

In the
Supreme Court of Ohio

DOUG BERGMAN, et al., : Case No. 2009-0558
: :
Plaintiffs-Appellants, : :
: :
v. : :
: :
MONARCH CONSTRUCTION CO., et al. : :
: :
Defendants-Appellees. : :
: :
: :

**MEMORANDUM OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF JURISDICTION**

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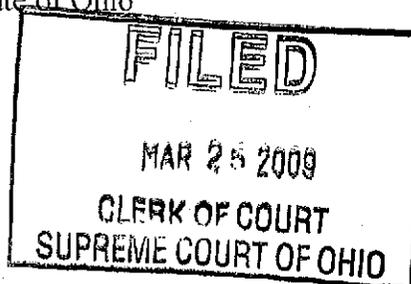


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INTRODUCTION

The decision of the Twelfth District Court of Appeals in this case undercuts Ohio's prevailing wage laws by restricting mandatory penalties and discounting the damages assessed against an offending employer, contrary to Ohio's express statutory scheme governing prevailing wages.

This Court's attention is warranted because the ruling below threatens Ohio's prevailing wage law enforcement in three ways. First, the Twelfth District's decision abrogates the mandatory 75% penalty payable by an offending employer to the Director of the Ohio Department of Commerce ("Director") in those cases brought by private parties. Second, the decision improperly renders discretionary both the compensatory and punitive damages owed by an offending employer to an employee. Finally, the decision extends a damages discount to an offending employer where a public authority may be at fault for failing to provide proper notice of the prevailing wage to the contractor, but without regard for whether the Director of Commerce made the predicate determination—required by R.C. 4115.05—that the public authority was, in fact, at fault.

This Court's review is also warranted because a split has developed in the appellate districts regarding the penalties set forth in R.C. 4115.10(A) for violating the prevailing wage law. Section 4115.10(A) provides that an employee who has been paid less than the fixed wage is entitled to the difference between the fixed rate and the amount actually paid as well as "a sum equal to twenty-five per cent of that difference." While the Twelfth District held in this case that the 25% penalty payable to an employee is discretionary, the Sixth District Court of Appeals has held that the penalty is mandatory. *International. Bhd. of Electrical Workers, Local Union No. 8 v. Stollsteimer Elec., Inc.* (6th Dist.), 168 Ohio App. 3d 238, 2006-Ohio-3865.

For all of these reasons this Court should accept jurisdiction over this case and reverse the decision of the Twelfth District.

STATEMENT OF AMICUS INTEREST

The interests of the State of Ohio include the interests of the Director of Commerce in her capacity as the administrator and enforcer of Ohio's prevailing wage laws, R.C. 4115.03 to 4115.21. The State of Ohio and the Director of Commerce have a strong interest in upholding the integrity of the prevailing wage laws, which depend in large part on lawsuits filed by employees. The General Assembly carefully designed Ohio's prevailing wage laws by requiring penalties when violations are found and by strictly limiting exclusions from the penalty provisions. The Twelfth District's decision undercuts the compensatory, deterrent, and punitive elements of this statutory scheme in unprecedented ways.

The interests of the State of Ohio also include the interests of all State entities that engage private contractors on public improvement projects. These entities have a strong interest in ensuring that courts respect those provisions of the prevailing wage laws that limit these public entities' exposure to litigation and liability for prevailing wage law violations.

STATEMENT OF THE CASE AND FACTS

The State of Ohio adopts Appellants' Statement of the Case and Facts.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Ohio's prevailing wage laws establish a comprehensive framework for workers' rights and remedies with respect to private contractors engaged in the construction of public improvements in Ohio. *State ex rel. Evans v. Moore*, (1982), 69 Ohio St.2d 88, 91. The laws sustain the integrity of the collective bargaining process by preventing private contractors from undercutting wages when they are engaged by the State on public improvement projects.

Prevailing wage laws must be vigorously enforced, lest contractors attempt to win public contracts by undercutting wages. To that end, the two centerpieces of Ohio's prevailing wage laws are (1) a series of deterrent provisions, which include both criminal and civil penalties, and (2) provisions that compensate employees whose employers have improperly denied them the prevailing wage. See R.C. 4115.10, 4115.99. The Twelfth District's decision here undercuts both the deterrent and compensatory objectives of these laws.

First, the Twelfth District's decision improperly abrogates the mandatory 75% penalty payable by an offending employer to the Director of Commerce in those cases brought by private parties—that is, in the Twelfth District's view, employees “lack[] standing to bring the claim [for the 75% penalty] on behalf of Commerce.” *Bergman v. Monarch Constr. Co.*, 12th Dist. No. CA2008-02-044, 2009-Ohio-551, at ¶94. But the Twelfth District's rubric of an employee's “standing” to bring a “claim” for the penalty is misplaced. The penalty is not a “claim,” but rather a mandatory fine that courts must assess when a violation has been found. The 75% penalty is critical to the State's prevailing wage enforcement scheme. The penalty serves as both a deterrent and punishment for prevailing wage law violations and supports the mission of the Department of Commerce, since R.C. 4115.10(A) provides that the penalties shall be deposited in a penalty enforcement fund for the enforcement of the prevailing wage laws. The Twelfth District has obliterated the 75% penalty in cases brought by employees, since neither the employees nor the Director could ever enforce the penalty: the employee because the Twelfth District has ruled that the penalty cannot be assessed in employee suits, and the Director because she is authorized to sue only if the employees do not prosecute their own claims. R.C. 4115.10(C) (authorizing the Director to enforce prevailing wage law claims on behalf of employees who do not pursue their claims through R.C. 4115.10(A) or (B)). In short, this

Court's review is warranted to preserve the civil penalties that are critical to the State's enforcement of Ohio's prevailing wage laws.

Second, the Twelfth District's decision guts the compensation scheme designed to make injured employees whole. The Twelfth District held that the 25% penalty payable to employees, as set forth in R.C. 4115.10(A), is discretionary, even though the prevailing wage law requires that a court, upon finding that a violation has occurred, "*shall . . .* 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). This Court's review is imperative because the Twelfth District's ruling not only imperils the 25% penalty to which employees are entitled, but it renders restitution discretionary as well. That is, R.C. 4115.10(A) provides that injured employees are entitled to both restitution ("the difference between the fixed rate of wages and the amount paid to the employee"), *plus* a penalty equal to 25% of that difference. The Twelfth District found that the 25% penalty was discretionary because R.C. 4115.10(A) states that an injured employee "may" recover restitution plus the 25% penalty. In this way, the court's reading of R.C. 4115.10(A) renders both restitution *and* the 25% penalty discretionary. Therefore, if left standing, the Twelfth District's decision threatens to leave countless prevailing employees out to dry, by denying them even the most basic remedy for prevailing wage law violations—restitution of back wages they are owed. This Court's review is warranted to prevent that patent injustice and to preserve the carefully crafted compensatory and penalty scheme created by the General Assembly for prevailing wage law violations.

Finally, the Twelfth District's decision extends a damages discount to an offending employer where a public authority may also be at fault (for failing to give proper notice of the prevailing wage laws to the contractor), but without regard for whether the Director of

Commerce made the predicate determination—required by R.C. 4115.05—that the public authority was, in fact, at fault for failing to give proper notice. The predicate finding is required so that public authorities—it was Miami University in this case—are not dragged indiscriminately into every prevailing wage law case, and so that liability is shared only in those circumstances where the Director has first found the public authority at fault. In other words, R.C. 4115.05 limits public entities’ exposure to litigation and liability for prevailing wage law violations, absent a predicate finding of fault by the Director of Commerce. This Court’s review is urgently warranted because the Twelfth District’s decision improperly evades the requirements of R.C. 4115.05. And by creating an affirmative defense for contractors—whereby contractors can now reduce their liability by pointing fingers at a public entity—the Twelfth District’s decision paves the way for parties to implead public entities in every prevailing wage case, irrespective of whether the requirements of R.C. 4115.05 have first been met. In sum, this Court should step in to ensure that courts respect those provisions of the prevailing wage laws that limit these public entities’ exposure to litigation and liability for prevailing wage law violations.

ARGUMENT

Amicus Curiae State of Ohio’s Proposition of Law No. 1:

Courts are required to assess the 75% penalty payable to the Director of Commerce under R.C. 4115.10(A) in employee suits where the employee prevails.

Ohio’s prevailing wage law has several enforcement mechanisms. Under R.C. 4115.10(A), an employee paid less than the prevailing wage may bring suit against the offending contractor; or, under R.C. 4115.10(B), the employee may request that the Director of Commerce bring suit against the employer on the employee’s behalf. If the injured employee fails to take either course of action, and if the Director has determined that a violation of the prevailing wage law occurred, then the Director shall bring any legal action necessary to collect any amounts owed to

employees and the Director. R.C. 4115.10(C). In short, the Director is authorized to bring suit under division (C) of R.C. 4115.10 *only* if no employee has brought suit pursuant to division (A) of R.C. 4115.10 or asked the Director to sue on his/her behalf under division (B). When the Director brings suit under division (C), she is empowered to collect the penalties under division (A) and turn them over to the affected employees. R.C. 4115.10(C).

Division (A) of R.C. 4115.10 is dedicated to employee suits, and sets forth the damages and penalties a court must impose if the employee prevails:

Any employee . . . who is paid less than the fixed rate of wages applicable thereto may recover from [the offending contractor] the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The [offending contractor] who fails to pay [the prevailing wage] *also shall pay* a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement.

(Emphasis added). In short, where an employee prevails under a suit in division (A), that division provides for three types of compensation and penalties: (1) restitution to the injured employee; (2) a penalty to the injured employee in the amount of 25% of the restitution; and (3) a 75% penalty payable to the Director of Commerce.

The Twelfth District has construed R.C. 4115.10 as entitling the Director to the 75% penalty only in suits brought by the Director herself—that is, in the Twelfth District’s view, employees “lack[] standing to bring the claim [for the 75% penalty] on behalf of Commerce.” *Bergman v. Monarch Constr. Co.*, 12th Dist. No. CA2008-02-044, 2009-Ohio-551, at ¶94. But the Twelfth District’s rubric of an employee’s “standing” to bring a “claim” for the penalty is misplaced. The penalty is not a “claim,” but rather a mandatory penalty that courts must assess when a violation has been found. As R.C. 4115.10(A) states, an offending contractor “shall pay” the penalty where a violation has been found. Moreover, the 75% penalty is set forth in the division of R.C. 4115.10 that specifically governs *employee suits*—division (A). It would make

no sense to include the 75% penalty in division (A) if it were only meant to apply to suits brought under division (C). Lastly, division (A) uses the word “also” in connection with the 75% penalty—“[the offending contractor] *also shall pay* a penalty to the director of seventy-five per cent of the difference between the fixed rate and wages and the amount paid to the employees”—meaning that the 75% penalty to the Director must be assessed in addition to the other damages and penalties that apply when an employee prevails in an employee suit.

In short, the 75% penalty set forth in R.C. 4115.10(A) and payable to the Director of Commerce is not a “claim,” but rather a mandatory penalty that courts must assess in employee suits where the employee prevails. To hold otherwise would contravene the plain language of the statute and would mean that the 75% penalty would not be assessed in a vast number of cases, since R.C. 4115.10(C) forecloses the Director from bringing suit where the employee has chosen to do so.

Amicus Curiae State of Ohio’s Proposition of Law No. 2:

The 25% penalty payable to an employee under R.C. 4115.10(A) is mandatory, unless the Director of Commerce has determined under R.C. 4115.13(C) that an employer’s violation was due to a misinterpretation of the prevailing wage statute or an erroneous preparation of the payroll documents.

As stated above, R.C. 4115.10(A) sets forth the damages and penalties a court must impose if the employee prevails, and specifically provides that an employee is entitled to restitution (that is, “the difference between the fixed rate of wages and the amount paid to the employee”), *plus* “a sum equal to twenty-five per cent of that difference.”

The Twelfth District has erroneously concluded that the 25% penalty is discretionary, on the ground that R.C. 4115.10(A) states only that an injured employee “*may recover*” restitution plus the 25% penalty. (Emphasis added). But this reasoning ignores the fact that a different

section of the prevailing wage law, R.C. 4115.16, provides that courts “*shall* . . . afford to injured persons the relief specified under R.C. 4115.03 to 4115.16.” (Emphasis added).

The Twelfth District’s conclusion also ignores the fact that the prevailing wage laws provide an explicit exception to the 25% penalty—but that exception does not apply here. Section 4115.13(C) shields an employer from the 25% penalty where the Director of Commerce has made a finding that any underpayment by the employer was the result of a misinterpretation of the statute or an erroneous preparation of the payroll documents. But no such finding was ever made as to Monarch in this case, and to extend to Monarch the benefit of an exemption not conferred by the prevailing wage law would violate this Court’s well-established principle of “*expressio unius est exclusio alterius*,” which prevents the Court’s “addition of an additional statutory exclusion not expressly incorporated into the statute by the legislature.” *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St.3d 390, 394. Accordingly, Monarch is not entitled to any exemption from the 25% penalty set forth in R.C. 4115.10(A).

Contrary to the Twelfth District’s decision here, the Sixth District Court of Appeals properly found that the 25% penalty is mandatory, and that an employed may be relieved of the penalty only where the conditions of R.C. 4115.13(C) have been met. *International. Bhd. of Electrical Workers, Local Union No. 8 v. Stollsteimer Elec., Inc.* (6th Dist.), 168 Ohio App. 3d 238, 2006-Ohio-3865.

In sum, the 25% penalty payable to an employee under R.C. 4115.10(A) must be paid by an employer unless the Director of Commerce has determined under R.C. 4115.13(C) that an employer’s violation was due to a misinterpretation of the prevailing wage statute or an erroneous preparation of the payroll documents. The Director never made any such

determination in this case. Accordingly, Monarch is liable for the 25% penalty to the employee plaintiffs.

Amicus Curiae State of Ohio's Proposition of Law No. 3:

A court cannot reduce the back wages owed by an offending contractor on the ground that a public authority is also liable, unless the Director of Commerce has made the predicate determination under R.C. 4115.05 that the public authority failed to notify the contractor of a change in prevailing wage rates as required by that section.

Discounting Monarch's damages even more, the lower courts cut approximately \$10,000 from the award to the employee plaintiffs in this case, on the theory that Miami University was partly at fault for the prevailing wage violation. The Twelfth District construed R.C. 4115.05 to assign liability to a public authority, and to reduce a contractor's damages accordingly, where the public authority failed to notify the contractor of a change in prevailing wage rates. But R.C. 4115.05 does not authorize courts to do any such thing. In relevant part, R.C. 4115.05 provides that:

If the director determines that a contractor or subcontractor has violated sections 4115.03 to 4115.16 of the Revised Code because the public authority has not notified the contractor or subcontractor as required by this section, the public authority is liable for any back wages, fines, damages, court costs, and attorney's fees associated with the enforcement of said sections by the director for the period of time running until the public authority gives the required notice to the contractor or subcontractor.

(Emphasis added). In other words, a public authority is liable only where the Director of Commerce has first determined that the public authority failed properly to notify the contractor of a change in prevailing wage rates.

The predicate finding by the Director makes sense as a matter of public policy. It ensures that public authorities are not dragged indiscriminately into every prevailing wage law case and that an offending contractor's liability is relieved only where the Director of Commerce has first found that the public authority failed to properly notify the contractor of a change in prevailing wage rates.

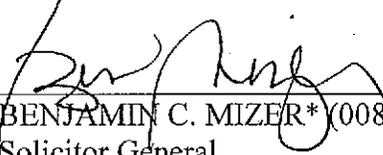
In short, a court cannot reduce the back wages owed by an offending contractor on the ground that a public authority is also liable unless the Director of Commerce has made the required finding of fault under R.C. 4115.05—a finding that the Director never made in this case.

CONCLUSION

For all of the foregoing reasons, this Court should accept jurisdiction over this case and reverse the decision of the Twelfth District Court of Appeals.

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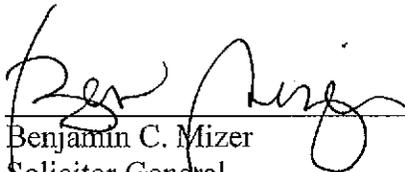
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