

ORIGINAL

In the  
SUPREME COURT OF OHIO

DOUG BERGMAN, et al.,	:	Case No. 2009-0558
	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Butler County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
MONARCH CONSTRUCTION CO.,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. CA2008-02-044

MEMORANDUM OF MONARCH CONSTRUCTION COMPANY  
OPPOSING JURISDICTION

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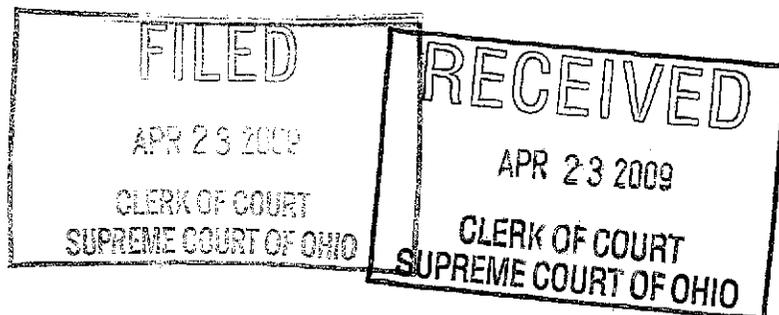
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### Statement on Public or Great General Interest

This lawsuit was unnecessary when it was instituted and its appeal to this Court is not of “public or great general interest” now. The trial court and Court of Appeals issued decisions in this prevailing wage matter that were consistent with the long-held enforcement position of the Department of Commerce. The Court of Appeals properly enforced the prevailing wage law and found Monarch Construction Co. (“Monarch”) liable for certain unpaid prevailing wages. The court followed Supreme Court precedent in rendering its decision. The arguments raised by Plaintiffs below properly were rejected. These arguments, and the new arguments raised for the first time by Plaintiffs and *amici*, are not proper for review by this Court.

Monarch was a general contractor on a construction project. One of its subcontractors went defunct toward the conclusion of the job, leaving Monarch liable for the subcontractor’s unpaid prevailing wages. Monarch paid those unpaid prevailing wages through Commerce to 52 employees of the subcontractor who did not bring suit. Thirty-four Plaintiffs brought this suit seeking \$225,518.26 in prevailing wages, although the subcontractor had underpaid them by about \$100,000. Plaintiffs, knowing they would receive *reasonable* attorney fees, filed unsuccessful motion after motion, that increased the attorney fee amount they ultimately sought. Plaintiffs also sought a 25% penalty on their own behalf and a 75% penalty on behalf of the State. The trial court awarded them their unpaid wages of \$88,013.53 for which Monarch was statutorily liable. No penalties were awarded. All but seven of the Plaintiffs accepted the decision; five<sup>1</sup> of those seven prosecute this appeal.

Plaintiffs wrongly claim that: “Until this case, no court has ever disposed of a prevailing wage claim by ordering that employees receive less than the prevailing rate of wages,” and that

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<sup>1</sup> One of the five is Andrew Sykes, who was paid all prevailing wages Plaintiffs claim he should have been paid. He is not a proper Appellant here, for he seeks no money from Monarch.

the Twelfth District Court of Appeals “literally over-wr[ote] Section 10(A) [4115.10(A)] completely out of existence.” The decision of the Twelfth District, *Bergman v. Monarch Constr. Co.* (Ohio App. 12 Dist.), 2009-Ohio-551, 2009 WL 295396, does not do this or change the interpretation or application of Ohio’s prevailing wage statute.

The Twelfth District enforced the prevailing wage statute’s terms and the existing case law. First, it correctly found that the plain language of R.C. 4115.10(A) does not require a court to award a 25% discretionary penalty for the statute says the court “may” – not “shall” – award said penalty. Plaintiffs ask this Court to rewrite the statute, which it may not do. Second, the Twelfth District correctly held that Plaintiffs did not have standing to seek enforcement of a 75% penalty payable not to them but to the Department of Commerce. Third, the Twelfth District properly applied R.C. 4115.05 as interpreted by this Court in *Ohio Asphalt Paving, Inc. v. Dep’t of Indus. Relations* (1992), 63 Ohio St. 3d 512, 589 N.E.2d 35, when it affirmed the trial court’s reduction of Monarch’s liability by the amount of Miami’s liability for the underpayment. Fourth, the attorney fee issue is a garden-variety fee dispute not worthy of discretionary review by this Court.

Plaintiffs (and their *amici*) raise several arguments in their memorandum in support of jurisdiction that they did not raise in the courts below. (Memorandum in Support of Jurisdiction 5-8) These arguments were not briefed below and therefore may not be presented to this Court for the first time. These include Plaintiffs’ newfound argument that the word “may” in R.C. 4115.10(A) also modifies the prevailing wage penalties calculation, and so cannot be discretionary with respect to the 25% penalty. Plaintiffs and *amici* also argue anew that a court may discount the amount of prevailing wages owed by a contractor to account for a public authority’s liability for an underpayment *only* if the Director first finds that the violation

occurred because of the public authority's failure to notify the contractor of a change in the rate of prevailing wages. Neither of these arguments was raised below and may not be raised here for the first time.

The Twelfth District's decision clarifies some previously ambiguous sections in the text of the prevailing wage statute, but it does not weaken the statute itself or the ability of employees or the Director to enforce it. Even if every appellate court in the state adopted the Twelfth District's holdings, employees would still have the same avenues for relief available to them that were available before the decision: they could receive a 25% penalty if it were warranted, they could seek unpaid prevailing wages from their employer or from the contracting public authority, and the courts could still apply the 75% penalty payable to the Department. The Twelfth District provided clarification, not change, and this Court should not devote its limited judicial resources to reviewing the decision, especially when a number of arguments are presented by Plaintiffs and their *amici* for the first time to this Court.

#### **Statement Of The Case And Of The Facts**

Monarch was general contractor of a student housing project at Miami University. Don Salyers Masonry ("Salyers") was one of its subcontractors. Salyers went defunct toward the end of the project, and it failed to respond to repeated inquiries from the Wage-Hour Division of the Department of Commerce for fringe benefit information related to prevailing wage compliance. After repeated notices that went unanswered, on December 12, 2005, Commerce issued a determination that Salyers owed \$368,266.34 in unpaid prevailing wages and it assessed an equal amount as a penalty. This notice also was sent to Monarch, which is the first notice Monarch received of any such issue.

Monarch was able to provide information to Commerce indicating that a substantial amount of the deficiency had in fact been paid. Commerce redetermined that Salyers had failed

to pay \$171,812.03 on behalf of 86 employees. Monarch paid 52 of these employees through Commerce without any suit being filed. Thirty-four of these employees brought this suit against Monarch. The 34 had been unpaid about \$100,000, but they sought from Monarch \$225,518.26 in back wages. They also sought a 25% penalty of about \$56,000 on their own behalf and a 75% penalty on behalf of the State of about \$170,000. The 34 Plaintiffs filed a raft of unsuccessful motions before the trial court, including for temporary restraining order and two separate motions for summary judgment. At trial (and before trial through motion practice), Plaintiffs lost every single material contested issue. The Court awarded Plaintiffs \$88,013.53. This represented the unpaid prevailing wages Monarch agreed were owed, less about \$10,000 that was the responsibility of Miami University for failing to provide timely notice to Salyers or Monarch of a change in the prevailing wage rate.

Plaintiffs then sought attorney fees of \$127,853.42, which included a one day charge of more than \$37,000 for one lawyer's time.

Most of the Plaintiffs took the Court's award, leaving but seven to prosecute an appeal. The Twelfth District affirmed the trial court in its entirety. Only five of the Plaintiffs prosecute this appeal (one of whom is owed nothing), seeking approximately \$3,400 more on their own behalf and about \$6,000 on behalf of the State.

#### **Plaintiffs' Propositions of Law**

- I. **Plaintiffs' Proposition of Law No. 1: R.C. 4115.10(A) requires payment of the prevailing wage rate and entitles any employee paid less to recover from a contractor the full amount of the difference as underpaid wages without reduction regardless of the cause.**

The first proposition is not of great public interest or importance. Plaintiffs' characterization of R.C. 4115.05 ignores the text of the prevailing wage statute and a past opinion of this Court; it relies principally on arguments that Plaintiffs and *amici* have only now

raised for the first time. R.C. 4115.05 states that in a prevailing wage case “the public authority is liable” for the amount of underpayment caused by the public authority’s failure to notify the contractor of a change in the prevailing wage rate. Miami’s failure to notify Monarch or Salyers of the correct prevailing wage rate was properly taken into account by the trial court when assessing Monarch’s liability.

Plaintiffs and *amici* argue for the first time to this Court that a trial court may only reduce a contractor’s liability by the amount of the public authority’s liability when the Director of the Department of Commerce determines that the underpayment occurred because of the public authority’s failure to notify of a change in the wage rate, citing language in R.C. 4115.05 that Plaintiffs did not cite for this purpose in the courts below. (Motion in Support of Jurisdiction 5-6) This argument was not raised in the trial court or the court of appeals. Plaintiffs may not raise new arguments for the first time on appeal. *See Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Stds. & Bldg. Appeals* (1975), 41 Ohio St. 2d 41, 43, 322 N.E.2d 629; *McKinley v. Ohio Bureau of Workers’ Compensation* (Ohio App. 4 Dist. 2006), 170 Ohio App. 3d 161, 177, 866 N.E.2d 527 (“It is a cardinal rule of appellate review . . . that a party cannot assert new legal theories for the first time on appeal. Thus a reviewing court will not consider an issue that a party failed to raise initially in the trial court.”) (citation omitted); *Martin v. City of Cleveland* (1993), 67 Ohio St. 3d 155, 157, 616 N.E.2d 886; O. Jur. 3d Appellate Review § 126 (2009) (“If issues are raised for the first time on appeal or review, the appellate court need not consider them.”).

Notwithstanding this objection, Plaintiffs’ arguments regarding the discount for Miami’s liability are without merit and are not of great general or public interest. This Court has previously examined and interpreted the language of R.C. 4115.05 differently than Plaintiffs

propose in *Ohio Asphalt Paving, Inc. v. Dep't of Indus. Relations* (1992), 63 Ohio St. 3d 512, 589 N.E.2d 35.

In that case, this Court held that contractors are liable for the full amount of underpayment of prevailing wages owed to an employee “except as provided in R.C. 4115.05.” *Id.* at 517 (emphasis added). In a footnote the Court explained that R.C. 4115.05 “places liability upon the public authority whenever it fails to notify the contractor of any changes in the prevailing rate of wages during the life of the contract.” *Id.* at 517 n.2 (emphasis added).

Plaintiffs had the public authority – Miami University – in this case but they did not seek their prevailing wage from Miami here or in the Court of Claims. They could have recovered against Miami one way or the other but chose not to proceed. They could have recovered the prevailing wage they sought but chose not to do so. For this additional reason the claim is not one of great public interest.

**II. Plaintiffs’ Proposition of Law No. 2: The penalties prescribed in R.C. 4115.10(A) are mandatory.<sup>2</sup>**

A. *The Penal Nature Of R.C. 4115.10(A) Requires That The 25% Penalty Is Discretionary.*

This Court has held that the prevailing wage statute’s penalty provision, R.C. 4115.10(A) which says that the 25% penalty of unpaid prevailing wages “may” be awarded to employees, is “penal in nature, and it must therefore be strictly construed.” *Dean v. Seco Elec. Co.* (1988), 35 Ohio St. 3d 203, 205, 519 N.E.2d 837, 840. The use of “may” in the statute must be construed as intentional, and the 25% penalty viewed as discretionary.

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<sup>2</sup> This issue has been certified to this Court by the Twelfth District Court of Appeals. Monarch maintains, per its Memorandum in Opposition to Plaintiffs’ Motion to Certify a Conflict Pursuant to Appellate Rule 25, that the 12<sup>th</sup> District opinion in this case does not conflict with *IBEW Loc. Union No. 8 v. Stollsteimer Elec., Inc.* (Ohio App. 6 Dist.), 168 Ohio App. 3d 238, 2006-Ohio-3865, on this penalties issue.

Plaintiffs' position that "may" means "shall" recalls a discussion from a Lewis Carroll novel.

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty, "which is to be master – that's all."

Carroll, *Through The Looking Glass (And What Alice Found There)*, Chapter 6 (1871).

Given that this is a penalty provision, contractors cannot be put in the position of having "words mean so many different things."

*B. The Use Of "May" In R.C. 4115.10(A) Means The 25% Penalty Is Discretionary.*

The "may recover" language used in R.C. 4115.10(A) (emphasis added) means that the 25% penalty is discretionary. *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 ("The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary.")

Plaintiffs and *amici* argue for the first time in this matter to this Court that "may" refers both to the 25% penalty and to the "calculation of underpayments," and that because the damages remedy resulting from the calculation of underpayments is central to R.C. 4115.10(A), the 25% penalty payable to the plaintiff employee(s) must also be mandatory when a violation is found. (Plaintiffs' Memorandum in Support of Jurisdiction 7) In other words, Plaintiffs argue that in the context of R.C. 4115.10(A) "may" actually means "must" or "shall." This rewrites the statute. It also is a new argument raised for the first time by Plaintiffs in their memorandum in support of jurisdiction. Therefore it should not be heard. *See Stores Realty Co.*, 41 Ohio St. 2d

at 43; *McKinley*, 170 Ohio App. 3d at 177; *Martin*, 67 Ohio St. 3d at 157; O. Jur. 3d Appellate Review § 126.

Notwithstanding this objection, Plaintiffs' argument fails. An award of the full amount of underpayments calculated under R.C. 4115.10(A) is a discretionary remedy, in that the prevailing wage statute itself permits reductions in this amount by a court in certain limited situations – even in one situation expressly acknowledged by Plaintiffs. For example, even under Plaintiffs' view of the prevailing wage statute, the statute permits a court to reduce the amount of unpaid prevailing wages owed by a contractor when the public authority is liable for all or part of the unpaid wages because the public authority failed to notify the contractor of the correct prevailing wage as determined by the Director of Commerce. *See* R.C. 4115.05.

(Appellants' Motion in Support of Jurisdiction 5)

C. *The Proper Use of "May" And "Shall" In Other Sections of The Prevailing Wage Statute Show That The Drafters Knew How To Use These Words To Achieve Their Desired Goals.*

"May" and "shall" are deliberately used according to their normal meanings in multiple places in the prevailing wage statute. *See* R.C. 4115.99; R.C. 4115.16(D). Had the General Assembly wished to make the 25% penalty mandatory it could have used such language. This is the wrong forum for Plaintiffs to seek a rewrite of the statute. This proposition does not raise a question of great general or public interest.

III. **Plaintiffs' Proposition of Law No. 3: An R.C. 4115.10(A) action is a special statutory proceeding wherein, upon finding an underpayment, the court has a statutory duty to order payment of the 75% penalty to commerce.**

Plaintiffs seek to "establish" a statutory penalty that has been enforced only once in 17 years. The superintendent of the Wage and Hour Bureau of the Division of Labor and Worker Safety at the Ohio Department of Commerce stated this during his testimony at trial.

Plaintiffs have no standing to raise this argument, for this claim belongs to the State, not to Plaintiffs. They wrongly argue that their effort to enforce the 75% penalty payable to the State is in their own interests, rather than in the interests of the State, and that they therefore have standing. This Court has stated that: "Generally, a litigant must assert its own rights, not the claims of third parties." *City of North Canton v. City of Canton*, 114 Ohio St. 3d 253, 256, 2007-Ohio-4005, at ¶ 14. Some limited exceptions are allowed, but one such requirement is that a claimant must "show[] some 'hindrance' that stands in the way of the claimant seeking relief." *Id.* at ¶ 14. Plaintiffs cannot meet this requirement when they claim the 75% penalty on behalf of Commerce. They lack standing, and third proposition of law is not appropriate for this Court to review.

**IV. Plaintiffs' Proposition of Law No. 4: The application of DR 2-106(B) is proper only in the second step of the Bittner calculation, and the "results obtained factor" should not be applied in both the first and second steps, effectively twice penalizing a Plaintiff who undertakes reasonable endeavors which are unsuccessful.**

This fourth proposition of law is a garden-variety attorney fees dispute. It does not raise any issues that are of "public or great general interest."

The trial court properly applied the two-step analysis established by this Court in *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 146, 569 N.E.2d 464. *Bittner* requires that a trial court first calculate the number of hours "reasonably" included in the "lodestar" amount. *Id.* at 145. The trial court did this when it eliminated hours that were unreasonably expended—meaning billed hours spent on wasteful, excessive, duplicative, or unsuccessful activities. *See Gibney v. Toledo Bd. of Educ.* (Ohio App. 6 Dist. 1999), 73 Ohio App. 3d 99, 108, 596 N.E.2d 591, 596. The trial court then applied the second step of the *Bittner* analysis—the application of the factors found in DR 2-106(B)—when it reduced the resulting lodestar by

half to account for Appellants' spectacular lack of success with regard to its arguments before the trial court.

Though the trial court did not use the word "unreasonable" when describing the hours whose removal from the lodestar Plaintiffs challenge, it is clear that this is what it was doing and that this is authorized by ample precedent. See *Bittner*, 58 Ohio St. 3d at 146 (courts may exclude "meritless" hours from lodestar); *State ex rel. Ohio Patrolmen's Benevolent Ass'n et al. v. City of Mentor*, 89 Ohio St. 3d 440, 448, 2000-Ohio-214 ¶ 15 ("Relators are not entitled to attorney fees concerning those claims that were meritless"); *Gibney*, 73 Ohio App. 3d at 108, 596 N.E.2d at 597 ("Unreasonably expended hours are generally categorized as those which are excessive in relationship to the work done, are duplicative or redundant, or are simply unnecessary.").

Plaintiffs' claim that the trial court applied the "results obtained" factor of DR 2-106(B) to both the first and second steps of the *Bittner* analysis is without merit. The trial court first recognized that the Appellants' original claim of \$127,853.42 in attorneys' fees was actually a claim of \$91,054.42 due to a typographical error. The court then removed unreasonable hours from this amount based on *Bittner*, as described above, in order to calculate the lodestar amount. Only then did it apply the DR 2-106(B) factors to reduce the lodestar by half to account for Appellants' unsuccessful results. There was nothing improper about this analysis.

This Court has long held that a trial court's award of attorneys' fees is reviewed for abuse of discretion. *Bittner*, 58 Ohio St. 3d at 146. The trial court's calculation of attorneys' fees in this case fits squarely within the precedents described above; it did not abuse its discretion. *Id.* This is not an issue that is of public or great general interest meriting jurisdiction.

**Conclusion**

For each, and all, of the foregoing reasons, Monarch respectfully requests this Court not to exercise its jurisdiction over the certified conflict question, or any of the four propositions of law as asserted by Appellants.

Respectfully submitted,



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**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the following via regular United States mail, this 22nd day of April, 2009.

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