IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX. REL. NORTHWESTERN OHIO BUILDING TRADES COUNCIL, ET. AL.	:	**Ohio Supreme Court Case No.: 2008-1069**
Appellants,	:	On Appeal from the Ottawa County Court of Appeal, Sixth Judicial Appellate District:
v.	:	Case No. OT-07-017
OTTAWA COUNTY IMPROVEMENT CORP., ET. AL.	:	
Appellees.	:	

BRIEF OF AMICUS CURIAE,
ASSOCIATED BUILDERS & CONTRACTORS OF OHIO, INC.
IN SUPPORT OF APPELLEES
THE OTTAWA COUNTY IMPROVEMENT CORP., OTTAWA COUNTY BOARD OF COMMISSIONERS AND FELLHAUER MECHANICAL SYSTEMS, INC.

Alan G. Ross (0011478), (COUNSEL OF RECORD)
Nick A. Nykulak (0075961)
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd. South, Suite 350
Cleveland, Ohio 44131
Tel: 2169-447-1551 / Fax: (216) 447-1554
E-mail: alanr@rbslaw.com

COUNSEL FOR APPELLEE
FELLHAUER MECHANICAL SYSTEMS, INC.

Joseph M. D'Angelo (0063348), (COUNSEL OF RECORD)
Cosme, D'Angelo & Szollosi Co., L.P.A.
The CDS Building
202 North Erie Street
Toledo, Ohio 43624
Tel: 419-244-8989 / Fax: 419-244-8990
Email: jdangelo@cdslaw.net

COUNSEL FOR APPELLANT
STATE EX. REL. NORTHWESTERN OHIO BUILDING & CONSTRUCTION TRADES COUNCIL, ET. AL.

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SUPREME COURT OF OHIO

Vincent Atriano (0041084) (COUNSEL OF RECORD)
David S. Farkas (0076033)
Matthew L. Sagone (0063281)
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 365-2783
Facsimile: (614) 365-2499

Mark E. Mulligan (0024891)
Ottawa County Prosecutor
OTTAWA COUNTY PROSECUTOR'S OFFICE
Ottawa County Courthouse
315 Madison Street, Second Floor
Port Clinton. OH 43452
Telephone: (419) 734-6845
Facsimile: (419) 734-3862

Gary A. Kohli (0021896)
KOHLI & CHRISTIE
142 West Water Street
Oak Harbor, Ohio 43449-1332
Telephone: (419) 898-2671
Facsimile: (419) 8988-3327

COUNSEL FOR APPELLEES OTTAWA COUNTY IMPROVEMENT CORP. AND OTTAWA COUNTY BOARD OF COMMISSIONERS

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STATEMENT OF FACTS

Associated Builders & Contractors of Ohio, Inc. ("ABC") adopts the Statement of Facts and Procedural History of this case as set forth in Appellees Ottawa County Improvement Corp. and Ottawa County Board of County Commissioners' Merit Brief.

ISSUES PRESENTED FOR REVIEW

This cause essentially presents two issues for review: (1) whether three essential elements must be present to trigger compliance with Ohio's Prevailing Wage Law: (a) whether there must be a "public authority;" (b) whether there must be a "public improvement;" and (c) whether there must be a "construction;" and (2) whether expenditures made by a public entity for non-construction related purposes, such as loans to a private borrower for the acquisition of real property and equipment, trigger compliance with Ohio's Prevailing Wage Law, where at the time of the loan(s), the private borrower plans to engage in construction activities, utilizing solely private funds.

Contrary to Appellants' assertions in this case, it is well established that in order to trigger prevailing wage obligations there must be a "public authority," providing public funds for the actual "construction" of a "public improvement," and where the total overall cost of the construction project exceeds a monetary threshold amount established by law.[1] Second, as the Court of Appeals correctly found, the expenditure of public funds must designated for actual physical construction, or at a minimum, at least for construction purposes in order for Ohio's Prevailing Wage Law to apply to the construction project. Fundamentally, prevailing wage laws have only applied to construction projects that are deemed to be "public improvements" and

[1] Certain construction projects deemed to be "public improvements" and funded by public obligations have no statutory threshold to trigger prevailing wage compliance if the funds are for the construction of a public improvement. See 4101:9-4-19 interpreting R.C. 4115.032.

where actual physical construction occurs. Necessarily, it follows that the public funds which are contributed to the construction project must then also follow the same path and be specifically designated for a construction purpose.

As such, the Court of Appeals was correct in holding Ohio's Prevailing Wage Law did not apply to the Fellhauer acquisition or any subsequent renovation because: (1) the evidence was undisputed that any renovation of the retail store would be funded with only private money; (2) Ohio's prevailing wage law applies to all construction projects that qualify as "public improvements;" (3) in order for there to be a "public improvement" by an "institution," there must be some kind of construction paid for, in whole or in part, from public funds expended by that "institution;" (4) Fellhauer did not meet the definition of an "institution;" and (5) assuming the existence of an "institution," there was nothing to suggest that either Fellhauer or OCIC expended any public funds on construction.[2]

The Court of Appeals decision should be affirmed and the Propositions of Law forwarded by the Appellee Fellhauer Mechanical Systems, Inc. ("Fellhauer") should be adopted by this Court.[3]

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[2] Judge Abood, at the trial court level, correctly ruled that R.C. Ch. 166 would have exempted the Fellhauer building from any prevailing wage obligations because the home theater showroom would be a point of final sale facility under R.C. 166.01(D). Hence, even if public funds were used for this home theater showroom renovation, the project would not be deemed a "public improvement" pursuant to R.C. 4115.032 because of the R.C. 166 exemption. Appellants' never appealed from this ruling and it stands as the law of the case.

[3] ABC of Ohio Specifically adopts these Propositions of Law and arguments set forth in Fellhauer's Merit Brief although not specifically discussed herein:

Proposition of Law No. 1: OCIC Does Not Meet the Statutory Definition of "Public Authority" within the Purview of Ohio's Prevailing Wage Law Because there was No Contract for Construction, and No Construction "By or For" OCIC.

Proposition of Law No. 3: The Requirement in R.C. Chapter 4115 that There must be a Construction of a Public Improvement for Ohio's Prevailing Wage Law to Apply to a Project is Established Explicitly by Ohio's Prevailing Wage Statute, R.C. 4115.03 et seq., Not by an Administrative Rule.

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. Its members regularly perform public and private construction work covering all construction trades and crafts, engage in real property development, perform design/build projects, as well as manufacture, fabricate, supply and transport products and materials under construction contracts throughout the State of Ohio. ABC of Ohio represents the combined interests of over one thousand members in the three Ohio chapters – the Northern Ohio, Central Ohio and Ohio Valley Chapters, which together cover the entire State.

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 companies located throughout eighty-four (84) chapters across the United States. The goal of ABC is "to provide the best educational and entrepreneurial activities and to 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 members have an interest regarding the coverage and scope of Ohio's Prevailing Wage Law as its members regularly perform construction work subject to the statute's requirements. Particularly, in the development and design/build context, the issues presented in this case will seriously impact the future of development projects in the State of Ohio. The Appellants' position seeking to expand Ohio's Prevailing Wage Law to public loans limited to

real property or equipment acquisitions is extremely detrimental to attracting, obtaining and constructing new development projects in the State of Ohio.

With the banking and financial industries in shambles, more and more developers, contractors and owners are looking to public entities to provide financing or tax breaks for the acquisition of real property and equipment. If subsequent construction occurs with private funds and prevailing wage laws apply, the cost of developing these projects will substantially increase making development nearly impossible in most circumstances. For instance, if a city wants to renew a blighted area or brown-field, and offers to provide the financing to a developer to purchase the property from the city or to remediate the land, or offers the developer property tax breaks to develop the property, according to Appellants' argument, prevailing wage obligations would apply to the entire project, as all activities under their theory would constitute the "total overall cost of the project." However, the increased cost of the project through the requirement of prevailing wage may eliminate any incentive for the developer for taking the risk to develop the property, leaving the city with no developer willing to redevelop blighted areas or brown-fields within the city.

As the industrial base in Ohio disappears, and along with it, the commercial, retail and residential properties that once arose and flourished around it, many cities in Ohio are facing vast tracts of vacant homes and buildings, as well as contaminated land. As such, these areas continue to degrade and are considered blighted. One ray of hope is for Ohio's public agencies to make these blighted lands marketable by investing public money into the remediation of brown-fields, by offering loans to acquire property, and/or by providing tax breaks and abatements to private developers, resulting in these private developers taking the risk to secure private financing for the construction of new buildings or renovations to existing vacant

structures in these areas. When private developers have so many choices as to what areas to invest their money and take risks, the imposition of prevailing wage is more than enough for them to look to other states or to non-blighted areas within our State where they are not saddled with risks or increased construction costs.

ABC does not contend that if the city were to undertake the remediation of a brown-field that prevailing wage law would not apply to the remediation done with public funds, it would. However, there is a difference between construction activities performed by the city and any subsequent construction undertaken by a developer with private funds. Conceptually, any purchase, construction, or acquisition activity can be considered a single "project" if the time line included was long enough. However, if the ownership of the remediated real property was later transferred or sold to a developer, this time line should be broken along with any prevailing wage obligations.

The same is true when a city or public entity provides financing to a developer to obtain an otherwise undesirable piece of property, or property that a bank will not provide financing for. If later construction or renovation is planned, and prevailing wage laws apply, the increased cost to develop the property will serve as a disincentive for any developer to take the risk that the redevelopment was an investment that may pay-off. Holding that the acquisition of real property financed by public funds is part of any "overall construction project" subject to prevailing wage effectively hand-cuffs cities and other state agencies from entering into arrangements with private developers to acquire properties and renovate them to combat urban blight, destroying urban renewal programs.

Likewise, when it comes to attracting new companies and businesses to Ohio, such as getting new manufacturing facilities to be built by companies within the State, any tax incentives

provided to these companies or financing to acquire equipment under the Appellants' way of thinking will trigger prevailing wage obligations, again creating a disincentive for these companies to move their operations or to build factories in the State of Ohio.

Ohio's Prevailing Wage Law is a comprehensive statute enacted by the Legislature which exclusively defines when prevailing wage obligations apply to construction projects. Public expenditures for non-construction related purposes have not, and do not trigger compliance with prevailing wage laws. It has always been understood that prevailing wage obligations apply when a public authority (public entity) is acting as the purchaser of construction services, or when certain public specifically monies fund the actual construction of projects deemed by statute to be public improvements. See R.C. 4115.03 and R.C. 4115.032.

Because it has been so clear and understood, the issue of when prevailing wage law applies to a construction project has not been the subject of serious debate until now. This expansion of prevailing wage law is contrary to statute and the intent of the Legislature, and will only serve to further weaken and incapacitate Ohio's already struggling economy. If Appellants' arguments are sustained, an environment hostile to creating new jobs and redeveloping properties in Ohio will be established. Appellants' cannot be allowed to use the Ohio Supreme Court, or the Governor's Office to rewrite when or how prevailing wage laws apply to construction projects.

ARGUMENT

ABC of Ohio adopts and incorporates herein all of the arguments made, and the Propositions of Law forwarded by Fellhauer Mechanical Systems, Inc. in its Merit Brief. However, ABC of Ohio offers the following arguments to emphasize certain points made therein.

Proposition of Law No. 1: The Public Expenditures of Funds by an "Institution" Alone Does Not Trigger the Application of Ohio's Prevailing Wage Law; There Must Also be a Construction of a Public Improvement.

Simply because a public entity provides financing or funding to a private company or person for non-construction related expenditures, such as real property acquisition, tax abatements, equipment purchases, or sells real property below market value, these acts do not trigger the application of prevailing wage laws, if subsequent construction is contemplated or follows. Currently, the way the prevailing wage statute is written, R.C. 4115.032 and O.A.C. 4101:9-4-17 do not provide a basis for Appellants' "subdividing" arguments, nor does the expenditure of public funds by a "public authority," as defined by R.C. 4115.03(A), alone, trigger prevailing wage compliance.

Non-construction related public fund expenditures are wholly unrelated to "construction" in anyway, and are clearly not part of any construction projects "total overall costs" as defined by R.C. 4115.03(B). It is undeniable that the statute is geared solely towards gauging the "total overall cost" of the construction being performed. The statute is clear that "total overall project costs" as used to R.C. 4115.03(B) does not include the costs of "equipment" or "acquisition of real property." "Total overall project costs," as properly determined by the Court of Appeals, is meant to refer to only "actual construction costs;" hence, that is why this language was placed into the definition of "construction." The total overall project cost is inextricably linked to the "cost of actual construction for a public improvement," meaning that the costs are specifically construction related and include all contracts for construction work including, but not limited to, electrical, heating ventilating and cooling work, plumbing work, general trades work, etc… were the total overall project construction cost is more than the prevailing wage threshold of $50,000.

Moreover, the statutory framework set forth evidences that R.C. 4115.033 and O.A.C. 4101-9-4-17 were included only to prevent a public authority from subdividing individual construction contracts on public improvement projects to evade the prevailing wage threshold and avoid compliance with the statute. The plain meaning of the statute and the specific wording used could not be more clear.

It is clear from the language used in R.C. 4115.033 and O.A.C. 4101-9-4-17 that both are addressing "contracts for the construction of a public improvement." Thus, the "subdividing" language used is only related to the "contract for the construction" of a public improvement, and further only constitutes a prohibition to subdivide contracts into component parts to evade the prevailing wage threshold. The Administrative Code clearly references the awarding of contracts to bidders, discusses completing construction projects in phases, and describes what happens when a bidder is unable to complete the project, all in the context of "threshold levels" triggering prevailing wage obligations. As such, the clear language of the statute and Administrative Code provide that these sections only apply to the subdividing of public improvement construction projects into individual construction contracts to evade the statutory threshold.

Appellants' argument simply seeks to expand the reach of prevailing wage law into the realm of private projects were the purpose and intent of the statute would not apply, as the "government is not the purchaser of any construction services" mandated by law to accept the lowest most responsible bid. Contrary to Appellants' assertions, the use of public money for non-construction related purposes simply does not create a "public right" entitling labor unions to request prevailing wages, in other words, the union wage, regarding any and every public

expenditure were later construction may be done. Simply put, public funds do not belong to labor unions, but to taxpayers.

In the instant matter, it is undisputed that no public funds were earmarked or provided for construction work on the Fellhauer building. All public funds were specifically provided for the purchase and acquisition of the land, building and equipment. Indeed, no construction work was even mandated on the building utilizing Fellhauer's private funds. It was Fellhauer's choice whether or not to renovate the home theater showroom and it bore no relationship whatsoever regarding whether or not Fellhauer would receive the loans for acquisition of the land, building or equipment.

Proposition of Law No. 2: The Fellhauer Project was Not Sub-Divided to Avoid the Statutory Thresholds of Ohio's Prevailing Wage Law. Public Funds must be Explicitly Allocated for the Construction of a Public Improvement as Mandated by Statute in order for Prevailing Wage Requirements to Apply to the Project.

Simply because a "public authority" expends public funds for non-construction related reasons is not enough to trigger prevailing wage obligations as Appellants' contend. For a construction project to be subject to prevailing wage requirements it must satisfy three elements.[4] First, the project must be a "public improvement" as defined in R.C. § 4115.03(C) or R.C. 4115.032.[5] Second, there must be a "construction," and the project's total overall construction cost must exceed the statutory threshold provided in R.C. § 4115.03(B)(1) and (2).[6] Third, there must be a "public authority," as defined by R.C. 4115.03(A), and the construction project must

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[4] The Legislative Service Commission has indicated that in order for prevailing wage to apply, there must be a public improvement. See MEMBERS ONLY: AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF, Vol. 126 Issue 2 at 4-6 (February 25, 2005). *See also* OHIO LEGISLATIVE SERVICE COMMISSION 127TH GENERAL ASSEMBLY S.B. 376 (as introduced)(stating "[P]revailing Wage Law only applies to construction of a public improvement the costs of which is above the statutorily prescribed thresholds.").

[5] *Id.*

[6] *Id.; See also* O.R.C. § 4115.03(C).

not be specifically exempted from coverage by Ohio's prevailing wage law.[7] This proposition is well settled. See *Episcopal Retirement Homes Inc. v. Ohio Dept. of Indus. Relations,* 61 Ohio St.3d 366, 369 (1990), the Ohio Supreme Court stated: "By its terms, Ohio's prevailing wage law applies to all construction projects that are 'public improvements' as defined in R.C. 4115.03(C)." Secondly, in *U.S. Corrections Corp. v. Ohio Dept. Indus. Relations* (1995), 73 Ohio St.3d 210, 218, the Ohio Supreme Court again made it clear that "Ohio's prevailing wage law applies to all construction projects that are 'public improvements.'" *Accord, United Bhd. of Carpenters & Joiners of Am. v. Bell Eng. Ltd., Inc.*, 2006-Ohio-1891 (3rd Dist.) ("The prevailing wage law takes effect anytime a public authority 'contracts for' a public improvement.").

Simply stated, if the statute does mandate prevailing wages to be paid by the operation of R.C. 4115.03(A), (B) or (C) in combination, or triggered by R.C. 4115.032 in combination with R.C. 4115.03(A) and (B), then prevailing wage law does not apply. Appellants' cannot pervert the meaning of R.C. 4115.033 or O.A.C. 4101-9-4-17 to expand prevailing wage law beyond the scope the Legislature specifically intended by arguing that "subdividing" somehow includes public expenditures for non-construction related expenditures or applies when any public money is directly or indirectly contributed to a private entity. Nor can Appellants' rewrite Ohio's Prevailing Wage Law to ignore the fact that statute not only requires there to be a "public authority" expending public funds on actual "construction," but there also must be a project that qualifies as a "public improvement" to trigger prevailing wage law applicability.[8]

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[7] *Id. ; See also* O.R.C. § 4115.04 and R.C. 166

[8] Appellants' also fail to explain to this Court that if the need for a "public improvement" is unnecessary to trigger prevailing wage compliance, why the defined terms "public authority" and "public improvement" are mentioned together in nearly every section of the statute. See R.C. 4115.03, 4115.032, 4115.033, 4115.04, 4115.06, 4115.07, 4115.08, 4115.09, and 4115.10. Appellants' never appealed from the ruling that the Fellhauer building was not a "public improvement" and cannot challenge this fact here.

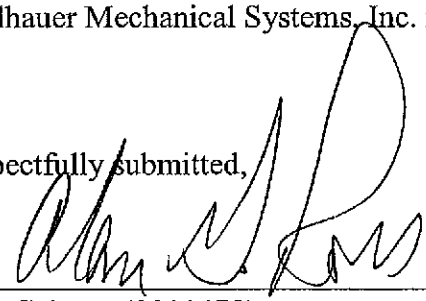
It is clear from the record that no construction work was ever performed on the Fellhauer building using public funds, that the Fellhauer building is not a "public improvement" under R.C. 166.02, and that neither the OCIC, nor the County qualifies as a "public authority" because neither entered into a contract for construction or otherwise mandated that construction services be performed with public funds. As such, Appellants' argument that prevailing wage law applies is wholly without merit.

If the Appellants' wish to change the prevailing wage law to include land acquisition and equipment as part of a "overall construction project," or to trigger prevailing wage application by simply having a "public authority" contribute public funds to a private company for any reason, then these arguments should be presented to the Ohio Legislature, as there is no support for Appellants' arguments given the clear meaning of the statutes Appellants' have relied upon. Appellants' appeal is without merit and the holding of the Court of Appeals should be upheld.

CONCLUSION

For all the reasons stated herein, ABC of Ohio respectfully requests this Court to adopt the Propositions or Law forwarded by Fellhauer Mechanical Systems, Inc. in its Merit Brief.

Respectfully submitted,



Alan G. Ross (0011478)
Nick A. Nykulak (0075961)
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd. South, Suite 350
Cleveland, OH 44131-2547
Tel: 216-447-1551 / Fax: 216-447-1554
E-mail: alanr@rbslaw.com

COUNSEL FOR ABC OF OHIO

Dated: December 23, 2008

CERTIFICATE OF SERVICE

This is to certify that one copy of the foregoing Amicus Curiae Brief of ABC of Ohio, Inc. was served this 23rd day of December 2008 via U.S. Mail, postage prepaid, upon the following:

Joseph M. D'Angelo (0063348), (COUNSEL OF RECORD)
Cosme, D'Angelo & Szollosi Co., L.P.A.
The CDS Building
202 North Erie Street
Toledo, Ohio 43624

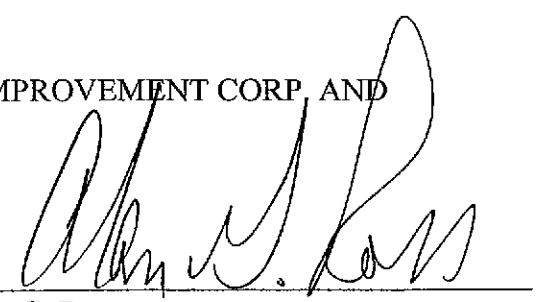
COUNSEL FOR APPELLANT

Vincent Atriano (0041084) (COUNSEL OF RECORD)
David S. Farkas (0076033)
Matthew L. Sagone (0063281)
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215

Mark E. Mulligan (0024891)
Ottawa County Prosecutor
OTTAWA COUNTY PROSECUTOR'S OFFICE
Ottawa County Courthouse
315 Madison Street, Second Floor
Port Clinton. OH 43452

Gary A. Kohli (0021896)
KOHLI & CHRISTIE
142 West Water Street
Oak Harbor, Ohio 43449-1332

COUNSEL FOR APPELLEES OTTAWA COUNTY IMPROVEMENT CORP. AND OTTAWA COUNTY BOARD OF COMMISSIONERS



Alan G. Ross