* However, the determination at issue was not an adjudicated violation. *Id.* ("The department's function in this case is an investigatory one . . ."). "[A] determination after an investigation without a hearing . . . is not an adjudication . . . and is thus not subject to appeal." *Id.*

*Harris* compared a determination issued without a hearing to an EEOC right to sue letter. 18 Ohio St.3d at 200-01. The Court cited federal precedent holding that due process did not give

contractors the right to appeal such letters, which do not have a binding legal effect upon the parties. *Id.*, citing *Georator Corp. v. EEOC* (4th Cir. 1979), 592 F.2d 765. Due process is not implicated by the EEOC's action in issuing a right to sue letter, because "[s]tanding alone, it is lifeless, and can fix no obligation nor impose any liability on the plaintiff. It is merely preparatory to further proceedings." *Id.* at 201 (quoting *Georator*, 592 F.2d at 768). Following this reasoning, the Court held that "[a]lthough the [determination] was written in definitive language, it is clear . . . that it was intended only as an effort to induce settlement and was not enforceable." *Id.*

The Court of Appeals departed sharply from *Harris* in its analysis of determinations. The Commissioners treated determinations as conclusive "find[ings]" of violations of the prevailing wage law. The Court of Appeals agreed, seizing on the "definitive language" that *Harris* casted aside. It held "[T]he [Division]'s characterization of these incidents as 'violations' . . . gives clear notice of the impact [the determinations] would have on the bid process with Franklin County." Under this decision, determinations are far from "lifeless." They impose liability on the contractor for a violation of law. The decision below is therefore inconsistent with *Harris* and R.C. Chapter 4115.

More egregious, the decision below ignores a critical issue of individual rights. It is stipulated that the determinations caused the Commissioners to reject The Painting Company due to a perceived lack of "Quality." When the state finds that a contractor has violated the law in performing construction contracts, it devastates the contractor's professional reputation, making it difficult if not impossible to win public contracts. This reputational harm is a protected liberty interest that demands due process. "[E]very person, for an injury done him in his . . . reputation, shall have remedy by due course of law . . ." Ohio Const. Art. I § 16. A contractor's "liberty

interest is affected when that denial [of opportunity to bid and be awarded public contracts] is based on charges of fraud and dishonesty . . . ." *Transco Securities v. Freeman* (6th Cir. 1981), 639 F.2d 318, 321; U.S. Const. Am. 14. See also *Lasmer Industries, Inc. v. Defense Supply Center Columbus*, Case No. 2:08-cv-0286 currently pending in the United States District Court for the Southern District of Ohio, Opinion and Order dated June 13, 2008 (citing *Transco* and finding a reputational liberty interest).

Moreover, The Painting Company had a protected property interest in its contract with the State of Ohio releasing the "disputed" claims without an admission of liability. If the County Commissioners were correct that the State "found" such violations either by or in spite of entering the agreement, then the State violated The Painting Company's property interest without due process. The county cannot properly rely on such findings.

If, as the Court of Appeals held, the Division's determinations are findings of a violation of law, then such determinations must meet the requirements of due process. The hallmark of due process is an appropriate opportunity to be heard. *United Tel. Credit Union v. Roberts*, 115 Ohio St.3d 464, 2007-Ohio-5247, ¶ 13. Because there was no hearing or right to appeal in this case, there was no due process. Even if determinations are findings of violations, the ones at issue are invalid and unenforceable because issued without due process. See *Harris, supra*, 18 Ohio St.3d at 201-02 ("[I]f the [determination] is considered an adjudication . . . , it is invalid because it was made without a prior hearing."). It was therefore wrong for the Court of Appeals to uphold Appellees' action relying on these unconstitutional findings. This Court should review and reverse that decision.

**Proposition of Law No. 2:**

This Court has jurisdiction over Appellants' due process argument: the decision below addresses constitutionality; constitutional questions are reviewed *de novo*; and failure to address due process was plain error.

The Court of Appeals ruled on two challenges to the constitutionality of the Commissioners' action. First, the argument that the rule applied is void for vagueness under the Due Process Clause. Second, the argument that R.C. Chapter 4115 preempts the standards. Because unconstitutionality was argued below, this Court has jurisdiction over Proposition of Law No. 1, *supra*. At trial in *City of Columbus v. Rogers* (1975), 41 Ohio St.2d 161, 324 N.E.2d 563, a criminal defendant argued that the statute under which he was convicted violated his rights to privacy, due process, and freedom of speech. *Id.* at 182. On appeal, he argued for the first time that the statute was void for vagueness. *Id.* This Court found that:

Inasmuch as appellant raised the question of constitutionality of the ordinance in the trial court, and preserved that issue both in the Court of Appeals and in this court, we deem it appropriate to consider appellant's contention that the ordinance is unconstitutionally void for vagueness.

*Id.* at 163. The same principle applies to the important procedural due process issue in this case.

Moreover, procedural due process questions are matters of law reviewed *de novo* by appellate courts. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835; *Whitman v. Whitman* (3d. Dist. App.) 2007-Ohio-4231, slip copy. In *Ignazio v. Clear Channel Broadcasting* (2007), 113 Ohio St.3d 276, 2007-Ohio-1947, this Court reasoned that

[Defendant] also argued that [Plaintiff] did not raise the issue of severability in the courts below, therefore the argument is waived. But the interpretation of a contract is a matter of law that we review *de novo*.

*Id.* at ¶ 19. Likewise, because constitutional questions are reviewed *de novo*, Appellants' due process argument is reviewable by this Court.

Finally, the Court of Appeals committed plain error when it failed to recognize that the findings Appellees relied upon violated Appellant's right to procedural due process. A finding of plain error is appropriate

where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.

*Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099. The Court of Appeals recognized the lack of an appeal and yet did not address the due process issue. Because this was plain error, the Court should take jurisdiction and reverse.

**Proposition of Law No. 3:**

Appellees' *de facto* debarment rule is preempted by R.C. Chapter 4115, a comprehensive scheme balancing the competing public interests in prevailing wage compliance and competition for public contracts.

The Ohio General Assembly and this Court have identified the competing public interests served by Ohio's prevailing wage law, R.C. Chapter 4115, and Ohio's competitive bidding law, R.C. § 307.86. The prevailing wage law is intended to preserve the integrity of collective bargaining, *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 349, 691 N.E.2d 655, while the competitive bidding law protects tax revenue by ensuring quality work for a low price and avoiding fraud and favoritism in the award of public contracts, *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991 at ¶ 9. The statewide debarment provision strikes a careful balance between these interests. It provides debarment from public contracting for intentional prevailing wage violations. R.C. § 4115.13(D). First offenders are debarred for one year, and repeat offenders for three. *Id.* The effect is to deter contractors from attempting to skirt the prevailing wage law, without unduly narrowing competition for public contracts.

Franklin County's Quality Contracting Standards obliterate the General Assembly's artful balancing rendering R.C. § 4115.13(D) all but superfluous. The Standards effectively debar contractors for eight to ten years based on violations which may be inadvertent. Thus, trivial miscalculations result in severe punishment and greatly diminish competition for public contracts. The standards contravene the General Assembly's clear purpose in enacting R.C. § 4115.13(D). "[T]he General Assembly, in enacting the prevailing wage law, manifested a statewide concern for the integrity of the collective bargaining process in the building and construction trades. Thus, the prevailing wage law preempts and supersedes any local ordinance to the contrary." *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 431 N.E.2d 311. Because state law preempts Appellees' actions, this Court should take jurisdiction over this case and reverse.

**Proposition of Law No. 4:**

The settlement agreements and court proceedings cannot legally be considered as establishing a violation of law, because such a finding would be contrary to both the language of those agreements and the public policy favoring resolution of disputes through mediation and settlement.

When the Attorney General signs a settlement agreement, that agreement binds the state. TPC's settlement agreement expressly indicated that it was not an admission of liability and could not be construed as such. It specified that TPC disputed all the state's prevailing wage claims. The agreement required the Attorney General to release the settled claims and to dismiss them with prejudice, waiving the ability to ever raise them again in a court of law. Upon dismissal, the case ended with no verdict, no findings of fact, and no adjudication of the disputed claims. Therefore, neither the settlement agreement nor the court proceedings constituted a findings of violations by the state which the Commissioners could view as meeting the standards.

**Proposition of Law No. 5:**

Because the state has not “found” that TPC violated the prevailing wage law within the last ten years, Appellees abused their discretion because either the Standards are void for vagueness or the Commissioners’ interpretation constituted an unannounced bid criterion.

As discussed *supra*, neither the Division nor the Attorney General nor the courts of this state have “found” TPC to be in violation of the prevailing wage law, and TPC has not admitted liability. The Division’s investigation without a hearing yielded a determination, not a finding.

Relator asserts that the language [in R.C. 4115.13] authorizing an appeal applies only to a situation where the director [of the Department of Commerce] **finds** that the underpayment was the result of a misinterpretation of statute, or an erroneous preparation of payroll documents. We agree . . . . .

[T]he Department’s function in this case is an investigatory one . . . . .

This is not to say, however, that there are no instances in which the director makes adjudication orders. . . . One instance would be pursuant to R.C. 4115.13 where the director **orders** that the prevailing wage has not been paid as the result of a misinterpretation of the statute or an erroneous preparation of payroll documents.

. . . [W]e hold that where the department makes a determination after an investigation without a hearing under R.C. 4115.13 that an employer has paid less than the prevailing wage, which determination creates a right to sue under R.C. 4115.10, it is not an adjudication . . . .

*State ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198, 201-02, 480 N.E.2d 471. Thus this Court used ‘to find’ as a synonym for ‘to order’ in the prevailing wage context, and decided an important due process issue based on the distinction between an order under R.C. § 4115.13 and a determination under R.C. § 4115.10. The Division’s determinations were not findings. Likewise, in the collection action on the determinations, the settlement agreement disclaimed liability and the court did not enter findings. It was thus an abuse of discretion for the Commissioners to interpret, as they did, that the state had “found” violations.

“Found” is not defined in the Standards. It is thus given its plain meaning. “Find” means “To determine a fact in dispute by verdict or decision.” Black’s Law Dictionary, 8th ed. (Bryan Garner, ed. 2004) at 664. A “finding” or “finding of fact” is “a determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record, usu[ally] presented at the trial or hearing.” *Id.* Because the Commissioners departed radically from the plain language meaning of their Standards, treating un-adjudicated determinations and/or non-admission settlements as “findings” by the state, the Standard does not “affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law” and is therefore void for vagueness. *Norwood v. Horney* (2006), 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 86.

In the alternative, the unexpectedly broad interpretation the Commissioners gave their Standards, which was announced only after bid closing, constituted an unannounced criterion. *See City of Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359. Although the Standards were publicized within the bid package, their only reasonable interpretation is in accord with *Harris* and plain meaning. The Commissioners actually applied a much broader rule, covering unadjudicated determinations settled without an admission of liability and dismissed with prejudice at the trial level. The rule applied was not announced, and the use of that rule to reject TPC was an abuse of discretion under *Scandrick*.

**CONCLUSION**

For the reasons set forth above, Appellants ask this Court to exercise jurisdiction over this appeal and review the judgment of the Court of Appeals.

Respectfully submitted,

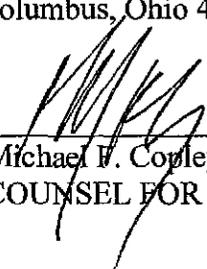


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**Certificate of Service**

I certify that a copy of this Notice of Appeal was sent by first-class U.S. mail to counsel for Appellees, Ron O'Brien and Nick A. Soulas, Jr., Franklin County Prosecutor's Office Civil Division, 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215 on July 28, 2008.

  
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## **Appendix A**

FILED  
COURT OF APPEALS  
IN OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2008 JUN 12 PM 12:13

CLERK OF COURTS

State ex rel. Associated Builders  
& Contractors of Central Ohio,

Plaintiffs-Appellants,

v.

Franklin County Board of Commissioners,  
et al,

Defendants-Appellees.

No. 08AP-301  
(C P C No 08CVH-3328)

(REGULAR CALENDAR)

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OPINION

Rendered on June 12, 2008

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*Mason Law Firm Co., L.P.A., Ronald L. Mason, David S. Timms, Aaron T. Tulencik and Matthew D. Austin, for appellants.*

*Ron O'Brien, Prosecuting Attorney, and Nick A. Soulas, Jr., for appellees.*

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*Schottenstein, Zox & Dunn Co., LPA and Roger L. Sabo, for Amicus Curiae Associated General Contractors of Ohio.*

*Bricker & Eckler LLP and Luther L. Liggett, Jr., for Amicus Curiae MCA-NOW, NECA on behalf of appellee Franklin County.*

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**McGRATH, P.J**

{¶1} This is an expedited appeal from a decision and judgment from the Franklin County Court of Common Pleas denying declaratory judgment, injunctive relief, and a writ of mandamus to an unsuccessful bidder for painting work in connection with construction of the Huntington Park Baseball Stadium in Franklin County, Ohio. The plaintiffs-appellants in this appeal are the Associated Builders & Contractors of Central Ohio ("ABC") and The Painting Company. Defendants-appellees are the Franklin County Board of Commissioners and the individual members thereof, hereinafter "the Commissioners" or "appellees "

{¶2} The county received two bids for painting work on its new ball park. The Painting Company bid \$770,010 and W. F. Bolin Company ("Bolin"), which is not a party to this appeal, submitted a bid of approximately \$46,000 higher. The county's assistant director of Public Facilities Management, Richard Myers, reviewed the bidding companies and concluded that The Painting Company did not meet the county's "quality contracting standards" due to a number of prevailing wage complaints filed against the company with the Ohio Department of Commerce, Labor and Worker Safety Division (formerly the Bureau of Wage and Hour). The Board of Commissioners eventually rejected The Painting Company's bid and awarded the contract to Bolin. Appellants then brought this action seeking injunctive relief based upon violations of Ohio's competitive bidding laws, a writ of mandamus ordering an award of the contract to The Painting Company, and declaratory judgment declaring that Franklin County's quality contracting standards conflicted with and were pre-empted by Ohio's prevailing wage laws. After a bench trial,

the trial court granted judgment for appellees on all aspects of the action, and appellants bring the following assignment of error:

The Court below erred by denying Associated Builders & Contractors of Central Ohio and The Painting Company mandamus, injunctive relief, and declaratory judgment against the Franklin County Board of Commissioners ("Franklin County").

{¶3} Appellants raise three principal arguments in support of their contention that the county's award of the painting contract is invalid: appellants assert that the applicable portion of the published bid criteria is unconstitutionally void for vagueness, that the pertinent section is also invalid because it is pre-empted by Ohio's prevailing wage statutes, and that in addition to the defective published bid criteria the Commissioners in practice awarded the contract based on additional unannounced bid criteria.

{¶4} Appellants seek three types of judicial relief in this case: (1) a writ of mandamus; (2) an injunction prohibiting award of the contract to other bidders; and (3) declaratory judgment. The injunctive relief sought by appellants hinges upon a suitable declaratory judgment construing the published bid criteria in their favor or finding that the contract was awarded under unannounced bid criteria. With respect to the requested writ of mandamus, appellants must demonstrate that (1) they have a clear legal right to the relief requested, (2) the Commissioners have a clear legal duty to perform the requested act, and (3) appellants have suffered an injury for which there is no plain and adequate remedy at law. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. As this case is now postured, appellants' right to a writ also turns on the same factors that would support declaratory judgment in their favor, and we will accordingly not separately

analyze the right to relief of mandamus as we review the trial court's grant of declaratory judgment to appellees.

{¶5} "The intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts." *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, at ¶9. While Ohio law provides for award by the county of public contracts through competitive bidding to the "lowest and best" bidder, R.C. 307.90, the lowest bid is not necessarily the best by virtue of being the lowest, and "courts in this state should be reluctant to substitute their judgment for that [public] officials in determining which party is the single 'lowest and best bidder.'" *Cedar Bay Const., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21. "This discretion is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the [public] authorities in whom such discretion has been vested are abusing the discretion so vested in them." *Id.* Franklin County enacted the bidding specifications at issue in this case, frequently referred to as the quality contracting standards, in 2002, and incorporated them in the published bidding requirements set forth in the project manual for the Huntington Park project. The section relied upon by the county in disqualifying The Painting Company is Section 8.2.4.15, which requires that bidders submit "information that the Bidder has not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years."

{¶6} The Painting Company does not dispute that it has been cited, in one form or another, by the Ohio Department of Commerce for prevailing wage violations a

sufficient number of times to meet the standard for disqualification, *if* any type of prevailing wage complaint is sufficient to trigger the application of Section 8.2.4.15. It is the nature and effect of the citations involving The Painting Company, and specifically whether they rise to the level of "violations," that is disputed by appellants in this case.

{¶7} We will first address appellants' contention that Section 8.2.4.15 is void and unenforceable because it is worded so imprecisely and vaguely that it fails to give a reasonable individual of ordinary intelligence fair notice and sufficient guidance to allow conformance to the law. *City of Norwood v. Home*, 110 Ohio St.3d 353, 2006-Ohio-3789. Appellants assert that the term *violations* in relation to past prevailing wage disputes involving a contractor is impermissibly vague because it is neither explicitly defined by the county regulations nor susceptible to a common and unmistakable interpretation. Without further definition, appellants argue, *violation* encompasses an impermissibly broad range of possible prevailing wage disputes involving a contractor. Specifically, appellants argue that in drafting Section 8.2.4.15, the *Commissioners* could only have intended to include *intentional* violations of prevailing wage rules, which appellees would define as those in which a separate determination has been made that the contractor deliberately planned to misrepresent or conceal wages not meeting the prevailing wage standard.

{¶8} The Painting Company points out that no such determination has ever been made against it in its prior prevailing wage disputes. Relying on deposition testimony from Department of Commerce officials, The Painting Company also points out that there is no appeal from an adverse prevailing wage determination unless an additional finding of intent is made. Because Section 8.2.4.15 refers to violations found *after all appeals*,

appellants argue, a violation that would not have given rise to an appeal could not be the subject of prohibition under Section 8.2.4.15.

{99} As the trial court noted, the absence of an express definition of the term "violation" in the county's quality contracting standards leaves the door open for such arguments. The fact that the door is open for consideration of these arguments, however, does not mean that those arguments are not properly resolved in the county's favor. The county has chosen to interpret Section 8.2.4.15 to include any determination of a prevailing wage violation issued by the Department of Labor and Worker Safety, whether or not those violations were cooperatively settled by a contractor and regardless of whether any finding of intent was made. Undisputedly, The Painting Company has been the subject of a sufficient number of such prevailing wage violations in a relevant time period to be excluded under Section 8.2.4.15, if the broader interpretation of *violation* is applied. These settled violations may not have given rise to substantial penalties, nor been coupled with any finding of intent. Nonetheless, it is not impermissible to give a word employed in a statute or regulation its broadest employment merely because an entity subject to that regulation finds the outcome harsh.

{10} The trial court examined the evidence before it pertaining to The Painting Company's prevailing wage violations and noted the phrasing of the determination letters issued by the Department of Labor and Worker Safety, which expressly notified the company that an "audit had revealed violations of the Ohio Prevailing Wage Law, Chapter 4115 of the Ohio Revised Code" (Trial court decision, at 13) We agree with the trial court's conclusion that the pertinent administrative agency's characterizations of these incidents as "violations" is the most reliable indicia to the subject company of the nature of

its conduct and gives clear notice of the impact it would have on the bid process with Franklin County.

{¶11} Nor do we find that the reference to "appeals" in Section 8.2.4.15 limits its application only to violations giving rise to such a right of appeal; the fact that The Painting Company chose to settle its prevailing wage disputes without pursuing the controversies to the point where they might have given rise to a right of appeal does not nullify the impact of such violations for purposes of the contracting standards. It is entirely reasonable to interpret the reference to appeals in Section 8.2.4.15 as precluding consideration of any violations for which appeals are yet pending, and conversely unreasonable to interpret the term as requiring reliance only on violations from which an appeal might have been taken.

{¶12} Ultimately, we find that the quality contracting standards in Section 8.2.4.15 as enacted by the Commissioners clearly set forth the number of prevailing wage violations that could disqualify a bidder from eligibility for award of a contract, and they are not void for vagueness. The wisdom of choosing to exclude contractors who may, in fact, have only minor violations is a matter of public policy left to the discretion of the Commissioners and not for review by this court.

{¶13} We now turn to the question of whether Sec. 8.2.4.15 is void because it conflicts with and is pre-empted by Ohio's general scheme of prevailing wage law. Generally, prevailing wage law applies to construction projects for public improvements paid for in part or in whole by public funds, R.C. 4145.10(A), and the prevailing wage generally is defined as the rate paid for comparable trades or occupations and the location where the work is being performed, R.C. 4145.05.

{¶14} "[I]n determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute prohibits and vice versa." *Eastlake v. Bd of Bldg. Stds* (1981), 66 Ohio St.2d 363, 368

{¶15} Appellants assert that, since the state has debarment provisions that disqualify bidders on the basis of past prevailing wage disputes, Franklin County could not create a harsher standard when considering its own bids. Appellants are unable to point to any provision in R.C. Chapter 4105 that prohibits public authorities from considering a contractor's history of compliance or non-compliance with prevailing wage law when considering which bid is the lowest and best for a particular job. To the contrary, at least two Ohio courts have considered comparable exclusions for contractors not otherwise debarred from public bidding under state law, and found no prohibition to such heightened standards. *State ex rel. Navratil v. Medina Cty. Commrs.* (Oct. 11, 1995), 9th Dist. No. 2424-M, jurisdictional motion overruled (1996), 75 Ohio St.3d 1412; *Steingass Mechanical Contracting, Inc. v. Warrensville Heights Bd. of Edn.*, 151 Ohio App 3d 321, 2003-Ohio-28. Because we can find neither authority nor rationale that establishes a conflict between Franklin County's reliance on past prevailing wage violations to exclude a contractor and the state's general scheme of prevailing wage regulation, we find that Sec. 8.2 4.15 is not invalid on this basis.

{¶16} Finally, we turn to appellants' contention that the Commissioners used an "unannounced" criterion to evaluate The Painting Company's bid. Appellants argue that when the quality contracting standards were adopted in 2002, the intent was only to exclude serious or intentional violations of prevailing wage law. Appellants presented the deposition testimony of a former Franklin County Commissioner and others to this effect.

Appellants also assert that, prior to a change in membership of the Board of Commissioners, no contractors were excluded on this basis, but as it is now constituted, the Board of Commissioners has undertaken to apply Sec. 8.2.4.15 as an instrument, in conjunction with trumped-up violations brought by competing union officials, to exclude non-union bidders. It is this change of policy, rather than any failure to properly announce and disseminate Sec. 8.2.4.15 in connection with the Huntington Park project, that constitutes the supposed unannounced criterion.

{¶17} We begin by noting that a court may not resort to legislative history, such as the comments of the former Franklin County Commissioner relied on by appellants, to alter the clear wording of the legislative enactment. *Cleveland Trust Co. v. Eaton* (1970), 21 Ohio St.2d 129, 138. Appellants cite the case of *City of Dayton ex rel., Scandrick v. McGee* (1981), 67 Ohio St.2d 356, for the proposition that reliance on unannounced criteria in awarding a contract will constitute an abuse of discretion. We do not disagree with that basic proposition, but *Scandrick* is not comparable to the case before us. In *Scandrick*, the court emphasized that public authorities had excluded a bidder in preference to another who resided in the city. The existence of this supposed residency requirement was not revealed until after bids were open. *Scandrick*, at 359. In contrast, in the present case, the Board of Commissioners rejected The Painting Company's bid on the basis of Section 8.2.4.15, whose language and requirements were plainly put forth in connection with all bids on the Huntington Park project. No new policy was disclosed after bids were made or opened, and thus, our case does not resemble the abuse of discretion found in *Scandrick*. Nor can we find that an abuse of discretion occurred even if the Board of Commissioners had recently adapted its interpretation of Section 8.2.4.15

in applying it more restrictively than envisioned by the former County Commissioner and employees. The currently elected Franklin County Board of Commissioners has given its interpretation of the pertinent regulations, and we have found that that interpretation reasonably comports with the actual wording of the regulations. More to the point, even the testimony cited by appellants did not establish that prior to the rejection of The Painting Company's bid, any contract was ever awarded by the Board of Commissioners to a contractor who did not meet the standards of Section 8 2.4.15, and thus that a substantial change in policy took place such that contractors could not reasonably rely on the words and application of that section when submitting bids.

{¶18} In summary, we find that the pertinent county bidding specifications are not void for vagueness, that the county did not accept and reject bids based on unannounced criteria, and that the pertinent specifications do not impermissibly conflict with Ohio's prevailing wage statutes. The trial court did not err in granting declaratory judgment for appellees, and as a result, appellants are neither entitled to a writ of mandamus nor an injunction.

{¶19} Accordingly, appellants' assignment of error is overruled and the judgment of the Franklin Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and BROWN, JJ., concur

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## **Appendix B**

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
10th DISTRICT  
2008 JUN 12 PM 12:16  
CLERK OF COURTS

State ex rel. Associated Builders  
& Contractors of Central Ohio,

Plaintiffs-Appellants,

v

Franklin County Board of Commissioners,  
et al,

Defendants-Appellees.

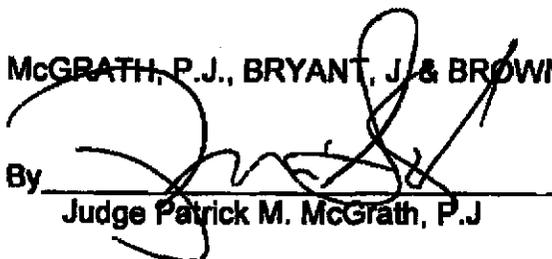
No. 08AP-301  
(C P C No 08CVH-3328)  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 12, 2008, appellant's single assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH, P.J., BRYANT, J. & BROWN, J.

By

  
Judge Patrick M. McGrath, P.J

## Appendix C

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
*[Signature]*  
2008 JUN 13 PM 12:07  
CLERK OF COURTS

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& Contractors of Central Ohio,

Plaintiffs-Appellants,

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et al,

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No. 08AP-301  
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(REGULAR CALENDAR)

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NUNC PRO TUNC OPINION <sup>1</sup>

Rendered on June 13, 2008

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*Mason Law Firm Co., L.P.A., Ronald L. Mason, David S. Timms, Aaron T. Tulencik and Matthew D. Austin, for appellants.*

*Ron O'Brien, Prosecuting Attorney, and Nick A. Soulas, Jr., for appellees.*

*Benesch, Friedlander, Coplan & Aronoff LLP, N. Victor Goodman and Mark D. Tucker, for Amicus Curiae Ohio State Building and Construction Trades Council and Columbus/Central Ohio Building and Construction Trades Council, on behalf of appellee, Franklin County Commissioners.*

*Schottenstein, Zox & Dunn Co., LPA and Roger L. Sabo, for Amicus Curiae Associated General Contractors of Ohio, on behalf of appellee, Franklin County Commissioners.*

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<sup>1</sup> This opinion replaces, nunc pro tunc, the original opinion released June 12, 2008, and is effective as of that date

*Brcker & Eckler LLP and Luther L. Liggett, Jr. for Amicus Curiae MCA-NOW, NECA, on behalf of appellee, Franklin County Commissioners.*

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McGRATH, P J.

{¶1} This is an expedited appeal from a decision and judgment from the Franklin County Court of Common Pleas denying declaratory judgment, injunctive relief, and a writ of mandamus to an unsuccessful bidder for painting work in connection with construction of the Huntington Park Baseball Stadium in Franklin County, Ohio. The plaintiffs-appellants in this appeal are the Associated Builders & Contractors of Central Ohio ("ABC") and The Painting Company. Defendants-appellees are the Franklin County Board of Commissioners and the individual members thereof, hereinafter "the Commissioners" or "appellees."

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{¶16} Finally, we turn to appellants' contention that the Commissioners used an "unannounced" criterion to evaluate The Painting Company's bid. Appellants argue that when the quality contracting standards were adopted in 2002, the intent was only to exclude serious or intentional violations of prevailing wage law. Appellants presented the deposition testimony of a former Franklin County Commissioner and others to this effect

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{¶18} In summary, we find that the pertinent county bidding specifications are not void for vagueness, that the county did not accept and reject bids based on unannounced criteria, and that the pertinent specifications do not impermissibly conflict with Ohio's prevailing wage statutes. The trial court did not err in granting declaratory judgment for appellees, and as a result, appellants are neither entitled to a writ of mandamus nor an injunction.

{¶19} Accordingly, appellants' assignment of error is overruled and the judgment of the Franklin Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and BROWN, JJ., concur

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