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I. ISSUE PRESENTED FOR REVIEW.

Whether the Ohio prevailing wage laws, as a result of a 1935 Amendment, should include suppliers and others who do not work on the site of construction but supply material for the project.

II. CONCERN OF THE AMICUS CURIAE.

Time is a major matter of concern in the construction industry. Almost without fail, the construction contract will state that “time is of the essence.” In contracts with public owners, there is typically a liquidated damages clause that will assess a specified dollar amount for each day the project does not come in on schedule. In highway construction in particular, owners will provide incentives for early completion.

This case is about time. It involves a 1934 Ohio Supreme Court decision as well as an amendment to the prevailing wage laws of Ohio that took place in 1935. In 2007, some seventy-two years after the amendment was enacted, the Ninth Circuit has chosen to apply the Ohio prevailing wage law to work performed in supplying materials worked on off the site of construction. There have been statutory amendments and court decisions in that seventy two year period. None have dealt with the application of the prevailing wage law to off site work. If there were some overriding social need to have such a requirement, no one thought enough of it to require such payments.

This Court, in its *Ohio Asphalt* decision noted *infra*, ruled that owners and contractors were presumed to know *the law* and that the Ohio prevailing wage law was a required contract provision regardless of whether the rates were physically incorporated. This Ninth Circuit decision *sub silentio* overrules the Supreme Court since, assuredly, no one knew of this interpretation.

The problems with applying the statute to materials prepared off site are too numerous to fit in one brief. For example, a highway guardrail contractor will have various sizes of guardrail in stock. Now it would have to log each piece and be certain the wage rate paid to fabricate the steel was in accordance with each county's rate where the equipment was to be installed. A highway contractor installing raised pavement markers would have to do the same. The same manufacturer may have to pay different wage rates for each county. The highway line striper has to be certain the paint applied or plastic tape is being paid at the manufacturer a different rate for each county.

The Ninth District recognized the obvious problem it would create with such a holding. It chose to judicially amend the amendment when it ruled the Ohio's Prevailing Wage Law "expressly provides for the payment of the prevailing rate of wages to employees who *fabricate* materials to be used in or in connection with a public work." They are unique to the project and are fabricated. The word "fabricate" at no point appears in the statutory amendment. Indeed, if this statute had been meant to overrule this Court's *Clymer v. Zane* opinion, *infra*, it was not because of fabrication. It involved whether the prevailing rate was to be paid to the employees of the contractor working in a gravel pit off the site of construction.

The Ninth District reached such a conclusion because that was what the Union wanted. It wanted a Gene's employee who was in the shop fabricating ductwork to be paid the "prevailing rate," in its view, the site work rate. (See, Memorandum of Local Union 33 to the Supreme Court at page 6).

Neither Gene's or the union, and subsequently the Ninth District, recognize the enormity of such a task. There are multiple fabricating requirements on a project involving a highway or a bridge. One such example is the steel or concrete beams specifically manufactured for a bridge.

These items weigh thousands of pounds and often are shipped from out of state. These are fabricated specifically for the project.

Even more pointedly, the statute for off site work does not define the rate to be paid for such work. Ohio GC 17.4a and now existing Revised Code 4115.05 has a rate requirement for on site work. For on site work, the statute provides the rate to be paid is that collectively bargained in labor agreements. The same section the statute speaks to "offsite" work but does not define how the rate would be determined.

III. THE OHIO CONTRACTORS ASSOCIATION.

The Ohio Contractors Association ("OCA") is a statewide association of general contractors and subcontractors, as well as those who supply contractors and who engage in such work as highway and bridge construction. Its members routinely bid upon and are awarded public works contracts. The public owners include state entities such as the Ohio Department Of Transportation, the Ohio Department of Natural Resources, and such political subdivisions as counties, villages, townships, and municipal corporations. These projects are typically required to have prevailing wage requirements. If federal funds are involved, the federal prevailing wage laws are applicable.

The OCA provides a variety of services to its members. Through its Labor Relations Division, it negotiates the labor agreements for heavy and highway construction which are then certified by the Department of Commerce as the prevailing rate. The OCA has participated in support of various amendments to the prevailing wage laws. OCA has a vital interest in the overall implications of the decision of the Ninth District Court of Appeals. While this case may be labeled with union versus non-union or merit shop overtones, that is not the concern of the OCA. Its interest lies in the prevailing wage law of Ohio. The purpose of the prevailing wage statute is to provide the "level playing field" for all contractors on public works, union or non-

union. Its purpose has never been to require those supplying product to the project to pay a “prevailing rate”, whatever that rate be.

IV. STATEMENT OF THE CASE.

The factual scenario in this proceeding will be adequately set forth in the other briefs to be filed with this court.

V. LEGAL ARGUMENT OF THE AMICUS OHIO CONTRACTORS ASSOCIATION.

PROPOSITION OF LAW:

OFF SITE FABRICATION OR MANUFACTURING OF GOODS FOR A PUBLIC IMPROVEMENT PROJECT ARE NOT SUBJECT TO THE REQUIREMENTS OF THE OHIO PREVAILING WAGE LAW.

As set forth above, the Ninth District has taken an amendment in 1935 that would apply the Ohio Prevailing Wage Law to work off the project site and apply it only to “fabrication work.” The apparent rationale is that this is an easy task. But an easy task is not the basis to amend a statute. The Ninth District states the 1935 Amendment was in response to the decision of this Court in *Clymer v. Zane*, noted below. The situation in *Clymer* dealt with employees in a gravel pit. Gravel is not a fabricated material. What the Ninth District fails to recognize is the “off site” amendment creates no basis to determine a prevailing wage. Within the same statutory section (Ohio Rev. Code 4115.05) are separate provisions dealing with work “on the site” and work “off the site.” For work on the site, the statute requires Commerce to utilize the collective bargaining agreement in force and effect. No such language is included in the provision for off site work. The Department of Commerce regulations only deal with determining the wages of employees on the site.

A. THE OHIO PREVAILING WAGE LAW.

This Court has noted the purpose of Ohio's Prevailing Wage Law, Ohio Rev. Code §§ 4115.03 to 4115.16:

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.

J.A. Croson v. J.A. Guy, Inc. (1998), 81 Ohio St. 3d 346, 349, 691 N.E. 2d 655, quoting *State ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, 91, 431 N.E. 2d 311. See also *Suhadolnik v. Ohio Dept. of Commerce* (2004), 157 Ohio App. 3d 561, 812 N.E. 2d 992 (“In other words, a person working on a public project must be paid union scale”).

Ohio's prevailing wage law applies to all construction projects that qualify as “public improvements.” See Ohio Rev. Code § 4115.10(A). see also, Ohio Adm. Code 4109:9-4-02(B); *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St. 3d 366, 369; *Taylor v. Douglas Co.* (Com Pls 2004), 130 Ohio Misc. 2d 4, 2004-Ohio-7348. Pursuant to Ohio Adm. Code 4101:9-4-02(B)(1)(d), in order for there to be a “public improvement” by an institution supported in whole or in part by public funds, there must be: (1) construction and (2) it must be paid for, in whole or in part, from public funds.

In addition to the statute, the Ohio General Assembly provides that the director “adopt reasonable rules” to facilitate the purpose of the Statute. Ohio Rev. Code § 4115.12 (West 2001). The director has adopted such regulations. Ohio Adm. Code § 4101:9-4 et. seq.

At the construction site, the prevailing rate of wages must be at least as much as that of the same trade or occupation in the location where the work is being performed. Ohio Rev. Code § 4115.05. The statute defines the prevailing wage as the sum of two components: (1) the basic

hourly rate of pay and (2) the rate of contributions irrevocably made by the contractor for certain fringe benefits. Ohio Rev. Code § 4115.03(E).

A contractor is required to abide by prevailing wage requirements even if the owner fails to include the requirement in the specifications. *Ohio Asphalt Paving v. Ohio Dept. of Industrial Relations* (1992), 63 Ohio St. 3d 512, 589 N.E. 2d 35, 39. Violations can result in criminal prosecution. Ohio Rev. Code § 4115.99; *State v. Buckeye Electric* (1984), 12 Ohio St. 3d 252, 466 N.E. 2d 894. As a result, the statute is strictly construed. *Dean v. Seco Electric* (1988), 35 Ohio St. 3d 203, 206, 519 N.E. 2d 837, 840. One Court of Appeals has even held that the general contractor is responsible for the back pay obligations of its subcontractors. *Cremeans v. Jimco* (10th Dist. June 5, 1986), No. 85AP-821, 1986 WL 6334.

The contractor and subcontractor had a series of requirements during the course of the contract, including:

- Contractors required to have its subcontractors to pay prevailing rates.
- Observe apprenticeship requirements under bona fide program (Ohio Rev. Code 4115.05).
- Notify employees of their job classification, rate of pay and identity of the prevailing wage coordinator (Ohio Rev. Code 4115.06).
- Contractor or subcontractor to make payments in accordance with the prevailing wage determinations (Ohio Rev. Code 4115.031).
- Construction “on any project” funded by certain other statutory provisions as a public improvement (Ohio Rev. Code 4115.032).
- Contractor or subcontractor to keep full and accurate records, (Ohio Rev. Code 4115.07).
- A prevailing wage coordination to deal with contractors and subcontractors (Ohio Rev. Code 4115.071).

See Ohio Rev. Code §§ 4115.05, 4115.07, 4115.071(C). All such matters deal with project site requirements. There are similar obligations upon owners, who are to:

- Request wage rate schedules.
- Appoint a prevailing wage coordinator.
- Update the wage schedule as revisions are issue during the contract with the failure to do so subjecting the public owner to liability.

One such statute, Ohio Rev. Code Section 4115.06 provides:

In all cases where any public authority fixes a prevailing rate of wages under Section 4114.04 of the Revised Code, and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed. The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.

The statute and the administrative regulations speak to “subcontractor,” not “fabrication.” There is a distinct difference. As set out in *Wren Reese, Inc. v. Great Lakes Structural Concrete Products, Inc.* (Ohio App. 6th Dist.) 50 Ohio App.2d 168,362 N.E.2d 269, 4 O.O.3d 137.

It is beyond dispute that defendant in agreeing to fabricate and to furnish one hundred I-beams to plaintiff did not agree to ‘perform on the on the job site’ within the meaning of Section 101.50 of the Department of Transportation’s Construction and Material Specifications, and thus was not a subcontractor. However, as to the I-beams, defendant was a firm ‘that fabricates structural metals or prestressed concrete members’ within the meaning of Section 101.22 of such plans, and thus was a fabricator.

As set out in the Concern of the Association, the very statute which provides for an interested party appeal, Ohio Rev. Code 4115.10, references the contractor employee and the subcontractor employee. This obviously forms another basis to set aside the Decision. But the Court also ignores the plain language of the statute when it attempts to use that to find jurisdiction.

In the case of *United Bhd. of Carpenters & Joiners of Am. Local No. 1581 v. Bell Eng. Ltd.* (Ohio App. 6 Dist. April 14, 2006), 2006 WL 988445, 2006-Ohio-1891 the Court did just such a legislative analysis, and concluded:

[¶ 24] R.C. 4115.04 clearly states, “every public authority authorized to contract for or construction *with its own forces* (emphasis added) a public improvement * * * shall have the director of commerce determine the prevailing rates of wages.” The statutory duty is placed squarely upon the village.

[¶ 23] The legislative intent to limit the applicability of the prevailing wage statutes to those whose forces or employees do actual physical construction and the contracting public authority is further reinforced by review of related statutes.

B. THE JUDICIAL AMENDMENT TO THE STATUTORY AMENDMENT IS NOT APPROPRIATE IN DETERMINING WHAT WORK IS SUBJECT TO THE OHIO PREVAILING WAGE LAW.

The overwhelming complexity that would be caused by the requirement all wages paid for materials incorporated into the project was conceded by the Ninth District. Recognizing the problem, the Ninth district rewrote the statute by stating:

The statute, however, includes a presupposition that the materials at issue must be fabricated specifically “to be used” in regard to the project, rather than pre-fabricated materials made in the ordinary course by suppliers.

Sheet Metal Wkrs., supra, ¶ 37. The Court went on to “surmise” (its wording):

[i]t would not be difficult to trace materials made specifically for a particular public improvement to determine which off-site workers would be subject to the prevailing wage law.

Id. The Court should have read further on in the statute. Immediately following the statutory provision concerning such rate as to “material to be used upon or in connection therewith,” is the next paragraph of 4115.03:

Every contract for public work shall contain a provision that each laborer, worker or mechanic, employed by such contractor,

subcontractor, other person *about or upon such public work*, shall be paid the prevailing rate of wages provided in this section.

(Emphasis added). The phrase “about or upon” designates, at a minimum, proximity to the site. The Court proceeded to amend the statute to read it in a way it sees fit.

The Ninth Circuit does from time to time push the borders of existing law to no doubt respond to what it considers an inviting set of facts. It fashioned a damage remedy for a competitive bidding dispute in *Cementech v. City of Fairlawn*, 109 Ohio St. 3d 475, 849 N.E.2d 24, in conflict with other Appellate tribunals and which was recently reversed by this Court.

C. THE STATUTE HAS NO MECHANISM TO PROVIDE A PREVAILING RATE OF WAGES FOR OFF-SITE WORK, NOR TO ENFORCE SUCH A PROVISION.

As set forth above, Ohio Revised Code 4115.05 sets out a provision for on site work and that the rate is as set forth in collective bargaining agreements. For off site work, the statute creates no mechanism how such a rate is determined, other than it is to be in the county where the work is to be performed. The Amendment only states:

The wages to be paid for a legal day’s work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day’s work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash.

The statute for purposes of determining the rate for work “on the site” of construction, also at Ohio Rev. Code 4115.05, adds one _____ :

The prevailing rate of wages to be paid for a legal day’s work, as prescribed in Section 4115.04 of the Revised Code, to laborers, workers, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed *under collective bargaining agreements or understandings* between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

Missing from “off site” is any reference to a Collecting Bargaining Agreement.

The Department of Commerce, in its Regulations, also only contains a provision for determining work to be performed “on the site of construction.” OAC 4101:9-4-09 (2004) (“The Director shall determine the prevailing rate of wages to be paid for a legal day’s work to employees upon such public works . . . “). Cf., Op. Attorney. Gen. No 77-076 (Since there was no collective bargaining agreement that define the rates of such technicians, there was no prevailing rate to certify). Various other statutes and regulations are limited to the site. Eg. OAC 4101:9-4-23 (2004) (the investigation may include an audit of the records of any employer on the affected project”).

In *Ohio Asphalt Paving, Inc. supra*, this Court noted that the contractor is required to pay the prevailing wage obligations “regardless of whether prevailing wage specifications were included in the contract.” 63 Ohio St. 3d at 515. The Court went on to rule that the contractor may maintain a cause of action in contribution “on the part of the public authority for failing to comply with the prevailing wage provisions.” 63 Ohio St. 3d at 517. Before either such remedy can occur, there must be a basis upon which the Department can make such a determination. The statute affords no such basis. In such absence, the Department of Commerce can regulate. As set out in Section 1.49, Revised Code:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) the object sought to be attained; (B) the circumstances under which the statute was enacted; (C) the legislative history; (D) the common law or former statutory provisions, including laws upon the same or similar subjects; (E) the consequences of a particular construction; (F) the administrative construction of the statute.

Simply put, the statute as amended in 1935 provided no basis to make a determination for the rate for off site work. Since it does establish one for on site work, the statute on off site work is predatory in nature. If there were such a rate that could be established, it is not the rate in

collective bargaining agreements. If a prevailing rate did apply to the fabricator working in the shop, and it was known how it could be determined, it would likely be the rate the employee was already making, not the higher job site rate. Following the admonitions of this court in *Pipefitters Local 347, Supra*, the rates of wages for off site work cannot be premised upon on site construction rates.

D. THE DECISION OF THE COURT IN CLYMER V. ZANE FORMED NO BASIS TO EXTEND THE OHIO PREVAILING WAGE LAW TO FABRICATORS OF MATERIALS MANUFACTURED FOR THE SITE.

The *Clymer* case (*Clymer v. Zane* (1934), 129 Ohio St. 359, 191 N.E. 123) involved a contractor's employees who worked in an off-site gravel pit, and employed by the Contractor, to provide sand and gravel for concrete to be used in a public improvement project. The issue before the Supreme Court was whether "the men who worked in the gravel pit [were] employees upon a public improvement" (emphasis in original). The Court held:

A private enterprise, separate in time and in space, is not necessarily a part of a public improvement because owned and operated by the contractor in charge of the public improvement, and workmen employed in such private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such enterprise is used in the public improvement.

This Court reasoned:

To extend the provisions of the statute to all employees who prepare material for a public improvement would be to include within the provisions of the law the employees of a cement factory which makes cement for a public improvement, and the employees of a brick plant which makes paving brick for a public highway, if such cement plant or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely lead to conflicts with regulations and 'codes' governing wages of other industries.

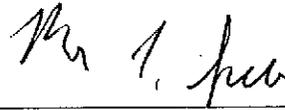
While the "rationale" for the decision included all materials furnished, the case was narrow in its application. A gravel pit.

The Ninth District Court in *Gene* limits its opinion to materials fabricated for the work site. That was not even the issue in *Clymer*. Its statement that the amendment to the Act applies to work “fabricated” for the site is non-supportable.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Ohio Contractors Association requests that the Court reverse the decision of the Ninth District.

Respectfully submitted,



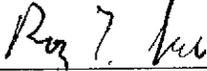
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief Amicus Curiae of the Ohio Contractors Association was served by regular U.S. Mail on this 15th day of August, 2008 upon the following:

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