

ORIGINAL

In the
Supreme Court of Ohio

DOUG BERGMAN, et al.,	:	Case No. 2009-0558
	:	Certified Conflict Case No. 2009-0649
Plaintiffs-Appellants,	:	
	:	On Appeal from the
v.	:	Butler County
	:	Court of Appeals,
MONARCH CONSTRUCTION CO., et al.	:	Twelfth Appellate District
	:	
Defendants-Appellees	:	Court of Appeals Case
	:	No. CA2008-02-044
	:	

**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLANTS DOUG BERGMAN, ET AL.**

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INTRODUCTION

In order to protect those who labor on public improvement projects, Ohio law requires private contractors engaged on such projects to pay their employees a prescribed “prevailing wage.” R.C. 4115.03 to 4115.21. As this Court has long recognized, the prevailing wage law “support[s] the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.” *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St. 3d 346, 34 (quoting *State ex rep. Evans v. Moore* (1982), 60 Ohio St. 2d 88, 91).

The prevailing wage laws must be vigorously enforced, lest contractors attempt to win public contracts by undercutting wages. To that end, Ohio’s prevailing wage law has two centerpieces: (1) a series of deterrent provisions, which include both criminal and civil penalties, and (2) provisions to compensate employees when contractors have improperly denied them the prevailing wage. See R.C. 4115.10, 4115.99.

The Twelfth District’s decision below grievously undercuts both the deterrent and compensatory components of these laws. First, the court ruled that the statutory penalties for a prevailing wage violation are discretionary. That is wrong. The plain language of R.C. 4115.10(A) makes clear that these penalties are mandatory. Indeed, if the penalties were merely discretionary, there would be little incentive for contractors to obey the prevailing wage law. Not only would this deprive many employees of the prevailing wage, but it would destroy the integrity of the competitive bidding process more broadly, since unscrupulous contractors could simply underbid competitors that do comply with the law. Simply put, the General Assembly included mandatory penalties in the prevailing wage law in order to ensure compliance and deter violations—efforts that the Twelfth District’s decision significantly undermines.

In addition to rendering the statutory penalties discretionary, the Twelfth District also announced that an offending employer’s damages can be reduced where the court determines

that a public authority may also be at fault (for failing to give proper notice of an increase in the wage rate). But the Twelfth District ignored the fact that courts have no jurisdiction to opine on a public entity's liability for failure to provide notice of a wage rate increase. Rather R.C. 4115.05 provides that a public entity can share liability based on a notice failure only where the Director of the Ohio Department of Commerce makes the predicate determination—required by R.C. 4115.05—that the public entity was, in fact, at fault for failing to give proper notice of a rate change. Two unlawful consequences flow from the Twelfth District's ruling that discounted Monarch's liability for back wages. First, by awarding Plaintiffs less than the total amount of back wages they are owed, the lower courts have failed to make Plaintiffs whole, even though the plain language of R.C. 4115.10(A) makes clear that the employees are entitled to the *full amount* of the difference between the prevailing wage and the amount they were actually paid. Second, although the public entity was not liable for any damages in this case—since it was dismissed from the suit before trial—the Twelfth District's decision creates an affirmative defense for contractors whereby they can now reduce their liability by pointing fingers at a public entity. In other words, the lower court's decision effectively paves the way for parties to implead public entities in every prevailing wage case, regardless of whether the required administrative determination under R.C. 4115.05 has first been made. This judicially created defense is wholly unsupported by the plain language of the prevailing wage statutes. It also contravenes the prevailing wage law's clear public policy of holding *contractors* accountable for prevailing wage obligations while limiting the liability of public entities only to narrow circumstances—none of which are applicable here.

For all of these reasons this Court should reverse the decision of the Twelfth District Court of Appeals.

STATEMENT OF AMICUS INTEREST

The interests of the State of Ohio embrace the interests of the Director of Commerce in her capacity as the administrator and enforcer of Ohio's prevailing wage laws. The State of Ohio and the Director of Commerce have a strong interest in upholding the integrity of the prevailing wage laws, which protect employees who labor on public improvement projects. The General Assembly carefully crafted the remedies for prevailing wage law violations, providing both for compensatory damages to employees (that is, back wages) as well as penalties that serve both punitive and deterrent purposes. The Twelfth District's decision undercuts the compensatory, deterrent, and punitive elements of this statutory scheme in ways that are unprecedented and directly contrary to the plain language of the prevailing wage statutes.

The interests of the State of Ohio also include the interests of the many 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—in particular, R.C. 4115.05—that limit a public entity's exposure to litigation and liability for the prevailing wage violations of private contractors.

STATEMENT OF THE CASE AND FACTS

In 2004, Miami University, which is a public university, contracted with Monarch Construction Company to build a student housing complex on its campus. Monarch in turn subcontracted with Don Salyers Masonry, Inc. to assist with the project. Because the contract was for a public improvement project, Monarch and Salyers were required to pay their employees the prevailing wage.

On March 10, 2005, an administrative complaint alleging a violation of the prevailing wage law was filed with the Ohio Department of Commerce ("Commerce"), the state agency responsible for enforcing the prevailing wage laws. Commerce determined that Salyers had, in

fact, violated the prevailing wage law and that it owed its employees \$171,812.03 in back wages and statutory penalties pursuant to R.C. 4115.10(A). Because Salyers was Monarch's subcontractor on the project, and because Salyers went out of business during the project, Monarch was liable for the underpayment of the prevailing wages.

Two camps of employees took two separate paths of action to pursue their remedies. This case arises from the path pursued by the second group. The first group of employees assigned the collection of their claims to Commerce, pursuant to R.C. 4115.10(B). Through that provision, the agency acts on behalf of the employees to collect any wages owed to them. Commerce accordingly resolved the wage claims on behalf of the first group of employees. The second camp consisted of 34 employees who chose not to assign their claims to Commerce. Instead, on February 21, 2006, these employees filed their own lawsuit in the Butler County Court of Common Pleas, pursuant to R.C. 4115.10(A). That provision allows employees to file suit on their own behalf for prevailing wage law violations. This appeal arises from the lawsuit filed by this group of employees.

Originally, Miami University was named as a defendant in the lawsuit. But the Complaint did not allege any claims against Miami or any wrongdoing on its part. Miami was therefore dismissed from the case before trial. Despite this dismissal, and despite the fact that Commerce never issued any determination of wrongdoing by Miami, Monarch claimed at trial that its damages should be reduced because Miami had failed to provide timely notice of an increase in the prevailing wage rate. The trial court agreed and proceeded to discount Monarch's liability by an amount the trial court determined to be attributable to Miami's alleged notice failure.

Accordingly, although the total back wages owed to the 34 employees who pursued their claims in the Court of Common Pleas exceeded \$100,000, the trial court ordered Monarch to pay only \$88,013.53. The trial court's ruling meant that the employees were never made whole for Monarch and Salyers's prevailing wage law violation.

In addition to failing to hold Monarch accountable for the full amount of back wages it owed, the trial court also refused to impose on Monarch the mandatory penalties set forth in R.C. 4115.10(A)—specifically, a penalty to the employees equal to 25% of the back wages and a penalty payable to the Director of Commerce equal to 75% of the back wages. In sum, Monarch was ordered to pay less than the full amount of back wages owed and no statutory penalties were imposed.

The Twelfth District Court of Appeals affirmed the trial court's decision. *Bergman v. Monarch Constr. Co.*, CA2008-02-044, 2009-Ohio-551. This timely appeal by Plaintiffs followed.

ARGUMENT

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

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.

The Court of Appeals was wrong to conclude that the 25% penalty payable to the underpaid employees was discretionary. The penalty is mandatory.

R.C. 4115.10(A) provides that an employee paid less than the prevailing wage can recover from the contractor both compensatory damages (that is, back wages) plus a penalty equal to 25% of the back wages owed: "Any employee upon any public improvement . . . who is paid less than the fixed rate of wages . . . may recover from [the 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 Court of Appeals found the penalty discretionary on the ground that R.C. 4115.10(A) provides that an underpaid employee “may recover” back wages and a penalty equal to 25% of those back wages. Specifically, the court held that the term “may” renders the penalty discretionary. But the court misread the statute. The word “may” simply vests the underpaid employee with the discretion to seek damages for a prevailing wage violation. That is, R.C. 4115.10(A) does not say that “the court may award a penalty,” it says that “[a]ny employee . . . who is paid less than the fixed rate of wages . . . may recover” back wages and the 25% penalty. In this respect, R.C. 4115.10(A) is similar to countless other statutes that authorize individuals to exercise statutory rights. For instance, R.C. 4112.06 authorizes appeals of Civil Rights Commission orders, stating: “Any complainant . . . claiming to be aggrieved by a final order of the commission . . . *may obtain judicial review*. . . .” (Emphasis added). No reasonable interpretation of that statute would expropriate the word “may” to suggest that courts have discretion to entertain the appeal; rather, the language confers discretion on the complainant to decide whether to seek redress. See also R.C. 4117.13(A) (State Employment Relations Board or complaining party “*may petition* the court of common pleas for any county wherein an unfair labor practice occurs” for the enforcement of a board order finding an unfair labor practice).

Indeed, when a statute provides that an individual “may recover” statutory damages or penalties, this Court has found the damages or penalties to be mandatory, absent a clear indication that they are discretionary. See, e.g., *Klemas v. Flynn* (1999), 66 Ohio St. 3d 249, 251 (statute provided that where landlord wrongfully withholds security deposit, tenant “may recover” security deposit plus damages equal to the amount of the deposit; Court held that proof

of landlord's improper withholding of the deposit "automatically triggers the recovery" of the penalty, and that the statutory damages award is "mandatory.").

In other words, the use of the word "may" in R.C. 4115.10(A) vests the *employee* with discretion to seek redress for a prevailing wage violation. It does not vest the *trial court* with discretion to decide whether or not to award back wages or the 25% penalty where a prevailing wage law violation has been found.

Instead, a *different* provision—R.C. 4115.16(B)—describes the trial judge's duties once a prevailing wage violation has been found, and makes clear that the trial judge is obligated to impose the statutory penalties set forth in R.C. 4115.10(A). As R.C. 4115.16(B) states, once a court has found a prevailing wage violation, the court "*shall . . . afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code*"—which include the 25% penalty to employees set forth in R.C. 4115.10(A). (Emphasis added). It is well settled that "the 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.*, 99 Ohio St. 3d 522, 2003-Ohio-4358, at ¶4 (citations omitted). Also, the prevailing wage law must be read as a whole. As this Court has repeatedly held, "[i]n reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, at ¶34 (citation omitted).

Reading the statute as a whole, it is clear that the word "shall" in R.C. 4115.16(B) renders the 25% penalty in R.C. 4115.10(A) mandatory and that the use of the word "may" in R.C.

4115.10(A) simply refers to the discretion vested in an employee to seek redress. Accordingly, the 25% penalty payable to an injured employee under R.C. 4115.10(A) is mandatory.

Moreover, were this Court to adopt the mistaken view of the Twelfth District, it would not only render the 25% penalty discretionary, but it would render restitution discretionary as well, thus gutting the compensation scheme designed to make injured employees whole. That is, R.C. 4115.10(A) provides that injured employees “may recover” 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. If the word “may” is construed to render the court’s remedial powers discretionary, then this would make even back wages an optional remedy, not mandatory. Under that interpretation, countless prevailing employees could be left out to dry and denied even the most basic remedy for a prevailing wage violation—back wages. Nothing suggests that the General Assembly intended to leave underpaid employees who successfully demonstrate a prevailing wage violation *without any remedy at all*—yet that is exactly what the Twelfth District’s mistaken interpretation of the word “may” would allow. To the contrary, the plain language of the prevailing wage law makes clear that the prescribed remedies—both the compensatory damages and penalties—are mandatory.

Finally, the Twelfth District’s ruling 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 found 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 determination was ever requested by or made as to Monarch in this case. And to extend to Monarch the benefit of an exemption not conferred by the General Assembly would violate this Court’s well-established

principle of “expressio unius est exclusion alterius,” which prevents the Court from creating a statutory exclusion “not expressly incorporated into the statute by the legislature.” *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St. 3d 390, 2004-Ohio-6549, at ¶20. Because the statutory exemption set forth in R.C. 4115.13(C) does not apply to Monarch here, Monarch is not entitled to any exemption from the 25% penalty set forth in R.C. 4115.10(A). See also *International Bhd. of Electrical Workers, Local Union No. 8 v. Stollsteimer Elec., Inc.* (6th App. Dist.), 168 Ohio App. 3d 238, 2006-Ohio-3865 (25% penalty is mandatory, and contractor may be relieved of the penalty only where the conditions of R.C. 4115.13(C) have been met).

For all of these reasons, this Court should reverse the Twelfth District and hold that the 25% penalty payable to employees is mandatory unless the statutory exceptions set forth in R.C. 4115.13(C) apply—which they do not in this case.

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

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.

Just as the Twelfth District was wrong to conclude that the 25% penalty payable to the employees is discretionary, the court also erred in holding that the 75% penalty payable to the Director of Commerce is discretionary. That penalty is also mandatory.

Section 4115.10(A) provides that, in addition to the back wages and 25% penalty owed to an employee in a successful prevailing wage action, an employer “*also shall pay* a penalty to the [Director of Commerce] 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). The Twelfth District ruled that the 75% penalty is only collectible by the Director herself in a suit that she prosecutes pursuant to division (C) of R.C. 4115.10. In the Twelfth District’s view,

employees “lack[] standing to bring the claim [for the 75% penalty] on behalf of Commerce.” *Bergman*, 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 75% penalty is not a “claim,” but rather a mandatory penalty that flows automatically from a violation. Section 4115.10(A) states that an offending contractor “shall pay” the penalty where a violation has been found. The statute says nothing to indicate that the penalty can only be imposed through suits brought by the Director under division (C) of R.C. 4115.10, rather than by employees under division (A). In fact, 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 by the Director under division (C).

The Twelfth District’s ruling would also mean that the 75% penalty would only be collected in a fraction of prevailing wage law cases. That is because the prevailing wage law establishes three procedural avenues for enforcement: (1) under R.C. 4115.10(A), an employee paid less than the prevailing wage may bring suit against the offending contractor; (2) under R.C. 4115.10(B), the employee may request that the Director of Commerce bring suit against the contractor on the employee’s behalf; or (3) under R.C. 4115.10(C), if the employee fails to take either course of action, and if the Director has found a violation of the prevailing wage law, the Director shall bring any legal action necessary to collect any wages and penalties owed to the employee and the Director. Thus, the Director is authorized to bring suit under R.C. 4115.10(C) *only* for employees who have not brought suit on their own, pursuant to division (A), or have not asked the Director to sue on their behalf under division (B). There is nothing in the statute limiting the 75% penalty to the fraction of cases brought by the Director of Commerce.

Moreover, although the plain language of the statute makes it unnecessary to resort to legislative history, the legislative history of R.C. 4115.10(A) confirms that the 75% penalty to the Director is mandatory, even in suits brought by employees. Since the statute's enactment in 1931, and until 1994, a prevailing employee was entitled to restitution plus a penalty equal to 100% of the back wages owed by the contractor. See, e.g., *Lovsey v. Morris Sheet Metal, Inc.* (4th App. Dist. Dec. 1, 1983), No. 1145, 1983 Ohio App. LEXIS 13508, at 4 (discussing the pre-1994 statute). The General Assembly amended the prevailing wage law in 1994 to create a penalty enforcement fund for the Department of Commerce, to be used for enforcement of the prevailing wage laws. See 1993 Am. Sub. H.B. No. 350. Although the 1994 amendment did not change the *amount* of the penalties owed by an offending contractor—that amount remained 100% of the back wages—the *allocation* of the penalty changed. Instead of the full penalty going to the employee, the amendment dictated that the employee would receive 25% of the penalty while the remaining 75% would go to the Director, for the newly created penalty enforcement fund. R.C. 4115.10(A).

The important point is that the General Assembly demonstrated no intent whatsoever to lower the amount of the penalty in any case, let alone a case brought by employees. Since 1931 until today, the penalty for all violations—whether they are pursued by the employees themselves or by the Director—has remained at 100% of the back wages owed by the contractor. The only thing that has changed is the allocation. Absent any indication that the General Assembly intended for offending contractors to be relieved in many cases of 75% of the penalties that they have been subjected to for almost 80 years, there was no basis for the lower courts to conclude that the penalty was discretionary in this case. Moreover, because the 75% penalty funds the State's prevailing wage law enforcement efforts, rendering the penalty

discretionary would significantly diminish the already-limited resources available to Commerce for enforcing these important laws.

For all of these reasons, this Court should reverse the Twelfth District and hold that the 75% penalty payable to the Director of Commerce under R.C. 4115.10(A) is mandatory in all cases where the employee has successfully shown a prevailing wage law violation.

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 was at fault for failing to notify the contractor of a change in the prevailing wage rate.

Discounting Monarch's damages even further, the Twelfth District also held that Monarch was not liable for the full amount of back wages owed to the employees. Rather, the court reduced Monarch's liability by an amount the court deemed attributable to Miami's alleged failure to notify Monarch of a change in the prevailing wage rate. That conclusion was wrong and must be reversed.

The Twelfth District construed R.C. 4115.05 as authorizing a *court* to assess a public entity's liability for failing to give notice of a wage rate increase and to reduce a contractor's damages accordingly. But R.C. 4115.05 does not authorize courts to do any such thing. In relevant part, R.C. 4115.05 provides:

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 contractor's liability can be partially reduced, and a public entity can be held partially liable, *only where the Director of Commerce issues a determination that the public entity failed properly to notify the contractor of a change in prevailing wage*

rates. No such determination was ever requested of or made by the Director of Commerce with respect to Miami University in this case.

Two unlawful consequences flow from the lower courts' decisions. First, by awarding Plaintiffs less than the total amount of back wages they were owed, the lower courts failed to make Plaintiffs whole. That result directly contravenes the mandates of the prevailing wage law, which provide that any employee deprived of the prevailing wage is entitled to "the difference between the fixed rate of wages and the amount paid to the employee." R.C. 4115.10(A). In other words, the statutes do not allow for damages in any amount less than the full amount of back wages owed.

Second, although the trial court did not actually hold Miami liable for any damages in this case—because it was dismissed from the suit before trial—the courts below have fashioned out of whole cloth an affirmative defense whereby contractors can now reduce their liability by pointing fingers at a public entity. In this way, the lower courts have effectively paved the way for parties to implead or seek contribution from public entities in every prevailing wage case, regardless of whether the Director of Commerce first determined under R.C. 4115.05 that the public entity is, in fact, at fault.

Indeed, *amicus curiae*, the Ohio State Building and Construction Trades Council, argues exactly that. The Trades Council contends that private contractors can sue public entities for contribution, regardless of whether the Director of Commerce determined under R.C. 4115.05 that the public entity was at fault for failing to give notice of a wage increase. See Trade Council's Br. at 12-14. Not only is the Trade Council's position wrong, but it conspicuously backtracks from its position in its *amicus* memorandum in support of jurisdiction. In that earlier filing, the Trade Council conceded that "[s]ignificantly, [R.C. 4115.05] only imposes liability

upon a public authority for its failure to notify contractors and subcontractors of increases in the prevailing wage rates “[i]f the director determines’ that the violation was attributable to such failure of notification.” See Trade Council’s Jur. Memo, at p.13 n.6. The Trades Council now refuses to acknowledge the statutory requirement of a predicate determination by the Director before a public entity can be held liable for a failure to provide notice of a wage rate increase, although it fails to explain how that requirement can be ignored. The Trades Council’s reliance on *Ohio Asphalt Paving v. Ohio Dep’t of Indus. Relations* (1992), 63 Ohio St. 3d 512 is completely misplaced. The issue in *Ohio Asphalt Paving* was whether a contractor could be held liable for a prevailing wage violation where the public entity failed to notify the contractor that the prevailing wage laws even applied to the project. Relying on a *different* statutory provision—R.C. 4115.06, which requires public entities to include prevailing wage specifications in the contract—this Court in *Ohio Asphalt Paving* concluded that the public entity’s failure to include prevailing wage specifications in the contract did not relieve the contractor from its statutory duty to pay the prevailing wage. The Court went on to hold, however, that a contractor could maintain an action in contribution against the public authority where the surrounding facts indicated that the public entity failed to follow the requirements of R.C. 4115.06.

Unlike *Ohio Asphalt Paving*, this case does not involve R.C. 4115.06, but rather R.C. 4115.05, which sets forth a public entity’s obligation to notify contractors of a wage rate increase. The differences between the statutory provisions are significant. Most important, R.C. 4115.06 is silent on a public entity’s liability for a defective contract, and that silence left the door open for this Court to craft an equitable remedy that permits the contractor to seek contribution from the public entity where the contract is defective. By contrast, R.C. 4115.05

sets forth a special statutory procedure for holding a public entity liable for failing to provide a wage rate increase. Accordingly, there is no room for this Court to recognize an equitable action for contribution by a contractor for a violation of R.C. 4115.05 where the Director of Commerce has not made a predicate determination that the public entity was, in fact, at fault.

The judicially created defense manufactured by the courts below and endorsed by the Trades Council contravenes this Court's well-settled precedents, which hold that a special statutory proceeding precludes relief by any other means. See, e.g., *State ex rel. Byrd v. Bd. of Elections* (1981), 65 Ohio St. 2d 40; *Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244; *City of Galion v. AFSCME, Local No. 2243* (1995), 71 Ohio St. 3d 620. In other words, without a determination under R.C. 4115.05 that the public entity failed to provide proper notice of a rate change, there can be no action for contribution against the public entity, no apportionment of fault by the court, no recovery of damages against a public entity, and no reduction of a contractor's liability for the full amount of back wages owed to employees. Here, the Director of Commerce never issued a determination under R.C. 4115.05 that Miami University was at fault for a notice failure. Therefore, there was no basis for the trial court to opine on Miami's liability or to reduce Monarch's liability for back wages accordingly.

Finally, the statute's requirement of a predicate determination by the Director of Commerce comports fully with the public policy apparent on the face of the prevailing wage laws. These laws leave very little room for contractors to share liability with a public entity. Rather, the statutes underscore that it is the duty of *contractors* to ensure that they are complying with the prevailing wage laws, and *contractors'* responsibility to make the employees whole. See, e.g., R.C. 4115.031 ("*The obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determination...*") (emphasis added); R.C. 4115.032 ("*All contractors*

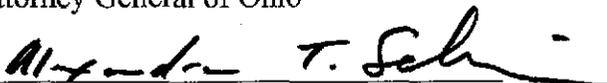
and subcontractors . . . shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code....”) (emphasis added); R.C. 4116.06 (“*The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.*”) (emphasis added); R.C. 4115.07 (“*All 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).

While R.C. 4115.05 provides that a public entity can be liable for certain back wages where it fails to provide proper notice of a wage rate increase, this exception is a narrow one and requires a predicate determination of fault by the Director of Commerce. This ensures that public entities 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 entity failed to properly notify the contractor of a rate change. Absent such an agency determination—and there was none in this case—the contractor is liable for the full amount of back wages and public entities cannot be exposed to any litigation or liability.

CONCLUSION

For the above reasons, this Court should reverse the decision of the Twelfth District.

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CERTIFICATE OF SERVICE

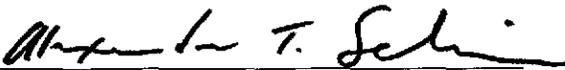
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellants Doug Bergman, et al. was served by U.S. mail this 3rd day of August, 2009, upon the following counsel:

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