

IN THE SUPREME COURT OF OHIO

STATE, EX REL. NORTHWESTERN : CASE NO. 08-1069
OHIO BUILDING & CONSTRUCTION :
TRADES COUNCIL, ET AL, : On Appeal from the
 : Ottawa County
 : Court of Appeals,
Relators - Appellants, : Sixth Appellate District
 :
v. :
 :
OTTAWA COUNTY IMPROVEMENT : Court of Appeals,Case
CORP., ET AL, : No. 07-07-017
 :
Respondents - Appellees. :

**BRIEF ON THE MERITS OF
AMICUS CURIAE MECHANICAL CONTRACTORS ASSOCIATION OF OHIO
IN SUPPORT OF RELATORS-APPELLANTS**

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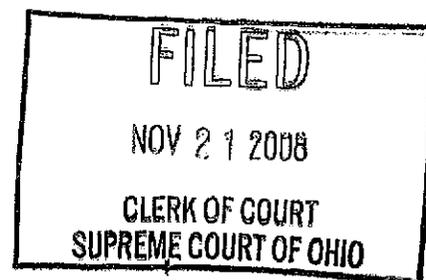
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	2
Amicus Curiae’s Proposition of Law No. 1:	2
Ohio’s Prevailing Wage Law applies to projects financed with expenditures from institutions in whole or in part	2
CONCLUSION.....	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases

<i>Episcopal Retirement Homes, Inc v. Ohio Department of Industrial Relations</i> (1991) 61 Ohio St. 3d 366, 369	4
<i>Harris v. Cincinnati</i> (1992) 70 Ohio App. 3d 163, 169.....	3
<i>Mershman v. Energetech Corp.</i> 120 Ohio Misc. 2d, 70, 2001 Ohio 4733	2
<i>State, ex rel Evans v. Moore</i> (1982) 69 Ohio St. 2d 88, 91	2

Other Authorities

O.A.C. 4101:9-4-02(BB)(1)(d).....	6
O.A.C. 4101:9-4-02(HH).....	7
OAG No. 82-096.....	7
Revised Code 4115.03(A).....	passim
Revised Code 4115.03(C).....	passim
Revised Code 1.47(B).....	4
Revised Code 1.47(C).....	4
Revised Code 1724.01	7
Revised Code 309.13	1
Revised Code 4115.03	3, 4, 5, 7
Revised Code 4115.03(B).....	3, 5
Revised Code 4115.032	7
Revised Code 4115.033	6
Revised Code 4115.16	3, 4, 5, 7
Revised Code Chapter 1724.....	1

STATEMENT OF FACTS

Respondent-Appellee Fellhauer Mechanical Systems, Inc. (“Fellhauer”) is an electrical contractor. Fellhauer operated out of the building it leased at 2435 Gill Road in Port Clinton, Ohio. The project at issue encompasses Fellhauer’s acquisition and renovation of this building in order to expand its business operations. (Tr. pp. 15-16) Approximately half of the Project was funded by public funds received from two sources. (Tr. pp. 17-18) One was a loan (approximately \$300,000) from Respondent-Appellee the Ottawa County Board of Commissioners. The funds for the loan came from the Ohio Department of Development’s Economic Development Program, and were originally Federal Small Cities Community Development Block Grant funds. (Tr. pp. 17-18) The other source was a loan (approximately \$36,750) from Respondent-Appellee the Ottawa County Improvement Corporation (the “CIC”), a non-profit corporation created under R.C. Chapter 1724. (Tr. p. 22, p. 26) CIC is almost entirely publicly funded. The total value of the loans equaled approximately \$336,750, which was 48.5% of the estimated \$695,000.00 project. (Tr. p. 17)

Respondents have not complied with Ohio’s Prevailing Wage laws. (Tr. pp. 18-20) Relators requested the County Prosecutor to take all legal actions necessary to bring Respondents into compliance with the prevailing wage law with regard to the Project. (Tr. p. 10) The Prosecutor failed and refused to seek to enjoin the misapplication of public funds and the execution and performance of illegal contracts by respondents. Relators brought this case as a taxpayer’s action under the common law and R.C. 309.13.

Ultimately, the Court of Common Pleas found that both funding sources were public authorities under R.C. 4115.03(A). In its application of R.C. 4115.03(C), however, the Court of Common Pleas held that the Fellhauer project was not for the benefit of the public authority, and

therefore was not “for the public authority.” As a result, the Court of Common Pleas found that the prevailing wage law did not apply to the Fellhauer project. The Court of Appeals affirmed on different grounds holding that the CIC was not an institution and that Ohio’s prevailing wage laws did not apply because the public funds were spent on building and land acquisition and other costs of the project, but not on construction.

ARGUMENT

Amicus Curiae’s Proposition of Law No. 1:

Ohio’s Prevailing Wage Law applies to projects financed with expenditures from institutions in whole or in part.

In *State, ex rel Evans v. Moore* (1982) 69 Ohio St. 2d 88, 91, this Court stated:

The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, inter alia, worker rights and remedies vis-à-vis private contractors, subcontractors and materialmen engaged in the construction of public improvements in this state * * *. Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.

The mechanism chosen by the General Assembly to accomplish this aim was to “level the playing field” for public improvements, i.e. the prevailing wage law prevents unfairness in bids for public improvements by requiring all bidders to use the same labor rates. *Mershman v. Enertech Corp.* 120 Ohio Misc. 2d, 70, 2001 Ohio 4733. When persons are permitted to avoid the application of prevailing wages to a project the members of amicus curiae Mechanical

Contractors Association of Ohio are put at a disadvantage in obtaining contracts for that project. As a result, their workers and all Ohio construction workers lose a part of the comprehensive framework intended by the General Assembly.

R.C. 4115.03 to 4115.16 require any person who constructs a public improvement to pay prevailing wages. In particular, since R.C. 4115.03(C) requires that construction be involved, Defendants' arguments about the payment of staff and purchase of office supplies are a non-issue. (Defendant's Memorandum in Opposition, p. 5 and p. 9). Similarly, Defendants' argument that construction was not involved is a non-issue. Defendant Fellhauer "constructed" a project within the definition of construction in R.C. 4115.03(B). The ultimate question here is whether Defendants should be permitted to avoid the application of the prevailing wage laws by "subdividing" the project into two projects, one for the acquisition of real and personal property and one for construction on the real property and in which the personal property is housed. It must be apparent that no purpose is served by such hair-splitting except to attempt to avoid the application of the prevailing wage laws. If Defendants had simply financed the purchase of office supplies to be used in the normal course of ongoing operations and unrelated to any construction, then they might have a point, but these are not the facts before this Court.

The Court of Appeals correctly stated that "Ohio's prevailing wage law applies to all projects that qualify as public improvements." *Harris v. Cincinnati* (1992) 70 Ohio App. 3d 163, 169. Instead, however, of then examining whether the project at issue was a "public improvement," the Court veered off course to consider whether a "public authority" was involved and whether the CIC was an "institution." The Court should have analyzed the definition of "public improvement," which would have provided context for the analysis of "public authority" and "institution."

In general, under R.C. 4115.03(C) a public improvement must be constructed (1) pursuant to a contract with a public authority and (2) for a public authority. *Episcopal Retirement Homes, Inc v. Ohio Department of Industrial Relations* (1991) 61 Ohio St. 3d 366, 369. Appellants have argued that the definition of “public improvement” in R.C. 4115.03(C) is not applicable here because that division only applies when a “public authority of the State or a political subdivision” is involved, and not when, as here, an “institution” is involved. Appellants’ argument is based on the language in R.C. 4115.03(A) which states that “[sections 4115.03 to 4115.16 of the Revised Code] apply to expenditures of such institutions made in whole or in part from public funds.” Amicus curiae Mechanical Contractors Association of Ohio adopts, incorporates and supports that argument.

In fact, the Court of Appeals apparently conceded Appellants’ argument that R.C. 4115.03(C) need not be met by an institution, but concluded that “[u]nfortunately for appellants, their success with regard to this assignment of error does nothing to alter the result in this case.” In essence, the Court of Appeals concluded that prevailing wages must be paid for projects which meet the “pursuant to a contract with a public authority” and “for a public authority” requirements in R.C. 4115.03(C), but that prevailing wages need not be paid for projects which do not have to meet those requirements. Logically, the opposite should be true. If the limits imposed by the definition of “public improvement” are removed, projects which otherwise would not be subject to prevailing wages become subject to them. See R.C. 1.47(C). (In enacting a statute, [a] just and reasonable result is intended.) Moreover, the Court of Appeals’ conclusion fails to give any effect to the language in R.C. 4115.03(A) cited above in violation of R.C. 1.47(B). (In enacting a statute, [t]he entire statute is intended to be effective.) As applied here, the result of Appellants’ argument would give effect to the entire statute including the

entire definition set forth in R.C. 4115.03(A), making the project at issue subject to prevailing wages.

Another approach to the analysis may help to clarify this result. As noted above, in most situations where a public authority does not construct a project with its own forces, R.C. 4115.03(C) defines “public improvements” to include “all buildings * * * and all other structures or works constructed by * * * any person who, pursuant to a contract with a public authority, constructs any structure for a public authority * * *.” Essentially, R.C. 4115.03(A) defines a “public authority” to mean (1) the state, (2) a political subdivision or (3) an “institution supported in whole or in part from public funds.” Assuming for the moment, that the CIC is an institution, then it would initially appear that R.C. 4115.03(C), as applicable here, would define a “public improvement” to be a project constructed by any person pursuant a contract with the institution and for the institution.

It is precisely at this point, however, that the final clause of R.C. 4115.03(A), which provides that “[sections 4115.03 to 4115.16 of the Revised Code] apply to expenditures of such institutions made in whole or in part from public funds,” becomes applicable. In short, this final clause excepts expenditures of public funds by institutions from the requirements in R.C. 4115.03(C). As applicable to institutions, R.C. 4115.03(C) should be read as follows:

“Public improvement” includes all buildings * * * and all other structures or works constructed * * * by any person with expenditures of an institution made in whole or in part from public funds.”

Further, nothing in the definition of “construction” in R.C. 4115.03(B) indicates that it does not include all costs of a project, including acquisition of land, building, equipment or furnishing or

even “soft costs” such as architectural services. In fact, any implication would be to the contrary in light of the use of the term “total overall project costs” in both R.C. 4115.03(B)(1) and (2). The conclusion seems inescapable that when the “public authority” involved is an institution, any expenditure by the institution of public funds for the project requires that any construction involved in the project be subject to prevailing wages.

This conclusion is also supported by R.C. 4115.033 which prohibits subdividing “a public improvement project into component parts or projects” in order to avoid the threshold amounts in the definition of “construction.” (Emphasis added.) R.C. 4115.033 indicates that the analysis to be made should be whether the project, taken as a whole, includes any expenditures of public funds by an institution, not whether a project can be divided into components or separate projects in an effort to avoid application of prevailing wages.

For the same reasons, the Court of Appeals is also mistaken when it cites O.A.C. 4101:9-4-02(BB)(1)(d) for purposes of exclusion instead of inclusion. O.A.C. 4101:0-4-02(BB)(1)(d) provides:

“Public improvement” means:

(1) All buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works which are:

* * *

(d) Constructed in whole or in part from public funds by an institution supported in whole or in part by public funds.

When any part of a project is financed with public funds from an institution, it is constructed in whole or in part by public funds. See OAG No. 82-096 reaching the same conclusion about expenditures of proceeds of industrial revenue bonds under R.C. 4115.032 and R.C. 165.03.

The Court of Appeals was similarly mistaken in its conclusion that the CIC was not an institution. The word “institution” is not defined in R.C. 4115.03 to 4115.16, but is defined in the Ohio Administrative Code Rules promulgated under those statutes. O.A.C. 4101:9-4-02(P) provides that “institution” means “any society or corporation of a for-profit, not for-profit, public or private character established or organized for any charitable, educational or other beneficial purpose.” The CIC is a corporation not-for-profit of a public character. R.C. 1724.01. The CIC is organized for the beneficial purpose of promoting economic development. R.C. 1724.01. See Ohio Constitution Article VIII, Section 13 which states that improving the economic welfare of the people of the State of Ohio is “in the public interest and a proper public purpose.”

In addition, it is evident from the record below that the CIC is almost entirely publicly funded and, therefore, is “an institution supported in whole or in part by public funds” as required by R.C. 4115.03(A). See O.A.C. 4101:9-4-02(HH) which provides that “supported in whole or in part by public funds” means “any payment or partial payment directly or indirectly from funds provided by loans, grants, taxes, or any other type of payment from public funds of the federal government or of the state as defined in division level 4101:9 of the Administrative Code.”

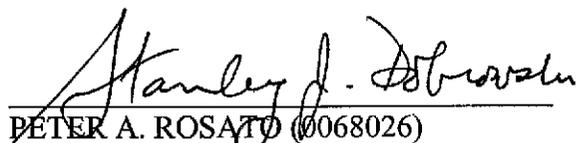
In summary, the project at issue here is subject to prevailing wage rates under R.C. 4115.03 to 4115.16. Either the project need not be a public improvement under R.C. 4115.03(C) because that division applies only to public improvements of the state or political subdivisions or because the project is a public improvement which is excepted from the requirements of being

constructed pursuant to a contract with a public authority and for a public authority by the final clause of R.C. 4115.03(A).

CONCLUSION

For the above reasons, this Court should grant review and reverse the judgment of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief on the Merits of Amicus Curiae Mechanical Contractors Association of Ohio in Support of Relators-Appellants was served by U.S. mail this 21st day of November, 2008, upon the following counsel:

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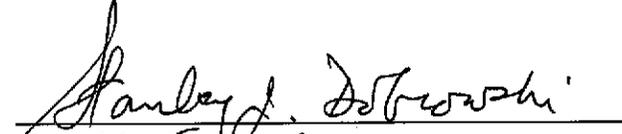
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