IN THE SUPREME COURT OF OHIO

Gene's Refrigeration, Heating & Air Conditioning, Inc. Appellant, v. Sheet Metal Workers' International Local Union No. 33 Appellee.	: : : : : : : : : : :	Case No. 2008-0780 On Appeal From the Medina County Court of Appeals, Ninth Appellate District

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MERIT BRIEF OF AMICUS CURIAE, THE OHIO READY MIXED CONCRETE ASSOCIATION, IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 2

Proposition of Law No. 1:
The off-site manufacturing to be used in or in connection with a public improvement project is not subject to Ohio's prevailing wage law because the requirements of Ohio's prevailing wage law only applies to work performed at and upon the job site of the public improvement project. 3

A. Courts must strictly construe the prevailing wage laws because they are penal in nature 4

B. The statutes and regulations make no reference to materialmen 5

C. For seventy-three years no one has made this claim, which would have been a major victory for unions 6

Proposition of Law No. 2:
A labor organization that obtains written authorization from an employee who has worked on a project subject to the requirements of Ohio's prevailing wage law only has standing as an interested party to pursue claims only on behalf of the employee who expressly authorized the representation. 8

CONCLUSION 9

PROOF OF SERVICE 10

TABLE OF AUTHORITIES

CASES: Page

Clymer v. Zane (1934), 128 Ohio St. 35 . . . . . 2, 3, 4, 6, 7

Dean v. Seco Electric Co. (1988), 35 Ohio St. 3d 203 4

Sheet Metal Workers Internat'l Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc. 9th Dist. No. 06CA0104-M, 2008-Ohio-1005 . . . . . 4, 8

Sheet Metal Workers' Internat'l Assn., Local Union No. 33 v. Mohawk Mech., Inc. (1999), 86 Ohio St. 3d 611, 716 N.E. 2d 198 8

United Brotherhood of Carpenters and Joiners, v. Bell Engineering Limited, Inc., 6th Dist. No. WM-05-009, 2006 Ohio-1891 4

Vaughn Industries, Inc. v. Dimech Services, 167 Ohio App. 3d 634, 2006-Ohio-3381 5

STATUTES; REGULATIONS:

R.C. 1311.25 6

R.C. 1311.251 6

R.C. 1311.26 6

R.C. 1311.261 6

R.C. 1311.28 6

R.C. 1311.29 6

R.C. 1311.311 6

R.C. 1311.32 6

R.C. 4115.03 . . . . . 5, 6, 8

R.C. 4115.031 5

R.C. 4115.032 5

R.C. 4115.06 5

R.C. 4115.07 5

R.C. 4115.071 5

R.C. 4115.12 5

R.C. 4115.13 5

R.C. 4115.132 5

R.C. 4115.133 5

R.C. 4115.15 5

R.C. 4115.16 . . . . . 1, 5

O.A.C. 4101:9-4-01 through 4101:9-4-28 6

O.A.C. 4101:9-4-02 6

STATEMENT OF THE CASE AND FACTS

Appellant, Gene's Refrigeration, Heating & Air Conditioning, Inc. (Gene's), is a construction contractor that performs plumbing, heating, ventilation and air conditioning work on both public and private construction projects. Gene's also manufactures and fabricates sheet metal duct work at its off-site headquarters. Gene's was awarded a contract to perform certain work at the Granger Fire Station, a public improvement project subject to Ohio's prevailing wage law (the Granger project). Some of the duct work used by Gene's on the Granger project was fabricated at its shop, which is not located at the construction site.

One of Gene's employees who helped fabricate the duct work but did no work at the Granger project site signed a form authorizing the Appellee, Local 33, to represent him in bringing a prevailing wage action in accordance with R.C. 4115.16. No other employee of Gene's signed such a form.

Local 33 brought this action claiming to represent all employees of Gene's who worked on the job-site or who participated in the fabrication of duct work used on the Granger project and claiming they were all entitled to be paid prevailing wages.

The Medina County Court of Common Pleas held that Local 33 did not have authority to represent employees other than the one who had signed the authorization form. The Court further held that the fabricators who did not work on the Granger project site were not subject to the prevailing wage law. The Court entered summary judgment for Gene's.

On appeal, two judges of the Ninth District Court of Appeals reversed the trial Court holding that Local 33 had standing to represent all of Gene's employees and that

the off-site fabrication of materials used in or in connection with a public improvement is subject to Ohio's prevailing wage law. Judge Slaby dissented from the majority opinion.

Amicus Curiae the Ohio Ready Mixed Concrete Association respectfully submits that the majority of the Court of Appeals erred in their conclusions and upon review by this Court should be reversed.

ARGUMENT

The Ohio Ready Mixed Concrete Association is a statewide trade association of ready mixed concrete producers. Its members – the vast majority of producers in Ohio – supply 30% of their product for highways, bridges and other public works construction contracts, which could bring them under the prevailing wage laws if the majority decision of the Court of Appeals is allowed to stand.

Like other off-site producers of materials, the producers have relied for seventy-four years on this court's ruling in *Clymer v. Zane* (1934), 128 Ohio St. 359, that workmen employed off-site in a private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such off-site enterprise is used in the public improvement.

In most instances, ready mixed concrete producers are neither contractors (having direct construction contracts with the owner) nor subcontractors (having construction contracts with a contractor or other subcontractor) working on the job site, but are materialmen, producing their product off-site and delivering it to the construction site to be incorporated into the project by a contractor or subcontractor.

The Ohio Ready Mixed Concrete Association believes that the majority decision by the Court of Appeals was wrong, and that the General Assembly did not legislatively

overrule *Clymer v. Zane*. This court should overrule the Court of Appeals. However, if the Supreme Court determines that the production of materials which are incorporated into a public improvement subject the producers to Ohio's prevailing wage laws, then the court should distinguish between those who merely produce the materials off-site from those who produce the materials and also incorporate them into the public improvement at the job site.

PROPOSITION OF LAW NO. 1: THE OFF-SITE MANUFACTURING TO BE USED IN OR IN CONNECTION WITH A PUBLIC IMPROVEMENT PROJECT IS NOT SUBJECT TO OHIO'S PREVAILING WAGE LAW BECAUSE THE REQUIREMENTS OF OHIO'S PREVAILING WAGE LAW ONLY APPLIES TO WORK PERFORMED AT AND UPON THE JOB SITE OF THE PUBLIC IMPROVEMENT PROJECT.

In *Clymer v. Zane*, the defendant had a contract to improve a public highway. The improvements called for the use of concrete, and the greater portion of the sand and gravel used came from a pit owned and operated by the defendant and located about a mile and a half from the nearer end of the improvement. This court held that the workers who removed the sand and gravel from the pit were not employees upon a public improvement and, therefore, not subject to Ohio's prevailing wage law. This court held:

> To extend the provisions of the (prevailing wage law) 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.

Id. at 363.

The following year, the General Assembly enacted Am. S.B. No. 294 amending certain sections and enacting additional sections of Ohio's prevailing wage laws.

A. Courts must strictly construe the prevailing wage laws because they are penal in nature.

This court has held that the prevailing wage laws are penal in nature and must therefore be strictly construed. *Dean v. Seco Electric Co.*(1988), 35 Ohio St. 3d 203, citing *Clymer*. The court below did not narrowly construe the statutes but went well beyond where any court had gone before. Judge Slaby recognized the slippery slope when he asked: "Must a contractor now record those fractions of working time spent by off-site employees whose work bears a tangential relationship to materials used in a public improvement?" *Sheet Metal Workers Internat'l Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* 9th Dist. No. 06CA0104-M, 2008-Ohio-1005, ¶ 50.

Although the issue now before the court was not present in two lower court rulings, the decisions suggest the narrow construction followed by the courts and their rejection of arguments advanced by the Appellee. In *United Brotherhood of Carpenters and Joiners, v. Bell Engineering Limited, Inc.*, 6th Dist. No. WM-05-009, 2006-Ohio-1891, the Court held that the prevailing wage law did not apply to the defendant who had been hired by the owner to prepare plans and specifications for a building and for bidding and contract documents. The court held at ¶ 21:

> The statute clearly and unambiguously limits those subject to it to include public authorities, corporations, firms, or people <u>who use their own forces in the actual construction of a public improvement project</u>.

Similarly, in *Vaughn Industries, Inc. v. Dimech Services,* 167 Ohio App. 3d 634, 2006-Ohio-3381, the Court held at ¶ 24:

> By its very nature, Ohio's prevailing wage law exists to determine the prevailing rate of wages in a particular industry at a specific location, i.e. jobsite.

Clearly, a materialman who simply supplies materials to a jobsite is not engaged in construction at the jobsite.

B. The statutes and regulations make no reference to materialmen.

The various statutes comprising Ohio's prevailing laws must be read in *pari materia.* It is important to note that R.C. Sections 4115.03(E)(2) and (3), .031, .071, .132, and .15 refer to "contractor and subcontractor" but make no reference to materialmen. R.C. 4115.032, .07, and .12 refer to "contractors and subcontractors" but make no reference to materialmen. R.C. 4115.06 refers to "the successful bidder and all his subcontractors" but makes no reference to materialmen. R.C. 4115.13 refers to "contractor, subcontractor, or officer of the contractor or subcontractor" and R.C. 4115.133 refers to "contractors, subcontractors, and officers of contractors and subcontractors" but neither makes reference to materialmen or officers of materialmen. Finally, R.C. 4115.03(F) which defines "interested party" refers to (1) bidders, (2) subcontractors, (3) unions, and (4) associations having as members those persons mentioned in (1) and (2) but makes no reference to materialmen.

If materialmen were intended to be included, the General Assembly knew how to make it clear they were included. Compare the absence of references to materialmen in the prevailing wage laws with the abundance of references in the laws providing for

liens on public improvement contracts. R.C. 1311.25 defines "materialman," "material supplier," and "material." R.C. 1311.251 defines when a materialman has a claim for furnishing materials. R.C. 1311.26 provides for the affidavit by an unpaid subcontractor, materialman or laborer. R.C. 1311.261 provides for the serving of notice by the unpaid subcontractors or materialmen. R.C. 1311.28 provides for the withholding of funds by the owner for the benefit of unpaid subcontractors, materialmen and laborers. R.C. 1311.29 provides for the filing of affidavits with the county recorder by unpaid subcontractors, materialmen and laborers. R.C. 1311.311 and .32 further define the right of subcontractors, materialmen and laborers.

The repeated references to materialmen and materials throughout the lien laws and the almost total absence of such references in the prevailing wage law manifest the clear intention of the legislature to grant rights to materialmen under the lien laws but to not include them under the prevailing wage law.

A review of the rules adopted by the Department of Commerce in connection with prevailing wage, O.A.C. 4101:9-4-01 through 4101:9-4-28, shows repeated references to contractors and subcontractors but an absence of references to materialmen except in the definition contained in O.A.C. 4101:9-4-02. Materialmen are thus distinguished from contractors and subcontractors.

C. For seventy-three years no one has made this claim, which would have been a major victory for unions.

Appellee contends that the General Assembly legislatively overruled the *Clymer* decision. While it may be true that there is no legislative history with respect to the enactment of that Act, there is an important post-enactment history.

A legislative reversal of *Clymer* would have been a major victory for the unions. But there is no evidence that the unions perceived it as such. One would have expected unions to immediately make claims against materialmen who did not pay prevailing wages for off-site work. There is no history of any claims having been presented for seventy-three years.

One would have expected the public officials responsible for enforcement of the prevailing wage laws to have demanded that materialmen supplying products for public works construction projects pay prevailing wages. There is no history of such demands having been made for seventy-three years. Nor is there any record of an employee of a materialmen litigating such a prevailing wage claim.

More than seven decades have passed without one worker, one union or one public official bringing a prevailing wage claim against a materialman to the courts. The absence of such claims speaks loudly that no such right was intended by the General Assembly or interpreted to exist by the parties directly affected.

Is the driver who brings the ready mixed concrete to the job site covered by the prevailing wage law? Are those workers at the batching plant who combine the ingredients to make the concrete covered? Are those who supplied the ingredients: cement, sand, gravel, various admixtures, and water, covered? As Judge Slaby concluded, the majority opinion of the court below "is unworkable."

There is nothing to support the idea that the General Assembly sought to legislatively overrule *Clymer v. Zane.* Until now, no worker, no union, no responsible governmental authority, and no scholarly writer has made such a claim. Such a change, after so long a period of time, should be effected by the General Assembly

clearly stating its intent rather than by judicial fiat.

<u>PROPOSITION OF LAW NO. 2</u>: A LABOR ORGANIZATION THAT OBTAINS WRITTEN AUTHORIZATION FROM AN EMPLOYEE WHO HAS WORKED ON A PROJECT SUBJECT TO THE REQUIREMENTS OF OHIO'S PREVAILING WAGE LAW ONLY HAS STANDING AS AN INTERESTED PARTY TO PURSUE CLAIMS ONLY ON BEHALF OF THE EMPLOYEE WHO EXPRESSLY AUTHORIZED THE REPRESENTATION.

R.C. 4115.03(F)(3), defi nes "interested party" to include "Any bona fide organization of labor which has as **members** or is authorized to represent **employees** of a person mentioned in division (F)(1) (bidders) or (2) (subcontractors) of this section...." That "members" and "employees" are plural is significant in considering whether authorization by one employee gives a union authority to represent all employees - whether the other employees want union representation or not.

Both Appellant and Appellee cite *Sheet Metal Workers' Internat'l Assn., Local Union No. 33 v. Mohawk Mech., Inc.* (1999), 86 Ohio St. 3d 611, 716 N.E. 2d 198, in support of their positions. Judge Slaby analyzed the case and the statute and concluded:

> *Mohawk* does not stand for the proposition that once a single employee authorizes representation under R.C. 4115.03(F)(3), a labor organization has carte blanche authority to represent the interests of all.

Gene's, 2008-Ohio-1005, ¶ 49.

The majority below does not address such obvious issues as: If one employee authorizes Union A to represent him/her and another employee authorizes Union B to represent him/her, can both unions claim to represent all employees of the party? If the Sheet Metal Workers' Union has an authorization from one person who does sheet metal work, can the union claim to represent those employees who might qualify for

membership in the teamsters, or electricians, or plumbers and pipe fitters unions?

In the case now before the Court, the authorization was signed by an employee who participated in the off-site fabrication of duct work. If the authorization had been signed by the employee who drove the truck to deliver the duct work to the job-site, would the union have had carte blanche to represent the interest of all employees? Again, this Court is being asked to start down a slippery slope with no rational end in sight. The only rational conclusion is to limit the union's right to representation to those who signed the authorization.

CONCLUSION

For the reasons stated above, the Court should overrule the Court of Appeals. As to Proposition 1, the Court should hold that Ohio's prevailing wage law does not apply to materials manufactured off-site. Or, if it does apply, that it is limited only to manufacturers that also incorporate the materials on-site. As to Proposition 2, the Court should hold that a labor organization only has standing to represent an employee who expressly authorized the representation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served by first class, U.S. Mail, postage prepaid, on the 26 day of August, 2008, upon:

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