

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND THE FACTS.....	2
ARGUMENT.....	4
 <u>Amicus Curiae's Proposition of Law No. 1:</u>	
WHEN A COURT FINDS THAT A CONTRACTOR OR SUBCONTRACTOR ON A PUBLIC IMPROVEMENT PROJECT HAS FAILED TO PAY AN EMPLOYEE THE PREVAILING RATE OF WAGES, THE COURT MUST ORDER THE CONTRACTOR OR SUBCONTRACTOR TO PAY TO THE EMPLOYEE THE AMOUNT THE EMPLOYEE WAS UNDERPAID AND, IN ADDITION THERETO, MUST ORDER THE CONTRACTOR OR SUBCONTRACTOR TO PAY TO THE EMPLOYEE AND TO THE DEPARTMENT OF COMMERCE THE PENALTIES SET FORTH IN R.C. 4115.10(A).....	4
 <u>Amicus Curiae's Proposition of Law No. 1:</u>	
A CONTRACTOR OR SUBCONTRACTOR ON A PUBLIC IMPROVEMENT PROJECT THAT HAS FAILED TO PAY AN EMPLOYEE THE PREVAILING RATE OF WAGES IS LIABLE FOR THE FULL AMOUNT OF THOSE WAGES AND MAY SEEK RECOVERY FROM A PUBLIC AUTHORITY FOR THAT PORTION OF ANY UNDERPAYMENT ATTRIBUTABLE TO THE PUBLIC AUTHORITY'S FAILURE TO NOTIFY THE CONTRACTOR OR SUBCONTRACTOR OF AN INCREASE IN THE PREVAILING RATE OF WAGES AS REQUIRED IN R.C. 4115.05	12
CONCLUSION.....	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Connell v. Wayne Builders Corp.</i> (Franklin App. Jan. 30, 1996), No. 95APE07-897, 1996 WL 39646	3
<i>Cremeans v. Jinco</i> (Franklin App. June 5, 1986), No. 85AP-821, 1986 WL 6334.....	3
<i>Dennison v. Dennison</i> (1956), 165 Ohio St. 146	8
<i>Englehart v. C.T. Taylor Co.</i> (Summit App. Dec. 8, 1999), No. 19325, 1999 WL 1215110, <i>appeal denied</i> (2000), 88 Ohio St.3d 1480, 2000-Ohio-2824	3
<i>Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations</i> (1991), 61 Ohio St.3d 366.....	1
<i>General Motors Corp. v. Tracy</i> (1995), 73 Ohio St.3d 29, <i>cert. denied</i> (1997), 519 U.S. 278	11
<i>Harris v. Atlas Single Ply Sys., Inc.</i> (1992), 64 Ohio St.3d 171	1
<i>Harris v. Bennett</i> (Lucas App. July 26, 1985), No. L-84-446, 1985 WL 7558.....	3, 6
<i>Harris v. City of Cincinnati</i> (Hamilton App. 1992), 79 Ohio App.3d 163	7
<i>Harris v. Van Hoose</i> (1990), 49 Ohio St.3d 24	1, 7, 9, 10
<i>Heid v. Hartline</i> (Tuscarawas App. 1946), 79 Ohio App. 323	8
<i>In re Adoption of Baby Boy Brooks</i> , (Franklin App.), 136 Ohio App.3d 824, <i>appeal denied</i> (2000), 89 Ohio St.3d 1433	6
<i>International Ass’n of Bridge, Structural and Ornamental Iron Workers, Local Union 290 v. Ohio Bridge Corp.</i> (Allen App. 1987), 32 Ohio App.3d 18	7
<i>International Bhd. of Elec. Workers, Local Union No. 8 v. Stollsteimer Elec., Inc.</i> (Fulton App.), 168 Ohio App.3d 238, 2006-Ohio-3865, <i>appeal denied</i> (2006), 112 Ohio St.3d 1419, 2006-Ohio-6712.....	4, 11
<i>J.A. Croson Co. v. J.A. Guy, Inc.</i> , 81 Ohio St.3d 346, <i>cert. denied</i> (1998), 525 U.S. 871	1
<i>John Ken Alzheimer’s Center v. Ohio Certificate of Need Review Bd.</i> (Franklin App. 1989), 65 Ohio App.3d 134	6

<i>Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations</i> (1992), 63 Ohio St.3d 512	1, 7, 12, 13, 14
<i>Ohio Civ. Rights Comm'n v. Countrywide Home Loans, Inc.</i> (2003), 99 Ohio St.3d 522, 2003-Ohio-4358	7
<i>Ohio Dep't of Liquor Control v. Sons of Italy Lodge 0917</i> (1992), 65 Ohio St.3d 532, 1992-Ohio-17	7
<i>Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.</i> (2009), 2009-Ohio-2747	1
<i>Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Mohawk Mechanical, Inc.</i> (1999), 86 Ohio St.3d 611, 1999-Ohio-209	1
<i>Singer Sewing Machine Co. v. Puckett</i> (1964), 176 Ohio St. 32	8
<i>State v. Buckeye Elec. Co.</i> (1984), 12 Ohio St.3d 252	1
<i>State v. Cook</i> (1998), 83 Ohio St.3d 404, 1998-Ohio-291, <i>cert. denied</i> (1999), 525 U.S. 1182	5
<i>State v. Stevens</i> (1954), 161 Ohio St. 432.....	6
<i>State ex rel. Dworken v. Court of Common Pleas</i> (1936), 131 Ohio St. 23	8
<i>State ex rel. Evans v. Moore</i> (1982), 69 Ohio St.2d 88.....	1, 7
<i>State ex rel. Harris v. Williams</i> (1985), 18 Ohio St.3d 198	1, 7, 10
<i>State ex rel. Moss v. Ohio State Highway Patrol Retirement Sys.</i> (2002), 97 Ohio St.3d 198, 2002-Ohio-5806.....	5
<i>State ex rel. Musial v. City of N. Olmsted</i> (2005), 106 Ohio St.3d 459, 2005-Ohio-5521.....	5
<i>State ex rel. Meyers v. Board of Educ.</i> (1917), 95 Ohio St. 367.....	8
<i>State ex rel. Ohio Democratic Party v. Blackwell</i> (2006), 111 Ohio St.3d 246, 2006-Ohio-5202.....	6
<i>State ex rel. Russo v. McDonnell</i> (2006), 110 Ohio St.3d 144, 2006-Ohio-3459.....	5

<i>State ex rel. Solomon v. Board of Trustees</i> (1995), 72 Ohio St.3d 62, 1995-Ohio-172.....	6
<i>Strain v. Southerton</i> (1947), 148 Ohio St. 153	8
<i>State ex rel. Staley v. City of Lakewood</i> (Cuyahoga App. 1934), 47 Ohio App. 519	9, 10
<i>Taylor v. Douglas Co.</i> (Lucas C.P. 2004), 130 Ohio Misc.2d 4, 2004-Ohio-7348	3
<i>U.S. Corrections Corp. v. Ohio Dep't of Indus. Relations</i> (1995), 73 Ohio St.3d 210, 1995-Ohio-102	1

Statutes

Page

R.C. 1.42	6
R.C. Chapter 4115.03.....	2, 6, 12
R.C. 4115.031	12
R.C. 4115.032	12
R.C. 4115.05	3, 13, 14
R.C. 4115.06	12
R.C. 4115.07	12
R.C. 4115.10	7, 10
R.C. 4115.10(A).....	<i>passim</i>
R.C. 4115.10(B).....	3, 10
R.C. 4115.10(C).....	2, 10

INTRODUCTION

The Ohio State Building and Construction Trades Council, AFL-CIO (“Council”), is a statewide organization representing construction trades unions throughout the State of Ohio. There are approximately 100,000 union construction tradesmen engaged in construction throughout the state.

The Council is responsible for protecting the interests of construction tradesmen and tradeswomen throughout the state. It carries out that responsibility by, *inter alia*, participating as *amici curiae* on a variety of issues in cases pending in courts across the state. This Court has long recognized the Council’s interest by accepting the Council’s *amicus* briefs in cases dealing with the prevailing wage law. See *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88; *State v. Buckeye Elec. Co.* (1984), 12 Ohio St.3d 252; *State ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24; *Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations* (1991), 61 Ohio St.3d 366; *Ohio Asphalt Paving, Inc. v. Ohio Dep’t of Indus. Relations* (1992), 63 Ohio St.3d 512; *Harris v. Atlas Single Ply Sys., Inc.* (1992), 64 Ohio St.3d 171; *U.S. Corrections Corp. v. Ohio Dep’t of Indus. Relations* (1995), 73 Ohio St.3d 210, 1995-Ohio-102; *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, *cert. denied* (1998), 525 U.S. 871; *Sheet Metal Workers’ Int’l Ass’n, Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, 1999-Ohio-209; *Sheet Metal Workers’ Int’l Ass’n, Local Union No. 33 v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.* (2009), 2009-Ohio-2747.

The prevailing wage law provides that, for violations involving an underpayment of prevailing wages, a contractor or subcontractor must pay not only the underpaid wages, but also penalties totaling 100% of the underpaid prevailing wages. R.C. 4115.10(A). The statute

provides for the imposition of these penalties against the contractor or subcontractor found by a Court to be in violation, and contrary to the Court of Appeals' decision in this case, the imposition of these penalties is mandatory. R.C. 4115.10(A) & (C).

The Court of Appeals' decision in this case allows employers to escape their obligations under the prevailing wage law. If the imposition of penalties were considered discretionary, unscrupulous contractors could simply violate the law with little fear of adverse consequences. Such contractors could simply underpay their employees and, if caught, simply pay the employees what they should have been paid in the first instance, with little additional adverse consequences. Unless such contractors "get caught" on every public improvement project on which they are performing work, they will save a great deal of money and continue to underbid competitors that comply with the law.

The General Assembly included the payment of penalties to add teeth to the law and to bolster compliance. Allowing the Court of Appeals' decision to stand in this case would greatly undermine that effort and encourage noncompliance. Accordingly, the Council respectfully urges the Court to reverse the judgment of the Court of Appeals for Butler County, Twelfth Appellate District.

STATEMENT OF THE CASE AND THE FACTS

The facts in this case are largely undisputed. Defendant-Appellee Monarch Construction Company ("Monarch") served as a contractor on the Miami University Student Housing Project, a public improvement project, see R.C. 4115.03(C), undertaken for Defendant-Appellee Miami University ("Miami"). Defendant-Appellee Don Salyers Masonry, Inc. ("Salyers") was a subcontractor for Monarch on the project. Salyers failed to pay its employees the prevailing rate of wages on the project as required by the prevailing wage law, R.C. Chapter 4115.

On March 10, 2005, an administrative complaint alleging a violation of the prevailing wage law was filed with the Ohio Department of Commerce ("Department"), the state agency responsible for enforcement of the law. After investigating and, at Monarch's request, reinvestigating the complaint, the Department determined that Salyers had underpaid its employees in the amount of \$171,812.03.

Some of those employees assigned their claims to the Director of Commerce ("Director") for the purposes of collection. See R.C. 4115.10(B). Thirty-four of the employees ("Plaintiffs"), however, commenced their own collection action, *i.e.*, this case, against Salyers, Monarch, and Miami in the Court of Common Pleas for Butler County. See R.C. 4115.10(A). Because Salyers was Monarch's subcontractor on the project, Monarch was liable for the underpayment of prevailing wages. See *Englehart v. C.T. Taylor Co.* (Summit App. Dec. 8, 1999), No. 19325, 1999 WL 1215110 at *2, *appeal denied* (2000), 88 Ohio St.3d 1480, 2000-Ohio-2824; *Connell v. Wayne Builders Corp.* (Franklin App. Jan. 30, 1996), No. 95APE07-897, 1996 WL 39646 at *2-3; *Cremeans v. Jingo* (Franklin App. June 5, 1986), No. 85AP-821, 1986 WL 6334 at *4; *Harris v. Bennett* (Lucas App. July 26, 1985), No. L-84-446, 1985 WL 7558 at * 2; *Taylor v. Douglas Co.* (Lucas C.P. 2004), 130 Ohio Misc.2d 4, 9, 2004-Ohio-7348 at ¶¶ 14-16.

Following a trial on the merits, the trial court awarded the Plaintiffs a total of \$88,013.53 in underpaid prevailing wages, but refused to impose the penalties required by R.C. 4115.10(A). Moreover, the trial court, despite having previously dismissed Miami from the case, concluded that the Defendants were not liable for that portion of the underpayment attributable to Miami's failure to notify the contractors on the project of a change in the prevailing rate of wages. See R.C. 4115.05.

The Court of Appeals for Butler County, Twelfth Appellate District, affirmed, *Bergman v. Monarch Constr. Co.* (Butler App. Feb. 9, 2009), No. CA2008-02-044, 2009-Ohio-551, and later certified its decision as in conflict with the decision of the Court of Appeals for Fulton County, Sixth Appellate District, in *International Bhd. of Elec. Workers, Local Union No. 8 v. Stollsteimer Elec., Inc.* (Fulton App.), 168 Ohio App.3d 238, 2006-Ohio-3865, *appeal denied* (2006), 112 Ohio St.3d 1419, 2006-Ohio-6712. This case is now before the Court on both the certified conflict and the allowance of a discretionary appeal. *Bergman v. Monarch Constr. Co.* (2009), 121 Ohio St.3d 1497 & 1500, 2009-Ohio-2511.

ARGUMENT

Amicus Curiae's Proposition of Law No. 1:

WHEN A COURT FINDS THAT A CONTRACTOR OR SUBCONTRACTOR ON A PUBLIC IMPROVEMENT PROJECT HAS FAILED TO PAY AN EMPLOYEE THE PREVAILING RATE OF WAGES, THE COURT MUST ORDER THE CONTRACTOR OR SUBCONTRACTOR TO PAY TO THE EMPLOYEE THE AMOUNT THE EMPLOYEE WAS UNDERPAID AND, IN ADDITION THERETO, MUST ORDER THE CONTRACTOR OR SUBCONTRACTOR TO PAY TO THE EMPLOYEE AND TO THE DEPARTMENT OF COMMERCE THE PENALTIES SET FORTH IN R.C. 4115.10(A).

The Court of Appeals herein ruled that the 25% penalty payable to the underpaid employee was discretionary, and that the Plaintiffs lacked standing to seek imposition of the 75% penalty payable to the Director. The Court of Appeals misconstrued the statute and was, therefore, wrong on both counts. Accordingly, the decision below must be reversed.

R.C. 4115.10(A) provides, in pertinent part:

No person, firm, corporation, or public authority that constructs a public improvement with its own forces, . . . shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed Any employee upon any public improvement . . . who is paid less than the fixed rate of wages applicable thereto *may recover* from such person, firm, corporation, or public

authority that constructs a public improvement with its own forces 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 person, firm, corporation, or public authority who fails to pay the rate of wages so fixed *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.* The director shall deposit all moneys received from penalties paid to the director pursuant to this section into the penalty enforcement fund, which is hereby created in the state treasury. The director shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. * * *

(emphasis added).

R.C. 4115.10(A) provides that an underpaid employee "*may* recover . . . 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 Council respectfully maintains that, contrary to the Court of Appeals' holding, the General Assembly's use of the word "may" does not render the imposition of the 25% penalty discretionary but, rather, is intended to vest the underpaid employee with the discretion to seek redress for the violation of the prevailing wage law. Once the employee has sought and properly proved entitlement to recovery of the underpaid prevailing wages, the imposition of the 25% penalty is *mandatory*.

"In construing a statute, [the Court's] paramount concern is legislative intent." *State ex rel. Musial v. City of N. Olmsted* (2005), 106 Ohio St.3d 459, 462, 2005-Ohio-5521 at ¶ 23 (citation omitted). See also *State ex rel. Moss v. Ohio State Highway Patrol Retirement Sys.* (2002), 97 Ohio St.3d 198, 201, 2002-Ohio-5806 at ¶21. "A court must look to the language and purpose of the statute in order to determine legislative intent." *State v. Cook* (1998), 83 Ohio St.3d 404, 416, 1998-Ohio-291, *cert. denied* (1999), 525 U.S. 1182. "In order to determine this intent, [the Court] must read words and phrases in context according to the rules of grammar and common usage." *State ex rel. Russo v. McDonnell* (2006), 110 Ohio St.3d 144, 149, 2006-Ohio-

3459 at ¶ 37 (internal quotation marks and citation omitted). See also *State ex rel. Ohio Democratic Party v. Blackwell* (2006), 111 Ohio St.3d 246, 248-49, 2006-Ohio-5202 at ¶ 13; *In re Adoption of Baby Boy Brooks*, (Franklin App.), 136 Ohio App.3d 824, 828 ("[T]he court must first look to the plain language of the statute itself to determine the legislative intent.") (citation omitted), *appeal denied* (2000), 89 Ohio St.3d 1433. When construing a statute, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. See also *State ex rel. Solomon v. Board of Trustees* (1995), 72 Ohio St.3d 62, 65, 1995-Ohio-172 ("Words used in a statute must be taken in their usual, normal or customary meaning.") (citation omitted); *John Ken Alzheimer's Center v. Ohio Certificate of Need Review Bd.* (Franklin App. 1989), 65 Ohio App.3d 134, 138. A court "is not permitted to read words into or out of that statute but must accept the enactment of the General Assembly as it stands." *State v. Stevens* (1954), 161 Ohio St. 432, 435. See also *State ex rel. Solomon*, 72 Ohio St.3d at 65.

"To properly adjudicate this issue it is important to examine the scope and effect of R.C. [Chapter] 4115." *Harris v. Bennett*, 1985 WL 7558 at *1. An examination of the prevailing wage law and its purpose discloses that the penalties set forth in R.C. 4115.10(A) are clearly intended to be mandatory. This Court has repeatedly summarized the legislative intent behind the prevailing wage law:

The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-a-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state. The prevailing wage law delineates civil and criminal sanctions for its violation. 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.

State ex rel. Evans, 69 Ohio St.2d at 91. See also *Ohio Asphalt Paving, Inc.*, 63 Ohio St.3d at 515; *Van Hoose*, 49 Ohio St.3d at 26; *Harris v. City of Cincinnati* (Hamilton App. 1992), 79 Ohio App.3d 163, 168-69; *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union 290 v. Ohio Bridge Corp.* (Allen App. 1987), 32 Ohio App.3d 18, 20. Moreover, this Court has ruled that "[t]he legislative intent is served if *all claims* are enforced through one of the three methods provided in the statute," and has, therefore, rejected a "construction of the statute [that] would eviscerate the legislative intent." *Van Hoose*, 49 Ohio St.3d at 27 (emphasis in original).¹ By concluding that the penalty payable to the employee was discretionary, rather than mandatory, the Court of Appeals has, in effect, read the penalty provision out of the statute.

"[T]he word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." *Ohio Civ. Rights Comm'n v. Countrywide Home Loans, Inc.* (2003), 99 Ohio St.3d 522, 523, 2003-Ohio-4358 at ¶ 4 (citations omitted). "It is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is mandatory." *Ohio Dep't of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, 1992-Ohio-

¹R.C. 4115.10 provides for three avenues of enforcement:

Division (A) authorizes the employee to file such a suit within `* * * sixty days of the director of industrial relations' determination of a violation of sections 4115.03 to 4115.16 of the Revised Code * * *." Division (B) authorizes the director to file such a suit for recovery on behalf of the employee where the employee gives the director an assignment of his claim. Division (C) authorizes the director to file the suit himself in the event the employee has not done so under division (A) or has not provided an assignment of claim under division (B).

State ex rel. Harris, v. Williams, 18 Ohio St.3d at 200.

17. In contrast, "in interpreting a statute, the word 'may' used therein should be given its ordinary, permissive and discretionary force, *unless the sense of the entire enactment requires a construction equivalent to 'shall' or 'must.'*" *State ex rel. Dworken v. Court of Common Pleas* (1936), 131 Ohio St. 23, 25 (emphasis added) (citation omitted).

"The literal meaning of the words, 'shall' and 'may,' is not always controlling in the construction of a statute. Cases in which these words are convertible are numerous." *Singer Sewing Machine Co. v. Puckett* (1964), 176 Ohio St. 32, 36 (citations omitted).

The literal meaning of the words "may" and "shall" is not always conclusive in the construction of statutes in which they are employed; and one should be regarded as having the meaning of the other when that is required to give effect to other language found in the statute, or to carry out the purpose of the legislature as it may appear from a general view of the statute under consideration.

State ex rel. Meyers v. Board of Educ. (1917), 95 Ohio St. 367, 367 (syllabus).

Although it is true that in some instances the word, may, must be construed to mean "shall," and "shall" must be construed to mean "may," in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word, "shall," is a mandatory one, whereas "may" denotes the granting of discretion.

Dennison v. Dennison (1956), 165 Ohio St. 146, 149. For example, the Court has held that the word "may" should be construed as "shall" in the minimum wage law to carry out the purpose of the General Assembly in enacting the law. *Strain v. Southerton* (1947), 148 Ohio St. 153, 157.

"[W]henver the word 'shall' or 'may' is used in a statute and the rights and interest of the public or third persons depend upon the exercise of the power or the performance of the duty to which such word refers, it is to be construed as mandatory and not directory." *Heid v. Hartline* (Tuscarawas App. 1946), 79 Ohio App. 323, 325-26.

In this case, it is clear that the word "may" used in 4115.10(A) does not vest the court with discretion. Rather, the use of the word "may" is intended to vest the underpaid employee with the discretion to seek redress for the violation of the prevailing wage law. Once the employee has sought and properly proved entitlement to recovery of the underpaid prevailing wages, the imposition of the 25% penalty is mandatory.

To read the statute otherwise could potentially deny an underpaid employee *any* recovery. R.C. 4115.10(A) provides that an "employee . . . who is paid less than the fixed rate of wages applicable thereto *may recover* . . . 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." (emphasis added). Because the word "may" appears only once in this provision, if it is interpreted as discretionary with respect to the penalty, then it must be interpreted as discretionary with respect to the underpaid wages themselves. Surely, the General Assembly did not intend that the recovery of prevailing wages be discretionary, and to interpret it as such would completely eviscerate the intent of the General Assembly that "*all claims* are enforced through one of the three methods provided in the statute." *Van Hoose*, 49 Ohio St.3d at 27 (emphasis in original).

The Court of Appeals for Cuyahoga County, Eighth Appellate District, has considered similar statutory language and ruled that it is mandatory. In *State ex rel. Staley v. City of Lakewood* (Cuyahoga App. 1934), 47 Ohio App. 519, the court interpreted former Gen. Code § 486-16, which provided that "[a]ny officer or employe [sic] in the classified service who has resigned from said office or position, *may* be restored to the eligible list therefor, upon his written request" *State ex rel. Staley*, 47 Ohio App. at 523 (emphasis added).

The word "may" as found in the above section does not intend to lodge discretion with the civil service commission to restore or not to restore to office an employee in the classified service who has resigned. The law intends to confer a right upon such employee, which he may exercise within the time limit set forth in said rule.

State ex rel. Staley, 47 Ohio App. at 523. As in *State, ex rel. Staley*, R.C. 4115.10(A) must be interpreted as vesting discretion in *the employee* with regard to seeking recovery under the statute, but not in the court to impose the mandated penalties once the employee has proven his entitlement to recovery.

With regard to the 75% penalty payable to the Director, the Court of Appeals failed to address whether the imposition of the penalty was mandatory because it erroneously concluded that the Plaintiffs lacked standing to seek the penalty. 2009-Ohio-551 at ¶¶ 92-30. The statute, however, does not require the Director to be a party to the collection action and, indeed, under the statutory scheme, is not intended to be a party in an employee's collection action under 4115.10(A), the division under which the *employee* commences his own collection action.² Although the statute does not require that the Director be a party to the employee's collection action, it does require that, if a court finds a violation involving the underpayment of wages, the court must impose a penalty, payable to the Director, against the offending contractor.³ The use

²As noted above, the R.C. 4115.10 provides for three avenues of enforcement: an employee may file an action under Division (A) or assign the claim to the Director for collection under Division (B). If the employee does neither, the Director is required to commence an action under Division (C) to collect any amounts due. *State ex rel. Harris, v. Williams*, 18 Ohio St.3d at 200. See also *Van Hoose*, 49 Ohio St.3d at 26-27.

³The Court of Appeals incorrectly refers to the 75% penalty as a "claim . . . for enforcement of the penalty." 2009-Ohio-551 at ¶ 99. The 75% penalty is not a "claim," but rather a mandatory penalty imposed when an employee has established *his or her claim* for a violation of the prevailing wage law.

of the word "shall" with regard to the 75% penalty leaves no doubt as to the mandatory nature of that penalty.⁴

Indeed, as noted in the Court of Appeals' decision herein, see 2009-Ohio-551 at ¶ 82, the Court of Appeals for Fulton County, Sixth Appellate District, has concluded that the imposition of both the 25% penalty payable to the employee and the 75% penalty payable to the Director are mandatory:

R.C. 4115.10(A) clearly enumerates penalties to be assessed against entities who have violated the prevailing wage law. *The only exception to this rule is that when the Director of Commerce makes a finding that the underpayment of wages was the result of a misinterpretation of the prevailing wage law or an erroneous preparation of payroll documents and the entity who made the mistake has made restitution, the entity is exempt from the penalty provision requiring it to pay to the employee 25 percent of the difference between the fixed rate of wages and the amount paid to the employee. R.C. 4115.10(A) does not exempt the offending entity from the penalty it is required to pay to the Director.*

Accordingly, we must conclude that the trial court erred in failing to assess statutory penalties on Stollsteimer upon its finding that Stollsteimer violated the prevailing wage law

Stollsteimer Elec., Inc., 168 Ohio App.3d at 244, 2006-Ohio-3865 at ¶¶ 22-23 (emphasis added).

The Court of Appeals in *Stollsteimer Elec., Inc.* was correct. Because the Court of Appeals herein disagreed, it erroneously affirmed the trial court's failure to impose statutory penalties.

⁴Both the trial court and the Court of Appeals herein noted that the Department, in negotiating settlements with contractors alleged to have violated the prevailing wage law, often "waives" the penalties. The position that the Department takes in settlement negotiations—which negotiations presumably occur before a violation has been established in a collection action—is of little relevance with regard to the mandatory nature of the penalties once a violation has been judicially established. See *General Motors Corp. v. Tracy* (1995), 73 Ohio St.3d 29, 31 (tax commissioner has discretion to waive mandatory penalties), *cert. denied* (1997), 519 U.S. 278.

Amicus Curiae's Proposition of Law No. 1:

A CONTRACTOR OR SUBCONTRACTOR ON A PUBLIC IMPROVEMENT PROJECT THAT HAS FAILED TO PAY AN EMPLOYEE THE PREVAILING RATE OF WAGES IS LIABLE FOR THE FULL AMOUNT OF THOSE WAGES AND MAY SEEK RECOVERY FROM A PUBLIC AUTHORITY FOR THAT PORTION OF ANY UNDERPAYMENT ATTRIBUTABLE TO THE PUBLIC AUTHORITY'S FAILURE TO NOTIFY THE CONTRACTOR OF AN INCREASE IN THE PREVAILING RATE OF WAGES AS REQUIRED IN R.C. 4115.05.

As noted above, the Court of Appeals also concluded that Monarch was not liable for that portion of the underpayment of prevailing wages attributable to Miami's failure to notify the contractors on the project of a change in the prevailing rate of wages. This conclusion was also in error, and the Court of Appeals' decision must, therefore, be reversed.

This Court has held that "the prevailing wage provisions and supporting precedent unmistakably require a contractor to pay its employees the prevailing wage on all public improvement contracts covered by R.C. Chapter 4115." *Ohio Asphalt Paving, Inc.*, 63 Ohio St.3d at 517. See also R.C. 4115.031 ("*The obligation of a contractor or subcontractor to make payment . . .*") (emphasis added); R.C. 4115.032 ("*All contractors and subcontractors . . . shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code . . .*") (emphasis added); R.C. 4115.06 ("*The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.*") (emphasis added); R.C. 4115.07 ("*All contractors and subcontractors . . . shall make full payment of such wages in legal tender . . .*") (emphasis added); R.C. 4115.10(A) ("*No person, firm, [or] corporation, . . . shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed . . .*") (emphasis added). Accordingly, R.C. 4115.10(A) clearly provides that an underpaid employee is entitled to full recovery from the

contractor or subcontractor on the project: "Any employee upon any public improvement . . . who is paid less than the fixed rate of wages applicable thereto may recover *from such person, firm, [or] corporation . . .* the difference between the fixed rate of wages and the amount paid to the employee . . ." (emphasis added).

Although the prevailing wage law places primary responsibility for the payment of prevailing wages on contractors and subcontractors on public improvement projects, R.C. 4115.05 does permit such contractors and subcontractors to recover a portion of such liability from a public authority that is remiss in its obligation to notify contractors of increases in prevailing wage rates. That section provides, in pertinent part:

Upon receipt from the director of commerce of a notice of a change in prevailing wage rates, a public authority shall, within seven working days after receipt thereof, notify all affected contractors and subcontractors with whom the public authority has contracts for a public improvement of the changes and require the contractors to make the necessary adjustments in the prevailing wage rates.

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.

In *Ohio Asphalt Paving, Inc.*, the Court addressed the issue of whether a contractor was absolved of its obligation to pay prevailing wages because of the public authority's failure to include prevailing wage specifications in the contract. The Court ruled that it was not and, in the course of its decision, stated:

Simply because the public authority failed in its duty to fix the prevailing wage rates within the contracts in issue does not mean that the contractor is excused from its statutory duty of ensuring compliance. In our view, a contrary holding would undercut the express provisions of R.C. Chapter 4115 as well as prior Ohio case law that requires contractors to strictly comply with the prevailing wage

provisions. Therefore, we hold that except as provided in R.C. 4115.05, a contractor will be held liable for the underpayment of prevailing wages with respect to a public improvement contract, even where the public authority fails to include prevailing wage specifications in that contract.

Ohio Asphalt Paving, Inc. 63 Ohio St. 3d at 517. In a footnote, the Court noted 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.*, 63 Ohio St.3d at 517 n.2.

Significantly, the Court expressly noted in its syllabus that recovery would be by way of an action in contribution:

A contractor may maintain a cause of action in contribution where the facts underlying a particular public improvement contract indicate culpability on the part of the public authority in failing to comply with the prevailing wage provisions.

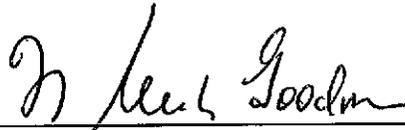
Ohio Asphalt Paving, Inc. 63 Ohio St. 3d at 512 (syllabus).

From the foregoing, it is clear that the Court of Appeals herein erred by reducing the amount of Monarch's liability by the amount it attributed to Miami's failure to notify contractors and subcontractors of an increase in prevailing wage rates, especially considering that the trial court had dismissed Miami from the case. R.C. 4115.05 and this Court's decision in *Ohio Asphalt Paving, Inc.* mandate that underpaid employees are entitled to a full recovery from the contractor or subcontractor, and that such contractor or subcontractor may thereafter maintain an action for contribution from the culpable public authority. Consequently, the judgment of the Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Plaintiffs-Appellants, *Amicus Curiae* the Ohio State Building and Construction Trades Council, AFL-CIO, respectfully urges this Court to reverse the decision of the Court of Appeals for Butler County, Twelfth Appellate District.

Respectfully submitted,



N. Victor Goodman (0004912)

Counsel of Record

vgoodman@bfca.com

Mark D. Tucker (0036855)

mtucker@bfca.com

BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP

41 South High Street, 26th Floor

Columbus, Ohio 43215

(614) 223-9300

FAX: (614) 223-9330

*Counsel for Amicus Curiae Ohio State Bldg. &
Constr. Trades Council*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S.

Mail Service, postage prepaid, this 29 th day of July, 2009 to the following:

Joseph M. D'Angelo
Cosme, D'Angelo & Szollosi Co. L.P.A.
202 North Erie Street
Toledo, Ohio 43064

Gregory Parker Rogers
Matthew R. Byrne
Taft, Stettinius & Hollister, LLP
425 Walnut Street
Suite 1800
Cincinnati, Ohio 45202

Benjamin C. Mizer
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Dan E. Belville
30 East Broad Street, 17th Floor
Columbus, Ohio 43215



Mark D. Tucker