

IN THE SUPREME COURT OF OHIO

**SHEET METAL WORKERS'
INTERNATIONAL
ASSOCIATION, LOCAL
UNION NO. 33**

Appellee,

v.

**GENE'S REFRIGERATION,
HEATING & AIR
CONDITIONING, INC.**

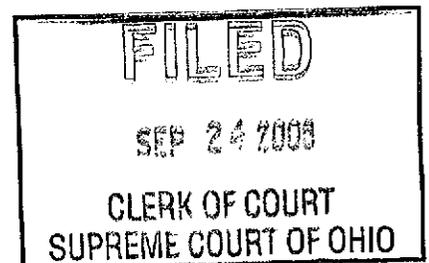
Appellant.

*
* On Appeal from the Medina County
Court of Appeals, Ninth Appellate
* District
*
* Supreme Court Case No. 2008-0780
*
* Court of Appeals
Case No. 06CA0104-M
*
*

**MERIT BRIEF OF APPELLEE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33**

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STATEMENTS OF FACTS

Sheet Metal Workers' International Association, Local Union No. 33 ("Local 33") adopts the procedural history and statement of facts presented by Appellant ("Gene's"). However, it must be emphasized that the R.C. 4115.16(B) Interested Party Prevailing Wage Enforcement Action brought against Gene's alleges workforce-wide underpayments, misclassification, ratio, and reporting violations.¹ Further, the parties stipulated that Gene's shop employees fabricated ductwork for installation in the Project,² and they were paid less than the prevailing wage rate for such work.³

ARGUMENT

A. Preliminary Statement

Ohio's Prevailing Wage law was first enacted in 1931. It consisted of 4 simple sections requiring payment of prevailing wage to laborers "upon a public improvement." This Court decided *Clymer v. Zane*⁴ three years later, holding that the statute did not contain any language from which its coverage could be read to reach beyond the actual construction site, to an adjacent off-site gravel pit. Within one year of the *Clymer* decision, the legislature enacted supplemental sections to the law – including specifically, General Code Section 17-4a.

The 1935 amendments to the prevailing wage law expanded its coverage beyond laborers working "upon a public improvement," by adding prevailing

¹ Stipulation of Facts, Appellant's Supp., p. 97, ¶ 23; Complaint, ¶ 14A-F, Supp. pp. 45-46.

² Stipulation of Facts, Appellant's Supp., p. 96, ¶ 17.

³ Stipulation of Facts, Appellant's Supp., p. 96, ¶ 18.

⁴ *Clymer v. Zane* (1934), 128 Ohio St. 359.

wage applicability for work “upon materials to be used in or in connection with” a public improvement. These two provisions remain virtually unchanged today in paragraphs one and six respectively, in R.C. 4115.05. The new language added in 1935 spoke directly to the limited reach of the prior version of the law considered by the *Clymer* Court. The question presented in this case is how to give effect to the legislature’s expansion of prevailing wage applicability.

Gene’s and company throw a variety of unfounded arguments against giving effect to the legislature’s final word on the subject, including several arguments not previously advanced below. For example, they argue that Davis Bacon should guide the Court’s application of R.C. 4115.05. But in addition to failing to raise this argument below, they completely ignore the divergent path the language of the Ohio statute took from the federal counterpart. Also argued for the first time to this Court, is the unfounded notion that interested party standing should be limited on a craft-specific basis.

Gene’s also takes great liberties in assuming facts that are not in the record. This case was decided on stipulations. There was no discovery. There is no evidence in the record to support the oft-repeated assertion that no enforcement of the law, as amended, was undertaken in over 70 years. While it is true that this is the first court case to raise the question of prevailing wage applicability to off-site labor on materials used in a public improvement since *Clymer*, there is no record of the agency’s actions, or industry practice in all this time. Indeed, rule-making authority was not bestowed on the agency until the enactment of R.C. 4115.12 in 1965. And the first comprehensive set of regulations was not promulgated until 1990.

Gene's and its supporting amici obfuscate the issues decided by the Ninth District Court of Appeals by expanding the Court's interpretation of the law. Regarding the First Proposition of Law, the appellate court recognized what is self-evident, that the legislature superseded the *Clymer* Court's ruling on the reach of the law. But Gene's goes way beyond the Ninth District's ruling, unjustifiably urging that the language in Paragraph six of R.C. 4115.05 must be given an "all-or-nothing" application. This leads to the absurd results Gene's and its Amici pounce on to argue reversal of the Ninth District's decision. They create this absurd interpretation of the statute in order to accuse the appellate court of judicially legislating a more reasonable one.

They argue this in spite of invoking the principle that courts must avoid statutory interpretations that create absurd or unreasonable results.⁵ Ironically, it is Gene's who posits a resolution of this matter that is utterly dependent on the Court judicially legislating the desired outcome - either the Court should simply ignore the statutory language added after *Clymer*, or it should borrow from a regulatory scheme addressing markedly different statutory language.

The Court should not lose sight of the limited nature of the case before it. Local 33 does not argue that the employees who manufactured the component parts of the air conditioning unit, or any material suppliers are owed prevailing wage. Gene's is an HVAC contractor who bid for, and was awarded a public works contract. Its undertaking to perform the HVAC contract necessarily entailed the manufacture and installation of ductwork. Gene's generated its bid

⁵ Appellant's Merit Brief, p. 22 and fn 20.

for the contract anticipating the material it would purchase, versus that which it could fabricate in its shop.

The facts of this case limit the question to whether a contractor who bids for a public contract must pay prevailing wage to his own employees who work off-site on material to be used in the public improvement. His obligation to do so is not beyond that which would be reasonably expected from his contractual undertaking. In a like manner, if not a question for another day, the supplier engaged to produce a particular product specifically for (or to the specifications of) a public improvement should reasonably expect that his contract, touching a public improvement, is subject to the prevailing wage law. That is the “intimate connection” the Ninth District required, that keeps the manufacture of pre-fabricated general stock and inventory materials beyond the reach of R.C.4115.05.

Gene’s does no better with the Second Proposition of Law. Here, Gene’s deceptively suggests that the interested party steps into the shoes of the underpaid employees, and that the interested party’s role is limited to a representational capacity on their behalf. But the statutory language, and the Ninth District’s ruling belie this restrictive view of the interested party’s role in the statutory scheme of prevailing wage enforcement.

Employees’ rights, and the agency’s duty to enforce the law are set forth in R.C. 4115.10. These go back to the original enactment in 1931. The interested party sections of the law, R.C. 4115.03(F) and 4115.16, were first enacted in 1979. The interested party’s right to enforce the prevailing wage law is co-extensive with that of the agency. Any violation of R.C. 4115.03 to 4115.16 may be redressed through an R.C. 4115.16 enforcement action. The language of R.C.

4115.16(B) makes it clear that the interested party steps into the shoes of the director of commerce, not the underpaid employees.

Interested party enforcement of the prevailing wage law was enacted to ensure that the law is strictly complied with on all covered projects. The statutes implementing this enforcement mechanism enable defined interested parties to assist the state in compelling compliance with the law, while shifting the cost of such enforcement from the state, to the private sector. Interested parties, in effect, provide self-regulation of this industry of which they are a part, to ensure that all contractors and subcontractors play by the rules. It is in their own self-interest that they seek to impose compliance with the law on their counterparts.

This is evident from the parties endowed with interested party standing. Every contractor and subcontractor who bids for a public contract, and every union and employer association who has members that bid for such work are interested parties. The statute defines an interested party with respect to the entire public improvement. Once standing as an interested party is established under R.C. 4115.03(F), the right of action created lies under R.C. 4115.16, which may redress any violation of the law.

Gene's argument to severely restrict the scope of this R.C. 4115.16(B) action is not only, *not* compelled by *Mohawk*, but it is in direct contravention of the unambiguous language of R.C. 4115.03(F) and 4115.16, and leads to inefficiencies and multiplicity in enforcement proceedings. The Ninth District's

ruling is in accord with the statutes, and other courts who have addressed the issue.⁶

B. Propositions of Law

Appellant's Proposition of Law No. 1: The Off-Site Manufacturing 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 Applies to Work Performed at and Upon the Jobsite of the Public Improvement Project

Appellee's Proposition of Law No. 1: Ohio's Prevailing-Wage Law Applies to Employees of a Contractor Who Perform Off-Site Work on Material to be Used in or in Connection with a Public Improvement.

1. *Clymer v. Zane* was Legislatively Superseded

Appellant relies on this Court's 1934 decision in *Clymer v. Zane*⁷ for the proposition that the prevailing-wage law does not apply to work performed off-site. It argues that the Ninth District's ruling contravenes *Clymer*. But *the Ninety-First General Assembly legislatively superseded Clymer*.⁸ Although *Clymer* held that offsite work was not covered by prevailing wage, a year later the General Assembly added language specifically requiring offsite employees to be paid prevailing wage for work upon materials to be used in or in connection with a public improvement.⁹

The current location of the operative language is paragraph six of R.C. 4115.05, which provides:

⁶ *Int'l Brhd of Carpenters & Joiners of America, Local 1581 v. Edgerton Hardware* (2007), 2007 Ohio 3958.

⁷ *Clymer v. Zane* (1934), 128 Ohio St. 359.

⁸ S. 294, 91st Gen. Assem., Reg. Sess. (Ohio 1935). *See also* 1935 Ohio Laws 206, 207 (1935).

⁹ S. 294, 91st Gen. Assem., Reg. Sess. (Ohio 1935).

The prevailing rate of wages to be paid for a legal day's work, to laborers, workers, or mechanics, *upon any material to be used in or in connection with a public work*, shall be not less than the prevailing rate of wages payable for a day's work in the same trade or occupation *in the locality within the state where such public work is being performed* and where the material in its final or completed form is to be situated, erected, or used.

This statutory amendment the year after *Clymer* directly and specifically legislated the issue of off-site work addressed by the Court, including within the reach of prevailing wage, work performed upon material to be used in or in connection with the public improvement.

That paragraph six of R.C. 4115.05 brings off-site work within the purview of prevailing wage is clear from two sources of its text. First, this new language added work "upon material" to the already existent work "upon a public improvement," thus it is clear that this amendment sought to include more than just the on-site labor that was already covered by the law.

Second, paragraph six goes on to state that the prevailing rate for work upon material is the rate in the same trade, "in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected or used." If the rate is the locality within the state where the work upon such material is performed, it necessarily contemplates that the locality may be different than the jobsite. This is reinforced by the final clause, which includes the locality of the jobsite as an additional floor. The rate for labor upon material must not be less than the rate in the locality of the work, and the locality of the jobsite.

*D.A.B.E. Inc. v. Toledo-Lucas County Board of Health*¹⁰ instructs that:

A basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’ Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.’

Gene’s effort to restrict off-site work under R.C. 4115.05 collapses paragraph six into one, rendering the legislature’s response to *Clymer* (G.C. 17-4a) superfluous. Further, this Court held that courts are required to construe statutes in the manner that carries out the intent of the General Assembly.¹¹ The addition of paragraph six was unnecessary to cover work upon a public improvement. The clear intent of the legislature was to cover fabrication, assembly and other preparatory work done off-site.

2. The Ninth District’s Opinion is a Reasonable Interpretation of R.C. 4115.05

The Ninth District held that Gene’s is required to the pay prevailing wage to its shop employees who fabricated ductwork to be installed in the Project. Construed beyond the actual case before it, the court’s opinion would only require that prevailing wages be paid if the material is specifically created to be used in or in connection with a particular public work. The Court required an “intimate connection” between the manufacture of the material, and the project in which it is used. The reasonable expectations associated with a particular contractual undertaking supply that intimate connection. Not all material used

¹⁰ 96 Ohio St. 3d 250, 256 (2002) (internal citations omitted); Brief of Respondents-Appellees at 9.

¹¹ *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26.

in a public work is subject to the prevailing wage, only material that is created specifically to be used in a public improvement project.

Gene's expands the decision of the Ninth District to the point that is unreasonable and unworkable. Applying the prevailing wage to a pre-made air conditioning unit, or its component parts, as Gene's suggests, is precisely the absurd result avoided by the Ninth District's decision. Such inventory items are not manufactured "to be used" in a public improvement project, per se. They are created without any regard to the particular project they may be purchased for.

3. Regulation of Off-Site Work on Materials to be Used in a Public Improvement is Feasible and Enforceable

Appellant argues that applying the prevailing wage to offsite work would be unfeasible, unworkable, and unenforceable. Its argument depends on its self-serving "all-or-nothing" interpretation of the law. If items pulled from inventory, or ordered pre-manufactured from a third-party supplier were included under the law, the evils and doom forecasted by Gene's and its Amici might come to pass. But the court's interpretation of the statute is workable because it limits prevailing wage applicability to material specifically fabricated "to be used" in a public improvement. This limitation makes manufacturing covered by prevailing wage readily identifiable in advance of such work being performed.

In this case, for example, Mr. Cherfan and his fellow fab-shop employees performed labor, including fabrication of ductwork that was installed on the Project. While so engaged, these employees used the plans and specifications for the Project, and forged the lengths and dimensions of ductwork called for. Their time so engaged is no more difficult to track and record than Gene's field

employees, who travel to multiple jobsites contemporaneously under construction. And Gene's certainly accounted for the time and material its fab-shop would expend in estimating its bid for the public contract. So too, was the public authority charged for these expenditures.

Other states' prevailing wage laws reach beyond the jobsite, and they have proven to be feasible and workable.¹² Washington's prevailing-wage statute is very similar to Ohio's in covering the off-site manufacture of materials to be used in a public work.¹³ The Ninth District's construction of R.C. 4115.05 is similar to these other states' laws and shows that applying prevailing wage law to off-site work on material to be used in a project is not unfeasible, unworkable, or unenforceable.

4. The Interpretation of Davis-Bacon is Inapplicable Because of the Differing Language of the Statutes

Appellant further argues that other states and the Federal prevailing wage laws apply only to work performed on the site of the Project, or work performed on project-exclusive, adjacent work sites. This argument ignores the differences between Ohio's prevailing wage statute and those cited by Appellant.¹⁴ The language of the Ohio statute and the Federal statute differ on the precise issue before the Court. While the Federal statute limits prevailing wage applicability to

¹² See RCW 39.12.010 et seq.; WAC 296-127-020; NRS 338.020 et seq; *see also State of Nevada, Dept. of Business & Indus. v. Granite Const. Co.* (2002), 118 Nev. 83; *Sherifi v. Young Bros. Inc.* (Tex. App. 1992), 835 S.W. 2d 221; *Green v. Jones* (1964), 23 Wis. 2d 551; *Superior Asphalt v. Dept. of Labor* (1997), 84 Wn. App. 401.

¹³ RCW 39.12.010 et seq.; WAC 296-127-020.

¹⁴ A court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute. *Everett Concrete Products, Inc. v. Dept. of Labor & Indus.* (1988), 109 Wn.2d 819, 826 (citing 2A N. Singer, *Statutory Construction* § 52.02 (4th ed. 1984)).

the “site of the work,” Ohio expanded its prevailing wage coverage from the comparable “upon a public improvement,” to include work “upon material to be used in or in connection with” a public improvement. Indeed, a mere survey of these divergent laws reveals Ohio’s sharp departure from Davis Bacon as early as the 1935 enactments.¹⁵

When the language of the state statute does not mirror that of the federal, there is no reason to follow the federal scheme. Other jurisdictions noting such differences have declined to adopt Davis-Bacon standards for coverage of fabrication of materials. For example, Washington’s prevailing-wage statute departs from the Davis Bacon by omitting the word *directly* when referring to off-site work. On this basis, Washington extends its prevailing wage law beyond the federal scheme. When Ohio added the language in paragraph six of R.C. 4115.05 the same effect was created. Therefore, Davis-Bacon should not be followed.

Appellant’s 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

Appellee’s Proposition of Law No. 2: R.C. 4115.03(F) Creates “Interested Party” Standing on a Project-Wide Basis, and Affords an Independent Cause of Action Under R.C. 4115.16 to Enforce any Violation of the Prevailing Wage Law.

Interested Party standing is clearly and unambiguously defined in R.C. 4115.03(F), providing that:

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

¹⁵ See Merit Brief of Amicus curiae Building Trades Department, AFL-CIO.

(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.

R.C. 4115.03(F) (emphasis added). It is stipulated that Gene's is a person mentioned in division (F)(1) or (2). The parties also stipulated that Local 33 is authorized to represent an employee of Gene's, and that it is a bona fide organization of labor which exists to negotiate with employers. In short, the factual predicate for Local 33's interested party standing under R.C. 4115.03(F)(3) is completely stipulated. And all courts below found that Local 33 is an interested party on the Project.

But Gene's improvidently seeks to restrict Local 33's power to enforce the prevailing wage law under R.C. 4115.16. Citing *Sheet Metal Workers' International Association, Local Union No. 33 v. Mohawk Mechanical*,¹⁶ Gene's claims an interested party may only pursue the rights of employees who explicitly authorize them. It theorizes that the interested party steps into the shoes of the authorizing employee, and undertakes an action in a representational capacity

¹⁶ 86 Ohio St. 3d 611.

only on the employee's behalf. It even goes so far as to say that the statute otherwise involuntarily imposes union representation on employees who have not chosen it. Nonsense!

First, the *Mohawk* Court only dealt with standing under R.C. 4115.03(F)(3).¹⁷ The Court determined what "authorization" gives rise to interested party standing, such that an R.C. 4115.16(B) enforcement action may be maintained.¹⁸ Specifically, In *Mohawk*, the court held R.C. 4115.03(F)(3) gives a union "interested party" status to maintain an R.C. 4115.16 enforcement action when a non-member employee of a contractor who bids the project executes a written authorization to the union.¹⁹ As the Ninth District correctly observed, *Mohawk* did not impose any of the limitations urged by Gene's on the ensuing R.C. 4115.16 action.

Second, to do so would contradict the clear statutory language. R.C. 4115.16 provides:

(A) An interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code.

* * *

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the *interested party* may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the *interested party* shall deliver a copy of the complaint to the director. Upon receipt thereof,

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Mohawk Mech., Inc.* (1999), 86 Ohio St.3d 611.

the director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. *The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code.*

R.C. 4115.16(B) (emphasis added). The interested party action under R.C. 4115.16 redresses any violation of R.C. 4115.03 to 4115.16. Although underpaid employees might enjoy some of the relief specified under the law, this does not convert the independent cause of action under Section 16 into merely a representational capacity on behalf of injured workers.

The interested party who chooses to pursue an R.C. 4115.16 enforcement action does so in its own self-interest. Whether an aggrieved bidder pursues the successful contractor to ensure he was not outbid through cheating on payment of the proper prevailing wage rates, or a union seeks to ensure its members were not disenfranchised by such undercutting of employee wages, the statute enables interested parties to impose compliance by all participants in public works construction. The interested party's action is not to the prejudice of the employees, who remain free to independently pursue their rights and remedies under R.C. 4115.10.

The General Assembly's intent in adding enforcement mechanisms—like interested-party standing—“is to enforce claims for prevailing wage violations, even where the affected worker fails to act.”²⁰ And giving standing to a labor union “ensures that employees will have their rights defended by an organization

²⁰ *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 27.

with some expertise”²¹ because a union “in its normal course concerns itself with the stuff of the prevailing wage statute.”²² This is hardly revelatory, given that “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.”²³

Third, Gene’s position again leads to absurd results, as the interested party by employee authorization would actually have less enforcement powers than other interested parties. R.C. 4115.03(F) and 4115.16 do not distinguish between interested parties. Not even Gene’s challenges the union’s standing to pursue any violation of prevailing wage law where it has as members, employees of a contractor that loses a bid for a contract. Yet, when the union’s standing is grounded on employees who actually worked on the project, Gene’s would have the few made whole, while the other prevailing wage violations go un-redressed.

This leads to the final defect in Gene’s position. It does not promote judicial economy, but rather lends itself to a multiplicity of proceedings over the same contractor and project. In this case, for example, the parties stipulated that all of the employees who fabricated duct to be installed in the Project were paid less than the prevailing wage rate. And Local 33 believes Gene’s also underpaid every employee who worked on the jobsite. But with the courts’ and the parties’ resources already expended, Gene’s would limit the recovery to some, but not all of its employees who were underpaid. Additional administrative and court

²¹ *Mohawk*, 86 Ohio St.3d at 614.

²² *Id.*

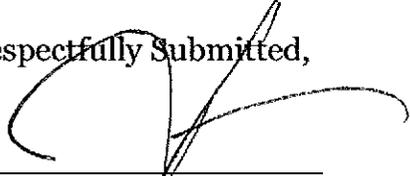
²³ *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91.

proceedings would be required to cure all the other violations of a single contractor on one project.

CONCLUSION

For the reasons stated by Appellee both here and below, Local 33 respectfully urges the Court to affirm the judgment of the Ninth District Court of Appeals.

Respectfully Submitted,



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Certificate of Service

I certify that on this 23rd day of September, 2008, a copy of Appellee's Merit Brief was sent by ordinary U.S. Mail to counsel for Appellants:

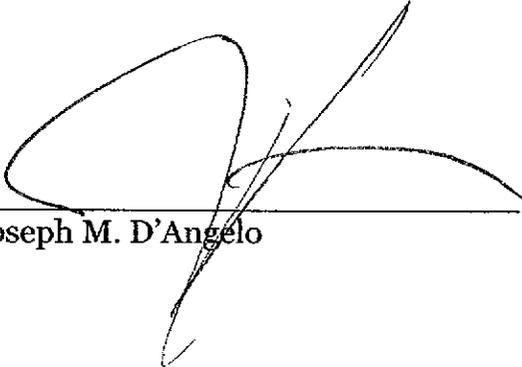
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