

IN THE SUPREME COURT OF OHIO

SHEET METAL WORKERS' : **Supreme Court Case No.: 08-00780**
INTERNATIONAL ASSOCIATION, :
LOCAL UNION NO. 33, : On Appeal From the Medina County Court
 : of Appeals, Ninth Appellate District Case
Appellee, : No.: 06CA0104-M
 :
v. : Medina County Court of Common Pleas,
 : Case No. 05-CIV-1249
 :
GENE'S REFRIGERATION, HEATING :
& AIR CONDITIONING, INC. :
 :
Appellant. :

**BRIEF OF AMICUS CURIAE,
ASSOCIATED BUILDERS & CONTRACTORS OF OHIO, INC.
IN SUPPORT OF
APPELLANT GENE'S REFRIGERATION, HEATING
AND AIR CONDITIONING, INC.**

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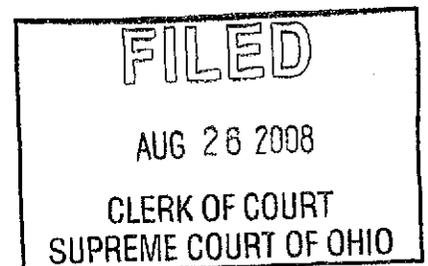


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STATEMENT OF FACTS

Associated Builders & Contractors of Ohio, Inc. (“ABC”) adopts the Statement of Facts as set forth in Appellant Gene’s Refrigeration, Heating and Air Conditioning, Inc.’s (Gene’s) Merit Brief.

ISSUES PRESENTED FOR REVIEW

This cause presents two critical issues for review regarding the construction of public improvement projects subject to Ohio’s Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16: (1) whether the labor performed in off-site manufacturing¹ of all materials to be “used in or in connection with” a public improvement project are to be paid at construction industry prevailing wage rates pursuant to R.C. 4115.05; and (2) whether a labor organization, that only represents employees performing sheet metal, heating and cooling work, has standing as an “interested party” to represent all employees in every trade or craft who worked on a public improvement project when only one employee, who never even performed work on jobsite of the project, had authorized that labor organization to represent him pursuant to R.C. 4115.03(F).

ABC submits that the incorrect resolution of these critical issues by the Ninth District Court of Appeals goes far beyond the limits of the law and undermines the specific intent of the Legislature when enacting Ohio’s Prevailing Wage Law. More so, the decision of the Ninth District detrimentally affects both union and non-union businesses equally operating in Ohio, and cuts across traditional philosophical lines that usually define the issues between these two groups. This fact is evidenced by the Amicus Briefs filed by the Associated General Contractors of Ohio and the Ohio Contractors Association, who primarily represent unionized contractors in the construction industry, and who have come out in full support of Appellant Gene’s

¹ When the term “manufacturing” is used in this brief, it is intended to include all types of fabricating or preparing of materials “used in or in connection” with a public works project.

Proposition of Law No. 1. The filing of Amicus Briefs by the three largest construction trade associations in the State of Ohio, both union and non-union, together with the Ohio Chambers of Commerce who represents the business community, all arguing that Ohio's Prevailing Wage Law has always applied only to work performed at the jobsite of public works projects, clearly demonstrates the weight of industry practice, and that the Ninth District's interpretation of R.C. 4115.05 is both incorrect and out of touch with reality. The Ninth District's decision should be reversed in total and Appellant Gene's Propositions of Law No. 1 and No. 2 should be adopted by the Court.

THE CONCERN OF THE AMICUS CURIAE

ABC of Ohio is a statewide trade association consisting of over one thousand construction industry employers, suppliers and associates adhering to the merit shop, free enterprise philosophy that construction projects should be awarded based upon merit to the lowest responsible bidder.² Its members perform construction work, manufacture/fabricate, supply and transport products and materials under public works construction contracts. Like other construction contractors and off-site manufacturers of materials, ABC members have relied upon for over seventy-four years this Court's ruling in *Clymer v. Zane*³, the consistent administrative enforcement and interpretation of the statute, as well as established industry practice dictating that workmen employed off-site in a private enterprise fabricating or

² ABC of Ohio is part of Associated Builders & Contractors Inc., the largest association of construction contractors and subcontractors in America. Its membership includes nearly twenty-five thousand (25,000) construction and construction related firms in eighty-four (84) chapters across the United States. The goal of ABC is "to provide the best educational and entrepreneurial activities and ensure all of its members the right to work in a free and competitive business climate, regardless of union or non-union affiliation." ABC of Ohio represents the combined interests of over one thousand contractors, suppliers and associates in the three Ohio chapters – the Northern Ohio, Central Ohio and Ohio Valley Chapters, which together cover the entire state.

³ *Clymer v. Zane* (1934), 128 Ohio St. 359.

manufacturing “materials” for use on a public works project are not subject to Ohio’s Prevailing Wage Law. Currently, and in accordance with the Ninth District’s improper interpretation of R.C. 4115.05, every construction contractor, manufacturer/fabricator, supplier, or delivery company who has ever manufactured, supplied or delivered “materials” to be used in or in connection with a public improvement project are in violation of R.C. 4115.05 and owe back pay to their employees who performed such work. R.C. 4115.21 would allow every employee (or interested party) who ever performed such off-site work in the last two years to file a prevailing wage complaint seeking to recover construction industry prevailing wages rates for the manufacturing or delivery work they performed. Because of the Ninth District’s incorrect interpretation of R.C. 4115.05, employers in the State of Ohio would be completely defenseless against such claims.

Second, these same construction industry employers, manufacturers and suppliers, most of whom are non-union, submit that this Court’s decision in *Sheet Metal Workers Local 33 v. Mohawk Mechanical*,⁴ and the express language of R.C. 4115.03(F), specifically limits the standing of a labor organization in representing employees (who are not members of the union) to only those individuals who have specifically authorized such union representation for prevailing wage complaint proceedings.

Moreover, ABC contends that even more fundamentally, such “interested party” standing is limited to the specific trade and craft that the labor union represents. It is submitted that it is beyond the Legislature’s intent to have a plumber’s local union attain standing to sue an electrical contractor, or to have a plumbing contractor attain standing to sue a carpentry contractor working on the same project alleging prevailing wage violations. A labor

⁴ *Sheet Metal Workers Union Local 33 v. Mohawk Mechanical*, (1999), 86 Ohio St.3d 611.

organization representing plumbers has absolutely no expertise in collective bargaining or otherwise, to represent the interests of employees of an electrical contractor because the wages, hours and other terms and conditions of employment in these two trades is so different. Likewise, a plumbing contractor has no interest, through competitive bidding or otherwise, to bring a prevailing wage complaint against a carpentry contractor as neither would have competed for the same contract for the project. Thus, interested party standing should be limited to representing the interests of employees who are engaged in performing the same work in the same trade or craft, to which their employers had submitted a competitive bid on the same contract for the project, and/or limited to just those employees who specifically authorized their own representation and assigned their prevailing wage rights to the union.

Members of ABC, members of other contractors associations, manufacturers, employees, governmental entities and the public in general will be seriously impacted if the decision of the Ninth District is allowed to stand regarding both issues accepted by this Court for review.

ARGUMENT

Proposition of Law No. 1: The Off-Site Fabrication of Materials 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 Apply to the Jobsite of the Public Improvement Project.

ABC fully incorporates and adopts the legal arguments set forth in Gene's Merit Brief with regard to Proposition of Law No. 1. In addition, ABC further submits additional arguments to add and to emphasize certain points regarding Gene's Proposition of Law No. 1.

In evaluating Proposition of Law No. 1, it is requested that this Court interpret the statutory provisions of Ohio's Prevailing Wage Law and determine the continued viability of *Clymer v. Zane*. ABC submits that the prevailing wage statute, R.C. 4115.03 *et seq.* is perfectly clear that prevailing wages apply only to construction work performed at the jobsite of the public

improvement project, and this Court's decision in *Clymer v. Zane* was never *legislatively superseded*. This position is enforced through the explicit statutory language used in multiple sections of the prevailing wage law, the language and provisions contained in the interpretive Administrative Code, well established Ohio Supreme Court precedent and other Ohio case law, as well as 74 years of industry custom, practice and enforcement.

Statutory analysis begins with looking to whether the statute at issue is ambiguous. It is submitted that R.C. 4115.05 would be ambiguous if this Court were to read the one contentious sentence at issue in complete isolation from the rest of the prevailing wage statute.

Hence, R.C. 1.49 provides guidance for interpreting ambiguous statutes and states:

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.

There is no legislative history available for R.C. 4115.05 from 1935. Hence, we cannot determine what "object" the Legislature sought to obtain through its 1935 amendment. Likewise, there are no surrounding facts mentioned in the statute which would indicate what particular "circumstances" the Legislature wished to address through the amendment. However, there is guidance to be found within R.C. 4115.05 itself, as well as other sections of Ohio's Prevailing Wage Law, the interpretive Administrative Code, and the Davis Bacon Act. More so, the "consequences" of the irrational statutory construction of this section by the Ninth District should be especially determinative when interpreting R.C. 4115.05.

1. *Clymer v. Zane* was Not Legislatively Overruled.⁵

It is completely speculative and improper for any inferior court to assume that because an amendment was made to present day R.C. 4115.05 in 1935, one year after this Court's decision in *Clymer*, that somehow this amendment was intended to *legislatively supersede* this superior court's well reasoned holding. As this Court is well aware, and as was well exemplified by the tenacious *Scott Pontzer* uninsured/underinsured litigation, the Legislature acts swiftly and with purpose to change certain statutory provisions intended to *legislatively supersede* Supreme Court decisions that may be rendered contrary to the Legislature's intent. More importantly, when the Legislature acts to *legislatively supersede* a specific Supreme Court decision, the statute enacted or amended will specifically cite to such decision to make the intent to supersede the holding absolutely clear. See R.C. 3937.18 (whereas the Legislature placed directly into the statute its clear intent to supersede Ohio Supreme Court decisions).⁶

⁵ The Kentucky Court of Appeals cited *Clymer v. Zane* with approval and adopted its reasoning as late as 1954. See *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848, (where the Kentucky Court of Appeals specifically adopted the reasoning of the Ohio Supreme Court in *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125 and held that work performed in the production of materials used in the construction of a public project is not work on the project itself, though being carried on by the owner of the producing plant, where the materials are produced in a separate enterprise. Hence, the off-site work was not subject to Kentucky's prevailing wage laws.).

Other Ohio Courts, including this Court, have cited to *Clymer* and have never indicated that its off-site holding had ever been overruled. See *Dean v. Seco Electric Co.* (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837; *Wadsworth v. Dambach* (1954), 99 Ohio App. 269, 133 N.E.2d 158; *State ex. rel. Corrigan v. Barnes* (1982), 3 Ohio App. 3d 40, 443 N.E.2d 1034; *Callaway v. NDB Downing Co.* (1961), 172 A.2d 260, at 264-266, 1961 Del. Super. LEXIS 100.

⁶ R.C. 3937.18 clearly provided the Legislature's intent by stating directly in the statute: "(D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by Am. Sub. S.B. 20 of the 120th General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 123rd General Assembly; (E) To supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America* (2000), 90 Ohio St.3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999),

In the instant matter, it is irrefutable that neither R.C. 4115.05, nor Am.S.B. No. 294, which amended Section 17-4a of the General Code, had made reference to this Court's decision in *Clymer v. Zane*. Further, there is no other indication contained in either version of the statute to indicate that the one sentence amendment was otherwise intended to change, modify or overrule the well reasoned holding in *Clymer* in anyway. It is well settled that statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written. *State v. Kreischer*, 109 Ohio St. 3d 391, 2006 Ohio 2706, 848 N.E.2d 496. Because the decision of *Clymer* was not mentioned anywhere in the amendment by the Legislature, the holding of *Clymer v. Zane* is still the law in Ohio. ABC submits that if it were the true intent of the Legislature to overrule *Clymer* by its amendment to R.C. 4115.05 in 1935, it would have made this intent perfectly clear.

In 74 years, no court or administrative agency has ever held the off-site manufacturing of "materials" to be used on a public works project was subject to Ohio's Prevailing Wage Law. No administrative agency has ever issued a "Schedule of Wages"⁷ covering off-site

85 Ohio St.3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St.3d 358, *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565, and their progeny."

⁷ O.A.C. 4101:9-4-10 (A), "Procedure for requesting wage rate schedules," provides, "Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have commerce determine the prevailing rate of wages to be paid to laborers, workmen, and mechanics for the class or classes of work called for in the construction of the public improvement." To date, the Department of Commerce has never issued a wage rate schedule covering off-site manufacturing or fabrication work. Hence, how could a contractor be required to make payment of prevailing wages as required by O.A.C. 4101:9-4-20(A) (An employer shall not pay or permit any worker to accept wages less than the prevailing rate of wages as

manufacturing or fabricating work. If it was truly the Legislature's intent to overrule the holding in *Clymer* and require prevailing wages to be paid for off-site work, then the eight subsequent times that R.C. 4115.05 has been amended since 1935 has provided the Legislature with ample opportunities to clarify this intent.⁸ The failure of the Legislature for 74 years to take steps to require that off-site manufacturing work to be paid at prevailing wages, or to have the Ohio Department of Commerce or its multiple predecessor agencies enforce R.C. 4115.05 as the Ninth District has interpreted it, make the present day intent of the Legislature absolutely clear: off-site manufacturing work is not subject to Ohio's Prevailing Wage Law.

2. R.C. 4115.03 *et seq.* when Read *In Pari Materia* applies only to Construction Work Performed at the Jobsite of the Public Improvement Project

Contrary to the Ninth District's decision and in 74 years of enforcement of prevailing wage laws, various administrative agencies, Ohio Courts and industry practice has made clear that the manufacturing of off-site "materials used in or in connection with" a public improvement project is not subject to the requirements of Ohio's Prevailing Wage Law. This is because prevailing wages are paid only for time spent performing work on the jobsite of the public project. The intent of the Legislature that prevailing wage laws apply only work performed at the jobsite of the public improvement project is clearly demonstrated through various provisions contained in the statutory sections of Ohio's Prevailing Wage Law.

R.C. 4115.10 (A) states, that "[a]ny employee upon any public improvement who is paid less than the...[prevailing wage] may recover...the difference between the fixed rate of wages

determined by the director and evidenced by the prevailing wage rate schedule) if such off-site wages were never included in the schedule of wages issued by the Department of Commerce?

⁸ GC § 17-4a; 116 v 206; 118 v 587; Bureau of Code Revision, 10-1-53; 128 v 935 (Eff 11-9-59); 131 v 992 (Eff 11-3-65); 135 v H 1171 (Eff 9-26-74); 137 v H 1129 (Eff 9-25-78); 141 v H 238 (Eff 7-1-85); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

and the amount paid to him and in addition thereto a sum equal in amount to such difference.” (Emphasis added). Similarly, 4115.10 (B) continues, “Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the director upon a form furnished by the director. R.C. 4115.032, “Construction projects to which prevailing wage provisions apply” explicitly states, “Construction on any project, facility, or project facility to which section 122.452 [122.45.2], 122.80, 165.031 [165.03.1], 166.02, 1551.13, 1728.07, or 3706.042 [3706.04.2] of the Revised Code applies is hereby deemed to be construction of a public improvement within section 4115.03... All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code...” Even R.C. 4115.05, which the Ninth District relied upon in rendering its incorrect decision begins with, “[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section.” (Emphasis added).

These sections clearly state that prevailing wages must be paid for construction work performed “on,” “upon” or “about” the jobsite of the public improvement project and is fully supported by the definition of “construction” contained in R.C. 4115.03(B):

“Construction” means:

- (1) Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars (“threshold”) adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority.
- (2) Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement the total overall project

cost of which is fairly estimated to be more than fifteen thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority. Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement.

(Emphasis Added). See also, O.A.C. Ann. 4101:9-4-02 (G).

Nowhere in the definition of "construction" is the off-site "manufacturing," "delivery," "supply" or "fabrication" of "materials" mentioned or included, but the statute specifically includes activities such as demolition, installation, clean up, drilling, landscaping etc... In fact, all of the activities in the definition of "construction" specifically refer to construction activities performed at the jobsite of the public improvement. If off-site manufacturing or fabrication is not mentioned in the definition of "construction" then it must be the intent of the Legislature to exclude this type of work from coverage of Ohio's prevailing wage law. "Construction" of a "public improvement" are the quintessential elements of any project which triggers coverage of Ohio's prevailing wage law.

The fact that manufacturing, fabrication, delivery and supply are excluded from the definition of "construction," coupled with the fact that various sections of the statute refer to "on" or "upon" a public improvement establishes that prevailing wages are to be paid for "construction" work performed at the jobsite of the public improvement project.⁹

⁹ Furthermore, O.A.C. 4101:9-4-13 defines the "Duties of contractors," however nowhere contained in the "duty of contractors" is the obligation to pay workers prevailing wages for off-site manufacturing or fabrication work.

The fact that prevailing wages only apply to the jobsite of the public improvement project is supported by two other sections of the Revised and Administrative Codes.¹⁰ R.C. 4115.07 and O.A.C. 4101:9-4-13(3) specifically refers to a posting of the “schedule of wages,” which must be placed at the “site of the work.”¹¹ The “site of the work” has been interpreted by two Sixth District decisions to be the jobsite. See *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167 Ohio App.3d 634, 643, 2006-Ohio-3381, 856 N.E.2d 312 (“The prevailing rate of wages for a specific jobsite is then set forth in a prevailing wage rate schedule which is posted at the jobsite. That schedule is to include the ratio of apprentices to skilled workers allowed on the jobsite. Ohio Adm.Code 4101:9-4-16(H).”) (Emphasis added); see *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, 6th Dist. App. No. WD-07-026, 2008-Ohio-2992, ¶41 (the Defendant properly posted the name of the prevailing wage coordinator on the “job box” located at the site of the construction project giving proper written notice of the coordinator’s identity to its employees pursuant to R.C. 4115.05); See also, *Robbins Sound, Inc. v. Ohio University*, 70 Ohio App. 3d 212, 590 N.E.2d 877, 1990 Ohio App. LEXIS

¹⁰ O.A.C. 4101:9-4-13 (3) provides that a contractor shall: “Post in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract for the various occupations of laborers, workmen, and mechanics employed. The notice must remain posted during the life of the contract and must be supplemented in its entirety whenever new wage rate schedules are issued by the department. The schedule must also state the name, address, and phone number of the prevailing wage coordinator.”

R.C. 4115.07, which O.A.C. 4101:9-4-13(3) is derived from similarly states: “There shall be posted in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract to the various classifications of laborers, workers, and mechanics employed, said statement to remain posted during the life of each contract.”

¹¹ No court has ever interpreted “site of the work” to mean a fabrication shop or manufacturing facility. Site of the work, like with Davis Bacon provisions has been defined to mean the jobsite of the public improvement project.

4910 (1990) (Every subcontractor performing work on a public project in this state has an independent duty to ascertain the prevailing wage for such project). See also, *Wren Reese, Inc. v. Great Lakes Structural Concrete Prods., Inc.* (1975), 50 Ohio App. 2d 168, 362 N.E.2d 269 (where the Court of Appeals, like in Ohio's Prevailing Wage Law held that the department of transportation defines a "subcontractor" as a person who performs work on the jobsite, hence, the trial court erred in concluding that the defendant, a "fabricator" who performed no work on the jobsite, was a subcontractor and, therefore, subject to RC § 5525.06).

How could Ohio's prevailing wage law cover off-site employees who perform work in a fabrication or manufacturing shop when the law specifically requires that the schedule of wages, which informs employees of the prevailing wage rate applicable per trade classification, must be posted at the jobsite where such employees will never work? Simply put, prevailing wages apply only to the jobsite of the public improvement where construction work is exclusively performed.

When interpreting these statutory sections, words must be given their usual, normal, and/or customary meanings.¹² The language used in the prevailing wage statute "upon" or "about" simply means "on," referring to the jobsite of the project, not some off-site manufacturing location. "It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law."¹³

¹² See *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 65.

¹³ *State v. Moaning* (1996), 76 Ohio St.3d 126, 128; *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535, 1998 Ohio 190, 696 N.E.2d 1079 (statutes pertaining to the same general subject matter must be construed *in pari materia*).

This Court has held that courts must avoid statutory interpretations that create absurd or unreasonable results.¹⁴ When possible, courts should also avoid interpretations that create confusion or uncertainty.¹⁵ There is no doubt given the history and seventy-four years of enforcement of this statute that the Ninth District's interpretation of R.C. 4115.05 will cause confusion, uncertainty and absurd results for all business who manufacture, supply or fabricate "materials" for public works projects.

Utilizing these statutory interpretation principles, it is clear that 74 years later, the Ohio Supreme Court's holding in *Clymer v. Zane* remains sound and carefully reasoned. This Court held in *Clymer* that the words "upon a public improvement" did not cover work performed off-site and this language particularly referred to work performed at the jobsite of the public project. This Court reasoned to hold otherwise would surely lead to conflicts with regulations and codes governing wages of other industries.¹⁶ Most significantly, the Ohio Supreme Court in *Clymer* noted that since the statute provided for sanctions and was penal in nature, it should be narrowly construed.¹⁷

The Ninth District did not "narrowly construe" the one sentence contained in R.C. 4115.05 when the Court read this sentence in isolation from the rest of the statute and held that

¹⁴ See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St. 3d 262, 2005 Ohio 6432, 838 N.E.2d 658.

¹⁵ See *Crawford Cty. Bd. of Commrs. v. Gibson* (1924), 110 Ohio St. 290, 298-299, 2 Ohio Law Abs. 341, 144 N.E. 117.

¹⁶ This is especially true were here, wherein the Ninth District's decision seeks to impose construction industry prevailing wage rates upon companies in the manufacturing industry. This imposition will surely lead to conflicts with the wages, hours and other terms of conditions of employment which were collectively bargaining for between labor and management, or are otherwise the standard or "prevailing wage rate" in the manufacturing industry.

¹⁷ See *Dean v. Seco Electric Co.* (1988), 35 Ohio St.3d 203.

all materials used in or in connection with a public project are subject to Ohio's Prevailing Wage Law. When reading the ambiguous provision of R.C. 4115.05 *in pari materia* with the rest of the provisions of Ohio's prevailing wage statute (and with itself), it is clear that prevailing wages apply to the work performed upon a public improvement, i.e. the jobsite, and the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by reading this one sentence in isolation and concluding that *Clymer* had been *legislatively superseded*.

3. The Administrative Code Reinforces that R.C. 4115.03 *et seq.* Only Applies to "Construction" Work Performed at the Jobsite.

Pursuant to R.C. 1.49 this Court may look to the comprehensive Administrative Code, adopted by the Director of the Department of Commerce pursuant to R.C. 4115.12, when interpreting the statutory provisions of Ohio's Prevailing Wage Law.¹⁸ However, this Court will find no regulation regarding any off-site manufacturing, delivery, supply or fabrication work, nor will this Court find any administrative regulation which would even hint that this type of off-site work is covered by Ohio's Prevailing Wage Law. To the contrary, this Court will find that the Administrative Code implemented by the Department of Commerce specifically states in various sections that Ohio's Prevailing Wage Law applies only to work performed at the jobsite of the public improvement:

O.A.C. 4101:9-4-02 (GG) defines "'subcontractor' to mean any business association hired by a contractor to perform construction on a public improvement or any business association hired by such subcontractor, or any subcontractor whose subcontract derives from the chain of contracts from the original subcontractor.

O.A.C. 4101:9-4-09 (A), Determination of wage rate schedule, explicitly states the director shall determine the prevailing rate of wages to be paid for a legal day's work to employees upon public works.

¹⁸ Under RC § 1.49(F) evidence of the administrative construction of a statute may only be considered if the statute in question is ambiguous. *Ohio Civ. Serv. Emp. Assn. v. Univ. of Cincinnati*, 3 Ohio App. 3d 302, 444 N.E.2d 1353 (1982). ORC Ann. 1.49

O.A.C. 4101:9-4-21 (A), Maintenance, preservation, and inspection of payroll records, provides “Each contractor and subcontractor performing work on a public improvement shall keep, maintain for inspection, and preserve accurate payroll records in accordance with these rules. If an employer performs both prevailing wage work and non-prevailing wage work, the records must be capable of being segregated. The employer may segregate such records on an hourly, daily, weekly, work shift, or project basis.

O.A.C. 4101:9-4-21 (C) continues, any records maintained by contractors and subcontractors concerning wages paid each employee or the number of hours worked by each employee on a public improvement shall be made available for inspection by any authorized representative of the contracting public authority, including the project prevailing wage coordinator and commerce, during normal working hours of business days.

O.A.C. 4101:9-4-23, Investigation states, a complaint may be filed with commerce by any employee upon a public improvement or any interested party.

(Emphasis added).

Before the Administrative Code was enacted, extensive hearings were held and testimony was taken from members of organized labor, construction industry employer groups and other stakeholders regarding the meaning, extent and interpretation of R.C. 4115.03 to 4115.16. If R.C. 4115.05 required prevailing wages to be paid for off-site manufacturing work, one would think that at least one of the building trades unions (or the Department itself) would have raised the point that off-site manufacturing/fabrication was within the reach and scope of Ohio’s Prevailing Wage Law, and subsequently the Administrative Code would have been drafted to reflect this coverage to extend to off-site work. Such was not the case because R.C. 4115.05 was not intended or interpreted to extend to any work performed off-site.

The Administrative Code interpreting the statutory provisions of Ohio’s Prevailing Wage Law, including R.C. 4115.05, make it absolutely clear that this law does not apply to any manufacturing, fabrication, supply or delivery work performed off-site from the public improvement.

4. The Consequences of the Ninth District's Interpretation of R.C. 4115.05 are Unworkable and will Produce Unwieldy Results

The complete unfeasibility of the Ninth District's off-site manufacturing holding becomes apparent when attempting to apply it to Ohio's Prevailing Wage Law. Pursuant to R.C. 1.49, these unwieldy, absurd and unworkable "consequences" may be considered by this Court when interpreting R.C. 4115.05. As Judge Slaby noted in his dissent:

The majority attempts to limit the practical effects of its holding, but one might fairly ask at what point that fabrication process achieves the 'intimate connection' the majority envisions. Must the fabricator of materials that are incorporated in machines used in job assembly pay the prevailing wage because the machine is ultimately used in connection with the public work? When certain off-site employees are paid for fabrication of materials, how is the fraction of their time spent on those items that become part of a public improvement to be determined and compensated out of an entire working day? Must a contractor now record those fractions of working time spent by off-site employees whose work bears a tangential relationship to material used in public improvements? Simply put, the rule is unworkable.

Genes Refrigeration, at ¶50. As Judge Slaby observes, the majority's holding will surely lead to confusion in the application of Ohio's Prevailing Wage Law, lead to absurd results and cause more unneeded litigation in this area.

If an employer, whether it be a manufacturer, supplier, or contractor, must pay prevailing wages to its employees for any material that is assembled, mixed, manufactured, fabricated, or otherwise constructed "in connection" with a public work the extent of the law under the Ninth District's holding would be endless. Any business dealing with sheet metal products, like the corrugated sheet metal on the exterior of a building or the flashing on roofing systems, would have to pay their employees construction industry Sheet Metal Workers prevailing wages; window manufacturers, cabinet makers, or door manufacturers would have to pay their employees "Carpenters prevailing wages;" any manufacturer of material used on the project that was painted or stained would have to pay its employees "Painters prevailing wages;" glass

makers or fabricators for windows or mirrors would pay Glazier's prevailing wages; manufacturers of air conditioning units, boilers or heaters would pay Millwright, Electrician, Pipefitter, and Sheet Metal prevailing wages; the list is virtually endless. This effect would lead to conflicts with collective bargaining agreements negotiated in the other industries beside construction, and would lead to conflicts with federal labor laws. Furthermore, it would undermine the industrialized system of collective bargaining agreements, job classifications and other duties negotiated by industrial/manufacturing labor unions for decades.

In addition, what labor "in connection" with the public project must be compensated at prevailing wages. Mr. Nortz, Gene's Project Manager, stated in his affidavit that Gene's fabrication shop, or "shop work," consists mainly of reviewing job blueprints and specifications, speaking to clients on the telephone, fabricating duct work, driving to pick up materials for the fabrication shop, making deliveries, loading and unloading delivery trucks, cleaning up the fabrication shop, and any other job related duties specified by the supervisor. (Nortz Aff. at ¶ 5). Fabricating duct work is not a job exclusively performed by any employee working in Gene's fabrication shop. Where does the reach of Ohio's Prevailing Wage Law end? Should Mr. Cherfan be paid prevailing wages for picking up the metal that will become the duct work, unloading the metal from delivery trucks, cleaning up the shop after the ducts were fabricated etc... because this work was done "in connection" with a public work? What if the sheet metal that is picked up or loaded in trucks is mixed with other sheet metal not destined for a prevailing wage jobsite? Is Mr. Cherfan paid prevailing wages for all his loading, delivery and unloading activities because it is impossible to separate prevailing wage time from non-prevailing work activities, let alone apportion his wages between the prevailing wage rate and his regular rate? Given the many duties assigned to Mr. Cherfan, who works exclusively in Gene's fabrication

shop, it would be overly burdensome and nearly impossible for Gene's, as well as other contractors or manufacturers, to keep track of the amount of time spent actually fabricating materials that MAY be used on a public project, versus performing some other task in the shop. The enforcement of Ohio's Prevailing Wage Law for off-site work would be practically speaking, impossible.

Given the sound reasoning in *Clymer* and reading R.C. 4115.05 *in pari materia* with the rest of the provisions of Ohio's prevailing wage statute, including the Administrative Code, the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by reading this one sentence in complete isolation from the rest of the statute and concluding that *Clymer* had been *legislatively superseded*. Based upon the explicit language of the statute when read as a whole, the language of the Administrative Code and the sound and affirmed reasoning of *Clymer*, the language "upon any material to be used in or in connection with a public work" must apply only to materials prepared on the jobsite of the public improvement project in question. The statute simply does not state or make any reference to the fact that materials prepared, manufactured or fabricated off-site would be subject to the requirements of Ohio's Prevailing Wage Law.

5. The Davis Bacon Act is Analogous and is Guidance for Interpretation of the Ambiguous Provision Contained in R.C. 4115.05

The Davis Bacon Act, the federal prevailing wage law, is helpful in defining what is considered the "site of the work" in public construction projects. The Davis Bacon Act is analogous to Ohio's Prevailing Wage Law, as many provisions contained in Ohio's Prevailing Wage Law were adopted from the Davis Bacon Act. As such, one provision of the Davis Bacon Act sheds light on the issue presented herein and should be deemed interpretive of the ambiguous language contained in R.C. 4115.05. 29 CFR § 5.2(i) provides comprehensive definitions and states that manufacturing, furnishing of materials, or servicing and maintenance

work is distinguishable from “construction activities” providing that these activities are excluded from coverage under the Act unless performed in connection with the Project and performed at the site of the work. See also 29 CFR 5.2(j)(1) and (l). The Davis Bacon Act specifically provides:

(l) The term “site of the work” is defined as follows:

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(Emphasis Added).

Under the Davis Bacon Act, the “site of the work” determines whether employees must be paid prevailing wages and the Act provides interpretation and guidance on several issues raised in this case. First, it is clear that the Davis Bacon Act recognizes that construction industry prevailing wages and regulations are simply not applicable for employees working in the manufacturing, supply or servicing and maintenance industries as these industries and their employees do not perform “construction activities.” 29 CFR § 5.2(i). Second, Federal

prevailing wages apply only to the “site of the work” unless the job headquarters, tool yards, batch plants, borrow pits, etc... are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work. Moreover, if these enterprises existed before the federal project began and are owned by contractors or subcontractors then they are specifically excluded from the “site of the work.” Hence, the “site of the work” is synonymous with the jobsite of the public improvement project. The statutory language of the Davis Bacon Act is completely in line with the reasoning and holding of *Clymer* where the Court noted that the gravel pit was a separate enterprise owned by the contractor that operated before and after the public works project began.

Because Ohio’s Prevailing Wage Law lacks definitions defining “materials,” “site of the work,” “off-site work” or what types of “off-site work” can be covered by construction industry prevailing wage laws, this Court can derive guidance and instruction from the Davis Bacon Act defining the “site of the work.” As demonstrated by the Davis Bacon Act, it is simply unfeasible to include manufactures, suppliers and fabricators under a statute designed to cover and regulate “construction activities” and the prevailing wages they must pay.

The only logical interpretation of R.C. 4115.05, as determined from the Davis Bacon Act, Ohio case law, and from various statutory and Administrative Code sections is that the ambiguous sentence contained in R.C. 4115.05 must be read to apply only to “materials” manufactured/fabricated at the jobsite of the Project. The Ninth District’s holding regarding prevailing wages to be paid for off-site preparation, fabrication and manufacturing of “material used in or in connection with a public improvement” project is incorrect, unreasonable, unworkable, and without statutory foundation. Reversing the Ninth District’s decision does not

change the status of the law in Ohio it simply returns the law to the status quo as it has been enforced in the last 74 years. Gene's Proposition of Law No. 1 should be adopted by the Court.

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

ABC of Ohio fully incorporates the legal arguments set forth in Gene's Merit Brief with regard to Proposition of Law No. 2. In addition, ABC further submits the following arguments to add and emphasize certain points regarding Gene's Proposition of Law No. 2:

R.C. 4115.03(F) and R.C. 4115.16, grants standing to an "interested party" to file a complaint on behalf of an employee to enforce that employee's rights to be paid prevailing wages on public works projects. However, contrary to Ninth District holding, Ohio's Prevailing Wage Law does not allow an "interested party" an unlimited license to pursue claims on behalf of any employee who has not "authorized" such action or representation. To allow an "interested party" to pursue and enforce claims on behalf of other employees who did not authorize the lawsuit violates this Court's holding in *Mohawk Mechanical*, the Legislature's intent, and the right of every employee to select his/her own "attorney-in-fact."

In *Mohawk*, three employees of Mohawk Mechanical, a non-union contractor, signed "authorization forms" that expressly granted authority to Local 33 pursuant to R.C. 4115.03(F)(3) to file a prevailing wage complaint "on their behalf" with regard to alleged underpayments for work they performed on a public improvement project. *Id.* at 613. After the lawsuit was filed, three other Mohawk employees who also worked "on the public project" signed Local 33's authorization forms. *Id.* After sixty days elapsed without a ruling from the Ohio Bureau of Employment Services, Local 33 filed its prevailing wage complaint on behalf of these three employees in the trial court. *Id.* at 613.

Shortly thereafter, Mohawk Mechanical filed a motion for summary judgment challenging Local 33's "interested party" standing pursuant to R.C. 4115.03(F), alleging Local 33 "was not authorized to represent" Mohawk employees because Mohawk was not signatory to a collective bargaining agreement with Local 33. *Id.* at 614. The Ohio Supreme Court disagreed and held that certain employees of Mohawk "took affirmative acts to authorize Local 33 to file a complaint on their behalf...within sixty days of the filing of the complaint, three Mohawk employees had given **written authorization** to Local 33 to represent them in the prevailing wage action." *Id.* at 614 (emphasis added). In reading *Mohawk*, it is clear that the Ohio Supreme Court permitted Local 33 to file a complaint on behalf of only those Mohawk employees who signed authorization cards, not on behalf of all employees who worked on the public project at issue.

This Court's reasoning in *Mohawk* for limiting Local 33's representation to only those employees who authorized the union to file suit on their behalf is sound. Allowing a labor organization to bring a prevailing wage complaint on behalf of employees who did not authorize the union to represent them would violate their inherent right to select their own legal counsel/representation, and would further violate their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.¹⁹ The National Labor Relations Act specifically grants every employee the right to accept or reject union representation; any law which would conflict with this right would be preempted. *Id.*

¹⁹ 29 U.S.C. § 157 states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]."

It is irrefutable that a labor organization acting as an “attorney-in-fact” has unlimited and unrestricted power to settle lawsuits for whatever is in the best interests of the labor organization, as the “interested party” is the only plaintiff in the lawsuit. A labor organization may settle a prevailing wage case for attorney’s fees or settle in return for the defendant employer signing a collective bargaining agreement, and never the collect or ensure that back pay is paid for any affected employees. These employees under Ohio law have absolutely no recourse against the labor organization, and would be effectively precluded from filing a prevailing wage complaint under the doctrine of *res judicata*, simply because R.C. 4115.03(F) was unnecessarily expanded beyond the Legislature’s intent to allow the labor organization interested party standing to represent the interests of these unwilling employees.

Continuing to expand the legal rights and standing for interested parties beyond the Legislature’s intent is dangerous, exploitive of employees and completely unneeded. R.C. 4115.10 as currently written allows employees working on prevailing wage projects, without the union, to file their own confidential complaints, retain attorneys of their choosing, or choose to have the Department of Commerce administratively handle and/or litigate their complaints. R.C. 4115.10 places the employees in complete control of their complaints, while the Ninth District and other Ohio Courts have acted to expand the definition and scope of interested party standing contemplated by R.C. 4115.03(F) to take this right of control away from employees. Clearly, this type of unrestricted and unregulated class action litigation allowed by the Ninth District was not the intention of the Legislature when enacting R.C. 4115.03(F) and creating interested party standing.

Clearly, the Legislature did not intend to allow an interested party standing to pursue or enforce provisions of the law that are not specific to the employee who “authorized” the action,

or otherwise, R.C. 4115.03(F)(3) would have drafted to simply state “any labor union may file a prevailing wage complaint as an interested party against any contractor or on behalf of any employee.” This is simply not the case because the Legislature when drafting R.C. 4115.03(F) specifically decided to include the phrase “or is authorized to represent employees of a person mentioned in division (F)(1) or (2)” in the definition of R.C. 4115.03(F)(3). As the *Mohawk Mechanical* Court opined, in enacting R.C. 4115.03(F), and in the absence of representing union members who work for a signatory contractor who submitted a competing bid on a project, the Legislature intended representation to extend only to other employees when those specific employees have directly authorized union representation.

To allow an “interested party” to pursue and enforce claims on behalf of other Gene’s employees who did not authorize the lawsuit would violate this Court’s holding in *Mohawk Mechanical*, the Legislature’s clear intent, and would serve to create other serious ethical considerations regarding unintended or unwilling “attorney-in-fact” fiduciary relationships. The Ohio Supreme Court’s reasoning in *Mohawk Mechanical* for limiting Local 33’s representation to only those employees who specifically authorized the union to file a lawsuit on their behalf is sound considering the special “attorney-in-fact” relationship Chief Justice Moyer stated was created by R.C. 4115.03(F)(3).

Furthermore, the Ninth District’s decision and a recent Sixth District’s decision in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc.* 2007-Ohio-3958, 2007 Ohio App. LEXIS 3602 raises another serious concern regarding interested party standing pursuant to R.C. 4115.03(F). Both of these Courts have rendered decisions which have effectively expanded the definition of “interested party” to allow any labor organization of any trade jurisdiction interested party standing to file a complaint (or

lawsuit) against any contractor who worked on the project, regardless of that contractor's trade/craft jurisdiction, and regardless of whether the interested party represents "members" of another contractor who had submitted a competing bid against that contractor who was awarded the contract on the project.

ABC submits that these two Court of Appeals decisions are incorrect, as for example, they effectively allow a labor organization representing only the interests of "plumbers," interested party standing to file a lawsuit against a contractor performing only carpentry work on a prevailing wage project. An employer signatory with the Plumbers Union would not have competed or otherwise submitted a bid for the same contract the carpentry contractor was awarded on the project. Moreover, the Plumbers Union is not familiar with the trade or craft work performed by carpenters, nor does the Plumbers Union possess the requisite expertise to represent carpenters regarding prevailing wage matters.

Most important, the Plumbers Union's "interests" lie in protecting the integrity of their own collective bargaining agreement (and prevailing wages), not that of some other labor union. It is submitted that the Legislature's intent was to limit "interested party" standing to the particular labor union which negotiates "...wages, hours and other terms of conditions of employment..." which is adopted by the Department of Commerce as the prevailing wage, with employers working in the same trade of craft the union represents. Here, Local 33 concedes that it only represents employees performing sheet metal, heating ventilating and cooling work. Given the foregoing, coupled with repeated work jurisdiction disputes that often occur between construction trade unions, it is inconceivable that the Legislature intended to give a single labor union a type of interested party status that would unnaturally elevate that particular union to a sort of "super-union status," suddenly capable of representing all union and non-union

employees of every trade or craft, regardless of the type of construction industry craft employees that union typically represents.

It is submitted that a single labor union could never fairly and adequately represent such a broadly diverse class without impugning the ethical obligations inherent in every attorney/client relationship. ABC contends that an underpinning of this Court's decision in *Mohawk Mechanical* requiring written authorization is a recognition of the ethical and statutory limitations imposed upon interested party unions, which narrowly focuses their representation to employees working in that union's trade who have provide express written authorization.

For example, plumbers and carpenters have different wage rates, perform completely different work and have different work rules. How could one union call itself an "interested" and be given the legal authority to represent employees performing work in a different trade when the labor organization often knows little about the specific trade work being performed or the terms of the collective bargaining agreement involved, and may actually claim the work falls under the trade jurisdiction of their union and not that of the competing union? Moreover, what if the Carpenters Union obtains an authorization as well? Thus, the Carpenters Union, at odds with the Plumbers Union, also claims to represent all the employees of the Project, including persons performing plumbers work?

It is clear that both the Ninth District holding in the instant matter, as well as the Sixth District's recent decision in *Edgerton Hardware* have misinterpreted the interested party provision of Ohio's Prevailing Wage Law. More so, these decisions conflict with the Third District's decision in *International Asso. of Bridge, etc. Local Union 290 v. Ohio Bridge Corp.* (1987), 32 Ohio App. 3d 18, 20, 513 N.E.2d 358, where the court not only held that in the absence of a unsuccessful union bidder, the employees must specifically authorize the union's

representation, but also held that interested party standing applied where contractors had competed for the same contract for the project. In other words, the contractor and/or a labor organization could file prevailing wage complaint against only those contractors who were engaged in the same trade or craft submitting bids for the same contract on the project.

To that part, R.C. 4115.03 provides:

(F) "Interested party," with respect to a particular public improvement, means:

- (1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;
- (2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;
- (3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;
- (4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.

The use on the word "any" in R.C. 4115.03 was not intended to mean "any" contractor against "any" other contractor or "any" labor organization against "any" contractor regardless of their trade or construction craft as the Sixth District surmised. This is clearly evidenced by the inclusion of the requirement to "submit a bid for the purpose of securing the award of a contract for construction" on the project, which mandates the interested standing to be "bid specific." If the standing is "bid specific," it is trade/craft specific as many construction contractors only perform work in one or two specific licensed trades or crafts, i.e. plumbing, electrical, HVAC, etc... Hence, prevailing wage interested party standing should only be granted to labor organizations, contractors or subcontractors who submitted competing bids for the same contract on the project. This correct interpretation of the statute, as discussed by the Third District, will

prevent frivolous litigation and will work to protect the competitive bidding process among contractor's performing the same type of work and competing for the same contracts on public works projects.

Thus, interested parties should be limited to (1) representing only those employees who specifically authorize the union's representation; or (2) when standing is achieved through having union member employees of a contractor who submitted a bid for the same contract on the project, only to enforce the prevailing wage law with respect to the labor organizations specific trade jurisdiction, i.e. the plumber's union filing complaints against contractors doing plumbing work on the project, the electrician union files against contractors doing electrical work on the project, etc...

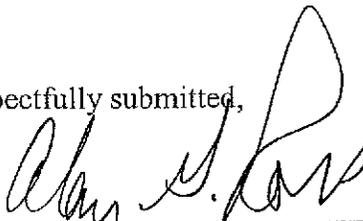
The Ninth District's decision regarding the union's interested party standing is unduly expansive, in dereliction of the Legislature's intent and is clearly erroneous in light of this Court's holding in *Mohawk*. As such, "interested party" standing by labor organizations should be limited to representing only those employees who specifically authorize the representation. Gene's Proposition of Law No. 2 should be adopted by the Court, resulting in Mr. Cherfan being the only employee the *Mohawk Mechanical* Court and R.C. 4115.03(F) would permit Local 33 to represent. Since, Mr. Cherfan did not perform any "construction activities," nor did he perform any other work at the jobsite of the Project at issue, then the Court's adoption of Gene's Proposition of Law No. 1 and No. 2 results in the dismissal of Local 3's Complaint in this case.

CONCLUSION

The decision of the Ninth District Court of Appeals is fundamentally wrong and has turned 74 years of prevailing wage law interpretation and application on its head. The Ninth District's decision has introduced confusion and absurdity into what was otherwise well

established principles of law that are reflective of union and non-union industry practices. As such, the Ninth District opinion should be reversed in total and Gene's two Propositions of Law adopted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that one copy of the foregoing Amicus Brief of ABC of Ohio was served this 25th day of August 2008 via U.S. Mail, postage prepaid, upon the following:

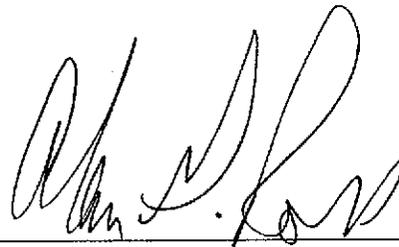
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