

ORIGINAL

IN THE SUPREME COURT OF OHIO

Doug Bergman, et al : Case No. 2009-0558  
:   
:   
Plaintiffs-Appellants, : Certified Conflict Case No. 2009-0649  
:   
:   
v. : On Appeal from Court of Appeals,  
: Twelfth Appellate District  
Monarch Construction Co., : Court of Appeals  
: Case No. CA2008-02-044  
Defendant-Appellee. :

---

BRIEF AMICUS CURIAE OF THE ASSOCIATED GENERAL CONTRACTORS  
OF OHIO AND ALLIED CONSTRUCTION INDUSTRIES IN SUPPORT  
OF MONARCH CONSTRUCTION COMPANY

---

Roger L. Sabo (0013125)  
Schottenstein Zox & Dunn  
250 West Street  
Columbus, Ohio 43215  
Tel. 614- 462-5030  
Fax: 614-222-3488  
*Counsel for Amicus Curiae  
Associated General Contractors of Ohio and  
Allied Construction Industries*

Joseph M. D'Angelo (0063348)  
Cosme, D'Angelo & Szollosi Co., L.P.A.  
The CDS Building  
202 North Erie Street  
Toledo, Ohio 43604  
Tel. 419-224-8989  
Fax: 419-244-8990  
*Counsel for Plaintiff-Appellants  
Doug Bergman, et al.*

Gregory Parker Rogers (0042323)  
Matthew T. Byrne (0082228)  
Taft, Stettinius & Hollister, LLP  
425 Walnut Street, Suite 1800  
Cincinnati, Ohio 45202  
Tel. 513-381-2828  
Fax: 512-381-0205  
*Counsel for Defendant-Appellee  
Monarch Construction Co.*

Benjamin C. Mizer (0083089)  
Alexandra T. Schimmer (0075732)  
Susan M. Sullivan (0012081)  
Dan E. Belville (0040250)  
Lindsay M. Sestile (0075618)  
Assistant Attorneys General  
30 E. Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
Tel. 614-466-8980  
Fax: 614-466-5087  
*Counsel for Amicus Curiae  
State of Ohio*

FILED  
SEP 02 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

N. Victor Goodman (0004912)  
Mark D. Tucker  
Benesch, Friedlander, Coplan & Aronoff, LPP  
41 South High Street, 26th Floor  
Columbus, Ohio 43215  
Tel. 614-223-9300  
Fax: 614-223-9330  
*Counsel for Amicus Curiae Ohio State  
Building and Construction Trades Council*

Alan Ross  
Nick A. Nykulak  
Ross, Brittain & Schonberg Co., LPA  
6480 Rockside Woods Blvd., Suite 350  
Cleveland, Ohio 44131  
Tel. 216-447-1551  
Fax: 216-447-1554  
*Counsel for Amicus Curiae Northern Ohio  
Chapter of Associated Builders and  
Contractors and Associated Builders and  
Contractors of Ohio*

**TABLE OF CONTENTS**

**Page**

TABLE OF AUTHORITIES .....	ii
I. ISSUE PRESENTED FOR REVIEW. ....	1
II. CONCERN OF THE AMICUS CURIAE. ....	1
III. THE ASSOCIATED GENERAL CONTRACTORS OF OHIO AND ALLIED CONSTRUCTION INDUSTRIES. ....	2
IV. STATEMENT OF THE CASE.....	3
A. The Facts Applicable to the Interest of the Amici AGC of Ohio and ACI.....	3
B. The Decision of the Court of Appeals. ....	4
V. LEGAL ARGUMENT OF THE AMICI AGC OF OHIO AND ACI.....	4
PROPOSITION OF LAW: .....	4
A GENERAL CONTRACTOR IS NOT OBLIGATED TO PAY A PENALTY FOR VIOLATION BY ITS SUBCONTRACTOR OF THE OHIO PREVAILING WAGE LAW ABSENT A FINDING BY THE DIRECTOR OF AN INTENTIONAL VIOLATION BY THE GENERAL CONTRACTOR. ....	4
A. Summary of Argument. ....	4
B. The Court of Appeals properly found no basis to assess a penalty against a general contractor for a violation of the prevailing wage law by a subcontractor.....	6
VI. CONCLUSION.....	16
CERTIFICATE OF SERVICE .....	17

## TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Cremeans v. Jimco</i> (10th Dist. June 5, 1986), No. 85AP-821, 1986 WL 6334.....	10
<i>Dean v. Seco Electric Co.</i> (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837.....	1, 15
<i>Electrical Workers Local 8 v. Stollsteimer Electric</i> (2006), 168 Ohio App. 3d 238, 859 N.E. 2d 590 .....	14
<i>Engelhaur v. C.T. Taylor</i> (Ohio App. 9 Dist., Dec. 8, 1999), 1999 WL 1215110 .....	10
<i>International Brotherhood of Electrical Workers v. Stollsteimer Electric, Inc.</i> (2006), 168 Ohio App. 3d 238, 859 N.E. 2d 590 .....	9
<i>Judy v. State of Ohio</i> , 6 <sup>th</sup> Dist. No. L-01-1200, 2004-Ohio-5673.....	11
<i>Northwestern Ohio Building &amp; Construction Trades Council v. Ottawa County Improvement Corporation</i> (2009), 122 Ohio St. 3d 283, 910 N.E. 2d 1025 .....	6
<i>Ohio Asphalt Paving v. Ohio Dept. of Industrial Relations</i> (1992), 63 Ohio St. 3d 512, 589 N.E. 2d 35 .....	7
<i>Sheet Metal Workers International Association Local 33 v. Gene's Refrigeration</i> (2009), 122 Ohio St. 3d 248, 910 N.E. 2d 444.....	3, 6
<i>State ex rel. Associated Builders &amp; Contractors of Central Ohio v. Franklin County Board of Commissioners</i> (10 <sup>th</sup> Dist. June 13, 2008), 2008-Ohio-287 .....	3
<i>State ex rel. National Electrical Contractors Association v. Ohio Bureau of Employment Services</i> (1998), 83 Ohio St. 3d 179, 699 N.E. 2d 64.....	8, 9
<i>State v. Buckeye Electric</i> (1984), 12 Ohio St. 3d 252, 466 N.E. 2d 894 .....	7
<i>United Bhd. Of Carpenters &amp; Joiners of Am., Local Union No. 1581 v. Bell Eng. Ltd.</i> (Ohio App. 6 <sup>th</sup> Dist. Apr. 14, 2006), 2006 WL 988445.....	11
<i>United Bhd. of Carpenters &amp; Joiners of Am. Local No. 1581 v. Bell Eng. Ltd.</i> (Ohio App. 6 Dist. April 14, 2006), 2006 WL 988445, 2006-Ohio-1891 .....	11

**Other Authorities**

Ohio Adm. Code 4101:9-4-02 (K)..... 13

Ohio Rev. Code § 4115.03(E)..... 7

Ohio Rev. Code § 4115.05..... 6

Ohio Rev. Code § 4115.071..... 15

Ohio Rev. Code § 4115.13..... 5, 8, 9, 14, 16

Ohio Rev. Code § 4115.16..... 7, 8, 9

Ohio Rev. Code § 4115.99..... 7

Ohio Rev. Code 4115.10..... 5, 8, 9, 13, 14

Ohio Rev. Code Section 4115.06..... 9, 11, 12

**I. ISSUE PRESENTED FOR REVIEW.**

Should the Prevailing Wage Laws of Ohio permit a penalty against the general contractor when a subcontractor is responsible for the failure to make the prevailing wage payment to its employees.

**II. CONCERN OF THE AMICUS CURIAE.**

Monarch Construction is a contractor signatory to agreements with labor unions. The unions, operating technically under the name Doug Bergman, seek to recover from Monarch the penalty amount for prevailing wage violations not by Monarch, but by its subcontractor. The Legislature built checks and balances built into the statute which is meant to avoid such overreaching by an adverse party. This penalty includes an amount Appellants will never see: payment to the Ohio Department of Commerce (“ODOC”).

The State of Ohio as *amicus curiae*, pontificating from its ivory tower, insists that a contractor must pay for its subcontractor’s sins. This Court has never had occasion to rule on whether, and why, a general contractor is liable for failure of payment of prevailing rates of wages by a subcontractor, let alone the penalties. Further, it has never set out the basis upon which private plaintiffs would have standing to pursue such a remedy.

While the Associated General Contractors of Ohio (“AGC of Ohio”) and Allied Construction Industrial (“ACI”) have always promoted the prevailing wage laws such that the unionized contractor is on a level playing field with the contractor, the trade unions have gone beyond the pale in this proceeding. In *Dean v. Seco Electric Co.* (1988), 35 Ohio St. 3d 203, 206, 519 N.E.2d 837, this Court recognized that a surety is not responsible for penalties. In this case, Monarch occupies the same position as a surety. Monarch did not violate Ohio prevailing wage laws; its subcontractor did. Monarch paid the assessed amount but contended the

additional amount of another one hundred per cent – twenty-five per cent to Appellants and seventy-five per cent to the ODOC -- was not something that it should bear. The Court of Appeals for the Twelfth District agreed. AGC of Ohio and ACI file this *amicus curiae* brief urging affirmance of the decision of this Court of Appeals.

In this case, the issue is the liability of the general contractor. Second, the issue becomes who may assert rights to such a penalty. Contrary to the assertion of the Appellants, that remedy is for the ODOC, not private litigants. The unions want to enforce a penalty provision for which it has no standing. The Ohio statute has a tripartite method of proceeding involving prevailing wage violations. This case is an action by an affected employee brought by the unions. If the union wants to have penalties enforced, its option is to allow ODOC to find the violation. Here, similar to what has occurred a multitude of times, the unions do not allow ODOC to sue on behalf of the individual complainant. Instead, the individual file the complaint in common pleas court, also seeking attorney fees.

### **III. THE ASSOCIATED GENERAL CONTRACTORS OF OHIO AND ALLIED CONSTRUCTION INDUSTRIES.**

The AGC of Ohio is a statewide association of general contractors and subcontractors, as well as those who supply contractors. Its members include local chapters throughout the State of Ohio. One chapter is ACI, headquartered in Cincinnati, where Monarch is located.

AGC of Ohio contractor and subcontractor members engage in construction projects for both public and private improvements throughout the State of Ohio. AGC of Ohio provides a variety of services to its members -- among them being the support of the Ohio prevailing wage laws as it involves public construction. AGC of Ohio and ACI have a vital interest in the overall implications of the decisions of the Court of Appeals that have been certified. AGC of Ohio

actively participates in the legislative process as to enactment of statutes, including those involved in prevailing wages. Indeed, it has appeared as *amicus* in cases involving owner rejection of a bidder for prevailing wage violations. AGC of Ohio appeared on behalf of the owner (*State ex rel. Associated Builders & Contractors of Central Ohio v. Franklin County Board of Commissioners* (10<sup>th</sup> Dist. June 13, 2008), 2008-Ohio-287). AGC of Ohio appeared on behalf of the contractor in before this Court in *Sheet Metal Workers International Association Local 33 v. Gene's Refrigeration* (2009), 122 Ohio St. 3d 248, 910 N.E. 2d 444.

While this case is often labeled with union versus non-union or merit shop overtones, that is not the concern of AGC of Ohio in this case. AGC of Ohio has both union and non-union members. The interest of AGC of Ohio lays in the appropriate interpretation of the prevailing wage laws of Ohio. The purpose of the prevailing wage statute is to provide the “level playing field” for all contractors on public works, union or non-union. Its purpose is not forwarded by punishing the prime contractor who is not the bad apple.

#### **IV. STATEMENT OF THE CASE.**

##### **A. THE FACTS APPLICABLE TO THE INTEREST OF THE AMICI AGC OF OHIO AND ACI.**

The facts as taken from the decision of the Twelfth District which are germane to this involvement by the two *amici curiae* are the following:

Monarch held the general trades contract with Miami University to build student housing. One of its subcontractors was Don Salyers Masonry (“Salyers”). As a result of a union complaint, the ODOC investigated Salyers and ordered it to pay back wages and penalties. During this time, both Miami University and Salyers told Monarch on repeated occasions the appropriate prevailing wage was being paid by Salyers. Only after its investigation and findings

toward Salyers did ODOC advise Monarch of its investigation and finding of violations by Salyers. Salyers subsequently went out of business. Certain of the employees did not assign their case to ODOC for collection, but instituted a separate lawsuit.

As a result of the trial, the lower court ordered Monarch to pay a certain amount to plaintiffs, but did not require it to pay an additional penalty of twenty-five per cent of the back pay to the employees or a seventy-five per cent penalty of the back pay to ODOC.

**B. THE DECISION OF THE COURT OF APPEALS.**

As the court noted (Op. at 13):

Commerce has not found the violation to be intentional.

Beginning with the twenty-five per cent payment to the employees, the Court ruled (§ 91):

Based on a review of the record, we cannot say that requiring Monarch to pay a 25 percent penalty, for a violation of which they were unaware, was warranted.

With respect to the seventy-five per cent penalty, the Court first noted that this amount is “primarily used as a bargaining tool to entice violating parties to settle claims without going to trial” (§ 98). The court found no reason Commerce could not have pursued such a remedy should it have so chosen, and no basis for employees to pursue a claim that was not theirs to make.

**V. LEGAL ARGUMENT OF THE AMICI AGC OF OHIO AND ACL**

**PROPOSITION OF LAW:**

**A GENERAL CONTRACTOR IS NOT OBLIGATED TO PAY A PENALTY FOR VIOLATION BY ITS SUBCONTRACTOR OF THE OHIO PREVAILING WAGE LAW ABSENT A FINDING BY THE DIRECTOR OF AN INTENTIONAL VIOLATION BY THE GENERAL CONTRACTOR.**

**A. SUMMARY OF ARGUMENT.**

Monarch paid the prevailing wage obligation of its subcontractor. What it objected to was the contention that it was required to pay statutory penalties for acts of its subcontractor. The trial court and the Court of Appeals for the Twelfth District agreed with that position. It ruled that the term “may” recover a twenty-five per cent penalty was discretionary. It ruled that it was only the function of ODOC to collect the penalty, with the employees lacking standing. This case is now before the Court upon certification of two courts of appeals decisions as a conflict. The conflict, out of the Sixth District, is premised upon a complete misreading of the statute involving an intentional violation.

So we have the Appellants and their supporters arguing such matters as “may” means shall, and that “shall” means shall but that “cases in which these words are convertible are numerous.” (Amicus of Building Trades in Support of Jurisdiction p. 7). These participants seek to sweep under the rug the issue of utmost concern to the *amici*: Monarch is the general contractor. Monarch was not even made aware of the findings against Salyers until after they were made. No basis exists to find Monarch liable for a penalty. To hold otherwise would now open the door to permit disqualification of from public work premised upon activities of its subcontractor, without the benefit of the contractor even receiving notice of any violations. In deciding this appeal, the provisions of Ohio Rev. Code § 4115.13 Revised Code regarding intentional violations must be read in conjunction with the penalty under Ohio Rev. Code § 4115.10.

Initially, it should be emphasized that the statute allows direct action by ODOC against subcontractors. That occurred here. ODOC only turned to Monarch when it realized Salyers had ceased to exist. Appellants would ask the Court to ignore the differences between a general contractor versus a subcontractor outlined under the Ohio prevailing wage law. As we note

below, the prevailing wage law sets forth the specific obligations of the contractor versus the subcontractor countless times.

**B. THE COURT OF APPEALS PROPERLY FOUND NO BASIS TO ASSESS A PENALTY AGAINST A GENERAL CONTRACTOR FOR A VIOLATION OF THE PREVAILING WAGE LAW BY A SUBCONTRACTOR.**

In addition to this case, This Court has three other prevailing wage law cases. This Court has issued two decisions this term on the Ohio prevailing wage law. In *Northwestern Ohio Building & Construction Trades Council v. Ottawa County Improvement Corporation* (2009), 122 Ohio St. 3d 283, 910 N.E. 2d 1025, this Court held that the Ohio prevailing wage law applies only when a public institution spends public funds to construct a public improvement. (*Id.* at 287, 1029). As it stated:

Moreover, Northwestern's argument that *any* spending of public funds by an R.C. 4115.03(A) institution would require payment of the prevailing wage law would unjustifiably expand the scope of prevailing wage law to include projects that are not public improvements, that are not constructed by a public authority, or that do not benefit a public authority.

In *Sheet Metal Workers International Association, Local Union 33 v. Gene's Refrigeration* (2009), 122 Ohio St. 3d 248, 910 N.E. 2d 444, this Court held that the prevailing wage laws apply only to those persons whose work is upon the site of the public improvement.

One other case is pending, the *Associated Builders and Contractors v. Franklin County Board of Commissioners* litigation, Case No. 2008-1478, on disqualification from bidding for violations of the prevailing wage law.

At the construction site, the prevailing rate of wages must be at least as much as that of the same trade or occupation in the location where the work is being performed. Ohio Rev. Code § 4115.05. The statute defines the prevailing wage as the sum of two components: (1) the basic

hourly rate of pay and (2) the rate of contributions irrevocably made by the contractor for certain fringe benefits. Ohio Rev. Code § 4115.03(E).

A contractor is required to abide by prevailing wage requirements even if the owner fails to include the requirement in the specifications. *Ohio Asphalt Paving v. Ohio Dept. of Industrial Relations* (1992), 63 Ohio St. 3d 512, 589 N.E. 2d 35, 39. Violations can result in criminal prosecution. Ohio Rev. Code § 4115.99; *State v. Buckeye Electric* (1984), 12 Ohio St. 3d 252, 466 N.E. 2d 894, 895. Yet, in the face of all this, Appellants would argue that ODOC having provided Monarch a finding of prevailing wage violations by Salyers after the investigation is concluded justifies penalties against Monarch. This goes far beyond what was intended by the statute.

This case does not involve restitution to employees by payment of the prevailing wage. Instead, Appellants seek two penalties from Monarch. Initially, the bifurcation of the lawsuit provisions needs to be considered. Then, two provisions of the law must be considered *in pari materia* as to penalties.

**1. Public Versus Private Lawsuits Under the Ohio Prevailing Wage Law.**

The statute at Ohio Rev. Code § 4115.16, provides who is permitted to file a complaint with the Department of Commerce. Once a complaint is filed, the complainant party can await a decision by ODOC, or it may, after 60 days, initiate its own lawsuit.

Even if ODOC makes a decision, the private party can “assign” its claim to ODOC or file a lawsuit on its own behalf should it become necessary to seek court intervention to obtaining the prevailing wage payment. Indeed, there can even be both an ODOC lawsuit and a private lawsuit.

Two lawsuits occurred in this case, that of ODOC and that of Plaintiffs-Appellants. There was no requirement for a private lawsuit to begin. The obvious carrot to instituting a private action is the ability to collect gargantuan attorney's fees. The Twelfth District Court of Appeals notes the flaws in the fee structure in its opinion. That attorney fees will be awarded forms no basis for a private litigant to argue that the penalty is "automatic."

## 2. Back Pay Versus Penalty.

The issue of available relief is provided at Ohio Rev. Code § 4115.10. It includes back pay. It may also include "penalties." A penalty of 25 per cent of back pay owed can be awarded the affected employees. A penalty of 75 per cent can be awarded to Commerce. It is this penalty that has brought about the certified conflict in this case. It is this portion over which the Appellants and its *amici* take us through the twisted and tortuous path of their version of statutory interpretation.

It is not that complicated. It only becomes complicated over myriad of decisions that arise as a result of private lawsuits. The operative section is Ohio Rev. Code § 4115.13. Under That section, the Director of the ODOC has the authority to make a decision whether the "contractor, subcontractor, or officer of a contractor or subcontractor has intentionally violated" the Ohio prevailing wage law. The remedies are harsh – including, among others, a prohibition from further contracting with any public authority. There are two separate remedy provisions in the law. In this case, there was an actual finding by the Director of ODOC against the subcontractor. This Court dealt with just such a debarment and the statutory penalties in *State ex rel. National Electrical Contractors Association v. Ohio Bureau of Employment Services* (1998), 83 Ohio St. 3d 179, 699 N.E. 2d 64, under Ohio Rev. Code § 4115.16 stating:

But to the extent that appellants' mandamus claim involves those cases in which the OBES Administrator determines within the R.C. 4115.16(B) sixty-day period that an intentional violation of the prevailing wage law has occurred, R.C. 4115.16(A) and (B) do not provide an adequate legal remedy. In these cases, appellants cannot raise their contentions concerning the failure of OBES to impose and collect penalties and to file a list of prevailing wage law violators with the Secretary of State by way of a complaint under R.C. 4115.16(A) or (B). See R.C. 4115.10(A), (C) and (E), and 4115.13(A). Therefore, R.C. 4115.16(A) and (B) do not provide complete, beneficial, and speedy relief for these contentions.

So the issue has already been decided by this Court. To impose a penalty, the director must first decide whether an intentional violation of the prevailing wage law occurred. In this case, the director made no such finding. The Appellants must sweep Ohio Rev. Code § 4115.13(B) under the rug to forward their cause.

The Court's statement in the *National Electrical Contractors* case, *supra*, as to Ohio Rev. Code § 4115.16 equally applies to this proceeding. There must be an intentional finding by the director in order to obtain a penalty under Ohio Rev. Code § 4115.10. An intentional finding is based upon the requirements of Ohio Rev. Code § 4115.13(B). It is the failure of the Court of Appeals in *International Brotherhood of Electrical Workers v. Stollsteimer Electric, Inc.* (2006), 168 Ohio App. 3d 238, 859 N.E. 2d 590, *infra*, to acknowledge that section to reach the result it did.

This difficulty all began when some lower courts failed to acknowledge that the subcontractor is a "stand alone" for purposes of prevailing wage liability. These courts have failed to heed the requirement of Ohio Rev. Code § 4115.06 that the contract is to require a provision that not only the general contractor must have such a provision, but also the subcontractors. If the general contractor includes such a clause in its contract with the

subcontractor, it has met its prevailing wage obligation. That should be the extent of the inquiry. Yet, some courts of appeals hold the general contractor responsible for the back pay obligations of its subcontractors, contract language notwithstanding. The court in *Cremeans v. Jimco* (10th Dist. June 5, 1986), No. 85AP-821, 1986 WL 6334 failed to understand the distinction. It states that “ordinarily” the subletting of work does not resolve the obligations of the contractor toward the owner. The prevailing wage law is not an obligation of a contractor toward the owner. It is one statutorily imposed. The statute sets forth the basis of remedies against both the contractor and the subcontractor.

Other reasons determined by courts for holding the general contractor liable are based upon their own concept of what the statute should say, not what it does say. So, in *Connell v. Wayne Builders* (10<sup>th</sup> Dist. Jan. 30, 1996), 1996 WL 39646, the court substituted its judgment for that of the statute, stating:

In our view, to so limit the employees’ rights under the statute would render the statutory framework less comprehensive than intended and defeat the primary purpose of the legislation, which is to prevent the undercutting of employees’ wages in the private construction sector.

This same overriding of the statute appeared in *Harris v. Bennet* (6<sup>th</sup> Dist. July 26, 1985) 1985 WL 7558, when it divined the meaning of the statute to be:

To reach the goal of wage equality, it is entirely proper to construe R.C. 4115.10 to impose liability upon general contractors for the violations of wage and hour provisions by subcontractors.

These court cases operate under the presumption that “of course” the general contractor is liable. The decisions then search for a way to justify their position. Indeed, the court in *Engelhour v. C.T. Taylor* (Ohio App. 9 Dist., Dec. 8, 1999), 1999 WL 1215110, went so far as to state:

[T]he legislative intent of R.C. 4115.10 allows for employees to name general contractors, subcontractors or both when they initiate a suit based upon a right to sue letter against a contractor.

It is not the function of the reviewing court to rewrite the statute enacted by the Legislature.

Prevailing case law dictates the guiding principle we must follow to be the plain meaning doctrine. We have no authority to bypass or modify the plain meaning of unambiguous statutory language. Statutory application must be limited to the confines of the plain meaning of the statutory language. *Judy v. State of Ohio*, 6<sup>th</sup> Dist. No. L-01-1200, 2004-Ohio-5673, at ¶8.

*United Bhd. Of Carpenters & Joiners of Am., Local Union No. 1581 v. Bell Eng. Ltd.* (Ohio App. 6<sup>th</sup> Dist. Apr. 14, 2006), 2006 WL 988445, ¶ 15.

Regardless, none of the cases as to general contractor liability addressed the issue in this case, the liability for penalties. Ohio Rev. Code § 4115.06 provides:

[t]he contract executed between the public authority and the successful bidder shall contain a provision *requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed.* The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.

(emphasis supplied). The statute as to “prohibitions” (Ohio Rev. Code § 4115.10), allows an employee “upon any public improvement” to recover past wages. Ohio Rev. Code § 4115.10, references the *contractor* employee and the *subcontractor* employee.

In the case of *United Bhd. of Carpenters & Joiners of Am. Local No. 1581 v. Bell Eng. Ltd.* (Ohio App. 6 Dist. April 14, 2006), 2006 WL 988445, 2006-Ohio-1891, the court performed a legislative analysis, and concluded:

[¶ 24] R.C. 4115.04 clearly states, “every public authority authorized to contract for or construction *with its own forces* a public improvement \* \* \* shall have the director of commerce

determine the prevailing rates of wages.” The statutory duty is placed squarely upon the village.

[¶ 23] The legislative intent to limit the applicability of the prevailing wage statutes to those whose forces or employees do actual physical construction and the contracting public authority is further reinforced by review of related statutes.

Unlike issues surrounding privity of contract, the Ohio Revised Code sets out that the statutory obligation rests directly upon the subcontractor. At Ohio Rev. Code § 4115.06, “the enforcement of liability for wage and hour violations is applicable as against either the contractor or the subcontractor. Other references include:

Ohio Rev. Code § 4115.032. All contractors and subcontractors working on such projects.

Ohio Rev. Code § 4115.04. Provides for wages and that every contract shall contain the provision that each employee employed by “such contractor, subcontractor.”

Ohio Rev. Code § 4115.06. The contract between the public authority and the successful bidder shall contain a provision requiring that bidder and his subcontractors to comply with the rate of wages so fixed.

Ohio Rev. Code § 4115.07. All contractors and subcontractors shall make full payment and maintain applicable payroll records.

Ohio Rev. Code § 4115.13. Future work prohibited upon finding that a contractor, subcontractor, or officer of a contractor or subcontractor for an intentional violation.

Ohio Rev. Code § 4115.15. When a contractor or subcontractor has failed to pay the prevailing rate, the work may be halted until the “defaulting contractor” has filed a bond.

When Appellants state to the Court:

Both the contractor (Monarch) and subcontractor (Salyer) were required under prevailing wage law to ensure that Plaintiffs were paid the proper wages,

it cites no legal authority.

The actual language of Ohio Rev. Code § 4115.10 does not state. In point of fact, there is nothing within Ohio Rev. Code § 4115.10 that sets out such an intent. But, whether the general contractor can be sued alongside the subcontractor does not decide the issue of whether a penalty can be imposed upon the general contractor for violations of a subcontractor.

That is evident from the use of the different verbiage in the statute. Section (A) of Ohio Rev. Code § 4115.10 begins with the directive that no person, firm or corporation “shall violate the wage provisions” or “require any employee to work for less than the rate of wages so fixed.” When we deal with the two penalty provisions of Ohio Rev. Code § 4115.10, the operative language is the person, firm, corporation “who fails to pay the rate of wages so fixed” shall pay a penalty. Salyers, the subcontractor, failed to pay that rate to its employees, not Monarch, the general contractor.

One must then turn his attention to the employee. This section of the prevailing wage law does not define “employee” but the Department of Commerce provides such a definition for the “employee” in its regulations.

“Employee” means any person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and includes owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent.

Ohio Adm. Code 4101:9-4-02 (K).

This Court dealt with the definition of an employee versus an employer in *International Union of Operating Engineers v Dan Wannemacher Masonry Co.*(1988), 36 Ohio St. 3d 74, 521 N.E. 2d 809, including the reference to Black's Law Dictionary (5 Ed. 1979) 471:

A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed. \* \* \* [Citation omitted.] One who works for an employer; a person working for salary or wages.

Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an 'employee.'

And, once we enter the heart of the statute, the terms "employee" and "employer" are the significant items. So, crucial to this case is Ohio Rev. Code § 4115.10, that where "the employee prevails in his suit, the employer shall pay the costs and reasonable attorney fees." No reference is made to "general contractor" or anyone other than the employer and the employee.

But as to the penalty issues of Ohio Rev. Code § 4115.10, there first has to be an "intentional" violation. That is the duty of ODOC to determine. The vice of the decision of the court in *International Brotherhood of Electrical Workers Local 8 v. Stollsteimer Electric* (2006), 168 Ohio App. 3d 238, 859 N.E. 2d 590, is its failure to distinguish between finding a violation as intentional under Ohio Rev. Code § 4115.13(B) and the "elimination" of the items under Ohio Rev. Code § 4115.13(C). Section (B) authorizes the director to determine "intentional violations."

(B) At the conclusion of the investigation, the director or a designated representative shall make a recommendation as to whether the alleged violation was committed. If the director or designated representative recommends that the alleged violation

was an intentional violation, the director or designated representative shall give written notice by certified mail of that recommendation.

Section (C) is a specific exemption for certain types of violations

(C) If any underpayment by a contractor or subcontractor was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll document, the director or designated representative may make a decision ordering the employer to make restitution.

If the court were correct in its read in *Stollsteimer*, Section (B) would be a nullity. All violations would be intentional except those in (C). That, of course, would mean the recommendation of the director of any violation as intentional as set out in section (B) to be superfluous.

The prevailing wage law provides on site review in an effort to avoid these very issues.

Ohio Rev. Code § 4115.071 establishes:

Each contracting public authority that enters into a contract \* \* \* shall, no later than ten days before the first payment of wages is payable to any employee of any contractor or subcontractor, designate and appoint one of its own employees to serve as the prevailing wage coordinator during the life of the contract.

Here, Miami University is assuring Monarch, as the Court of Appeals found, that Salyers was paying the prevailing rate of wages. The issue of general contractor liability as to a penalty is the same as before this Court in *Dean v. Seco Electric* (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837. The court stated, in language applicable here:

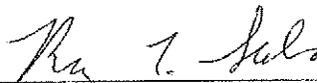
Imposition of the statutory penalty upon sureties such as F & D would thus not serve the purpose of the statute that the General Assembly intended: to penalize past occurrences and deter future incidences of employers not paying prevailing wages.

Assuming, for purposes of this appeal, the general contractor is liable, that does not allow an “automatic win.” Only when Ohio Rev. Code § 4115.13 is complied with does the issue of penalty come into play.

**VI. CONCLUSION.**

For the foregoing reasons, *amicus curiae* AGC of Ohio and ACI request that this Court affirm the decision of the Twelfth District and set aside the decision of the Sixth District.

Respectfully submitted,



---

Roger L. Sabo (0013125)  
Schottenstein Zox & Dunn Co., LPA  
250 West Street  
Columbus, Ohio 43215  
Tel: (614) 462-5030  
Fax: (614) 222-3488

*Counsel for Amicus Curiae  
Associated General Contractors of Ohio and  
Allied Construction Industries*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Merit Brief, *Amicus Curiae*, of the Associated General Contractors of Ohio and Allied Construction Industries was served by U.S. Mail on this   9   day of September, 2009 upon the following:

Joseph M. D'Angelo  
Cosme, D'Angelo & Szollosi Co., L.P.A.  
The CDS Building  
202 North Erie Street  
Toledo, OH 43604  
*Counsel for Doug Bergman, et al.*

N. Victor Goodman  
Mark D. Tucker  
Benesch, Friedlander, Coplan & Aronoff, LPP  
41 South High Street, 26th Floor  
Columbus, Ohio 43215  
*Counsel for Amicus Curiae Ohio State  
Building and Construction Trades Council*

Gregory Parker Rogers  
Matthew T. Byrne  
Taft, Stettinius & Hollister, LLP  
425 Walnut Street, Suite 1800  
Cincinnati, Ohio 45202  
*Counsel for Monarch Construction Co.*

Alan Ross  
Nick A. Nykulak  
Ross, Brittain & Schonberg Co., LPA  
6480 Rockside Woods Blvd., Suite 350  
Cleveland, Ohio 44131  
*Counsel for Amicus Curiae Northern Ohio  
Chapter of Associated Builders and  
Contractors and Associated Builders and  
Contractors of Ohio*

Benjamin C. Mizer  
Alexandra T. Schimmer  
Susan M. Sullivan  
Dan E. Belville  
Lindsay M. Sestile  
Assistant Attorneys General  
30 E. Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
*Counsel for Amicus Curiae State of Ohio*



---

Roger L. Sabo