

IN THE SUPREME COURT OF OHIO

DOUG BERGMAN, *et al.*, : Case No. 2009-0649
: Case No.: 2009-0558 (Consolidated)
Appellants, :
: Certified Conflict on Appeal
v. : Butler County Court of Appeals
: Twelfth Appellate District of Ohio
MONARCH CONSTRUCTION CO. : Case No.: CA2008-02-0044
: Appellee. : Butler County Court of Common Pleas
: Case No. CV2006 02 0605

**BRIEF OF AMICUS CURIAE ABC OF OHIO, INC. AND THE NORTHERN OHIO
CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC.
IN SUPPORT OF APPELLEE MONARCH CONSTRUCTION COMPANY**

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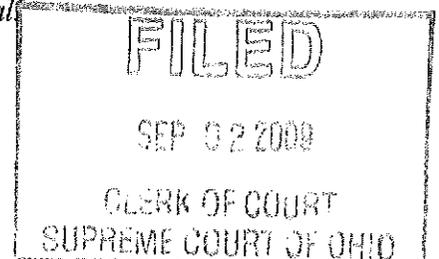
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THE CONCERN OF THE AMICUS CURIAE

ABC of Ohio, Inc. (hereinafter "ABC") is a statewide trade association consisting of over one thousand construction industry employers, including general contractors and subcontractors, suppliers and associates from its three Ohio Chapters – Northern Ohio, Central Ohio, and Ohio Valley Chapters, which adhere to the merit shop, free enterprise philosophy that construction projects should be awarded based upon merit to the lowest responsible bidder. ABC firms employ tens of thousands of Ohio construction industry workers. Its members perform construction work, manufacture/fabricate, supply and transport products and materials under public works construction contracts in the State of Ohio.

ABC is part of Associated Builders & Contractors, Inc., the largest association of construction general contractors, subcontractors, suppliers and associates in America. Its membership includes nearly twenty-five thousand (25,000) construction and construction related firms in eighty-four (84) chapters across the United States employing millions of construction industry workers. The goal of ABC is "to provide the best educational and entrepreneurial activities and ensure all of its members the right to work in a free and competitive business climate, regardless of union or non-union affiliation."

This cause essentially presents two issues for this Court to decide. The first issue is whether 100% penalties must be assessed by a court of common pleas for underpayment violations of Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16. However, all of the Briefs filed by Appellants and their *Amici* concede that the Director of the Department of Commerce, or her designated representative, pursuant to statute has the authority to decide whether or not to assess 100% penalties for underpayment violations pursuant to R.C. 4115.13(C). ABC submits that this admission is dispositive of the issue presented on appeal as

the court of common pleas is vested with all of the investigatory and enforcement powers of the Director when an employee or an interested party files a civil action for enforcement of the provisions of Ohio's Prevailing Wage Law. The decision of the Sixth District Court of Appeals in *IBEW Local 8 v. Stollsteimer Electric* (2006), 168 Ohio App.3d 238, 2006-Ohio-3865, is fundamentally wrong in its interpretation of the authority of the director versus the authority of the trial court and should be overruled.

In other words, and as explained in detail below, when a civil action is filed, the court of common pleas "steps into the shoes" of the Director of the Department of Commerce to decide whether violations of R.C. 4115.03 to R.C. 4115.16 have occurred and can afford to injured persons the remedies of the statute. See R.C. 4115.10 and 4115.16; and *International Brotherhood of Electrical Workers Local 317 v. Southeastern Electrical Construction*, Dec. 30, 1986, 4th Dist. App. No. 85 CA 12, 1986 Ohio App. Lexis 9948. As such, the term "common pleas court" as used in the statute is interchangeable with "director" when a civil action is filed by an interested party or employee seeking to enforce compliance with the law.¹ This Court has already held that the court of common pleas has the same authority and power as the director of the Director of the Department of Commerce to determine intentional violations of the statute, holding the term "director" and "common pleas court" are interchangeable depending upon the venue of the action when interpreting the statute. See *State ex. rel. National Electrical*

¹ It would be absurd to hold that the common pleas court did not assume the powers of the director under the statute when a civil action is filed, especially if the civil action was brought against a contractor by the director. If this were the case the director could make determinations under the statute, i.e. that the underpayment was not the result of a misinterpretation of statute pursuant to R.C. 4115.13(C), and then proclaim to the trial court that this determination is unreviewable by the trial court on the basis that trial court lacks jurisdiction under the statute because the statute used the term "director" instead of "common pleas court?" Such a holding would vest the director with unrestricted authority, denying the contractor of due process under the law.

Contractors Association v. Ohio Bureau of Employment Services (1998), 83 Ohio St.3d 179, 699 N.E.2d 64.

This case presents a situation not contemplated by the Legislature when enacting Ohio's Prevailing Wage Law; the liability of a general contractor for a subcontractor's underpayments or violations of the law. Nowhere in Ohio's Prevailing Wage Law did the Legislature use language or otherwise express an intent to hold a general contractor liable to a subcontractor's employees. The liability of a general contractor for a subcontractor's underpayments was a judicially created remedy that has never been addressed by this Court.²

Thus, and given the facts of this case, it must be stressed that Appellants and their *Amici* are seeking to assess 100% penalties against a contractor who did not violate any provision of the prevailing wage law, but instead was held liable for a subcontractor's underpayments through a judicially created remedy. Surely, if the Legislature had intended not to penalize a contractor who had underpaid its own employees due to a negligent preparation of payroll or a

² See *Harris v. Bennett* (Jul. 26, 1985), 6th Dist. App. No. L-84-445, 1985 WL 7558; *Cremeans v. Jinco* (Jun. 5, 1986), 10th Dist. App. No. 85AP-821, 1986 WL 6334.

The only requirements placed upon the subcontracting of work for a public improvement project interposed by the Legislature are found in R.C. 4115.05 and R.C. 4115.06. R.C. 4115.05 provides: "Every contract for a public work shall contain a provision that each laborer, worker, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section..." and "...No contractor or subcontractor under a contract for a public work shall sublet any of the work covered by such contract unless specifically authorized to do so by the contract."

R.C. 4115.06 states: "In all cases where any public authority fixes a prevailing rate of wages under section 4115.04 of the Revised Code, and the work is done by contract, the 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." These sections do not state a contractor is responsible for a subcontractors violations of the law.

misinterpretation of statute, the Legislature certainly did not intend to assess such penalties against a general contractor who did not violate the law in any way. As such, because the general contractor's liability is a judicially created remedy, not originally contemplated by the Legislature when enacting the statute, the trial court should have the discretion to waive statutory penalties pursuant to R.C. 4115.13(C).

Contrary to the assertions of Appellants and their *Amici*, such a holding will not result in contractors violating prevailing wage laws and underpaying employees until they are "caught." The trial court or the director may always, in their discretion, impose 100% penalties against offending contractors who are deemed to be culpable. The law has "teeth." Such a result instead allows contractors a defense against parties prosecuting prevailing wage claims whose motives are questionable. Mandating 100% penalties for any underpayments and taking away all discretion from the trial court to make determinations that are akin to those made by the director pursuant to R.C. 4115.13(C) will allow interested parties and others with questionable motives to abuse the purpose of prevailing wage statutes and use the law to either deter contractors from bidding on public improvement projects, or to harass those contractors who are successful in obtaining contracts.

Leaving contractors absolutely defenseless to inadvertent payroll errors or imposing liability for 100% penalties resulting from a subcontractor's violations of the law will lead to an increase in the cost of public construction projects. Contractors will not bid on public works projects because the liability imposed upon them outweighs the benefit of performing the work. As more and more contractors stop bidding public works projects because of these unforeseen liabilities, the costs of public construction will increase.

Every contractor, union and non-union alike, is capable of violating prevailing wage laws inadvertently. Payroll calculation errors can occur due to paying the same employees different rates for each classification of work performed on the project. Addition and subtraction errors in calculating a company's credit for fringe benefits can occur. Most common for union contractors, jobsite "journeyman to apprentice" ratio violations often occur. Under prevailing wage law, a company may be allowed one apprentice for every two journeyman working on a project. If one of the journeymen calls off work, or goes home sick for the day, the company may be out of ratio and would be required to pay an apprentice journeyman wages for the day. There can be dozens of journeyman and apprentices working on a jobsite and the ratio violation, although completely unintentional, may go unnoticed. Prevailing wage law was not designed to penalize contractors for inadvertent mistakes in payroll or for misinterpretations of statute if restitution is made to employees who were inadvertently underpaid. R.C. 4115.13(C).

The fundamental premise that the trial court assumes the authority of the director of the Ohio Department of Commerce when a civil action is filed also aids in resolving the second issue presented to this Court regarding whether a public authority is liable to an employee, contractor or subcontractor for the public authority's failure to notify the contractor or subcontractor of a change in the prevailing wage rate pursuant to R.C. 4115.05. Because the prevailing wage statute vests the court of common pleas with jurisdiction to decide all prevailing wage issues arising under the statute when a civil action is filed, the trial court again has the same authority as the director of the Department of Commerce to make this determination pursuant to R.C. 4115.05. Both Appellant and *Amicus* Ohio State Building Trades Council agree that a contractor can file a claim for contribution against a public authority for a notification violation of R.C. 4115.05. However, to do so intrinsically requires this Court to substitute the "trial court" in

place of “director” to determine whether a violation of R.C. 4115.05 has occurred. See *Southeastern Electrical Construction, supra* and *National Electrical Contractors, supra*.

Again, the common pleas court “steps into the shoes” of the director and proceeds to decide the claims presented therein, whether the case is brought by the director, by employees or by interested parties. To hold otherwise would eviscerate relevant portions of the statute simply based upon the venue of the case and will prevent employees, contractors and subcontractors from obtaining due process under the law which the Legislature intended to afford such parties through the application of R.C. 4115.05 and R.C. 4115.13(C).

More so, the manner in which counsel for Plaintiff or for the Defendant choose to litigate this case or to prosecute their claims against the public authority does not in any way contravene the authority and jurisdiction of the common pleas court to make a determination regarding a public authority’s liability in a civil action pursuant to R.C. 4115.05. Hence, even if this Court were to hold that Monarch is primarily liable for underpayments caused by a public authority pursuant to R.C. 4115.05, or that Plaintiffs should have prosecuted their claim against the Miami University for its portion of the underpayment due to them, this finding against Miami University is still a determination that the court of common pleas court has jurisdiction and authority to make in substitution of the director.

Members of ABC, members of other contractor associations and the public in general will be seriously impacted in denying the trial court discretion to assess penalties on public work projects or by limiting a public authority’s liability resulting from violations caused by the public authority pursuant to R.C. 4115.05. It is respectfully requested that this Court affirm the holding of the Twelve District Court of Appeals in favor of Monarch for the reasons stated by the Appellate Court, as well as for the additional reasons explained and stated herein.

STATEMENT OF FACTS

ABC adopts the Statement of Facts as set forth in Appellee Monarch Construction Company's Merit Brief, but wishes to emphasize the following facts for this Court:

Monarch Construction Company ("Monarch") was the General Contractor for the Student Housing Project ("Project") for Miami University. Unbeknownst to Monarch, Don Salyers Masonry ("Salyers"), a subcontractor of Monarch had underpaid its employees the applicable prevailing wage rate for work those employees performed on the Project. Monarch inquired as to the prevailing wage compliance of Salyers multiple times and was assured by Miami University that Salyers was paying its employees the applicable prevailing wage. Monarch did not itself underpay any employee who performed work on the Project, nor was it found to have violated any other provision of Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16. Monarch was notified of the violations of Salyers only after the Department of Commerce issued a determination finding that Salyers employees were underpaid \$368,266.34. The back pay liability, as well as the issue regarding assessment of penalties and interest in this case, are solely caused by the actions of Salyers.

Moreover, the Director's designated representative, Robert Kennedy, the Superintendent of the Bureau of Wage and Hour, Division of Worker Safety within the Ohio Department of Commerce testified that it is the Department's position that the assessment of 100% penalties against contractors and subcontractors found to have underpaid employees was discretionary and a "bargaining tool" the Department uses to resolve prevailing wage complaints. In fact, the Department of Commerce had used its discretion in this case and decided not to assess Monarch with penalties for Salyers' underpayments with regard to the employees who elected to have the Department of Commerce represent them. Essentially, the 52 employees of Salyers who were

represented by the Department of Commerce had resolved their issues with Monarch long ago, while the 34 employees who chose to be represented by legal counsel and had filed a civil action with the trial court remain unresolved. Appellants represented by legal counsel repeatedly sought to obtain double recovery of the back pay allegedly due from Salyers by objecting and refusing to allow any credit to Monarch for the fringe benefits Salyers had paid for and provided to these employees.

Last, when Appellants brought this action against Monarch, Appellants also had filed suit against the public authority, Miami University. However, before trial, the Appellants did not do anything to prevent the dismissal of Miami University from this lawsuit, who filed an unopposed Civ. R. 12(b)(6) motion. It is undisputed that Miami University failed to notify Monarch or Salyers of a wage rate change on the Project. However, testimony from Robert Kennedy at trial indicated that the Department of Commerce was in the process of negotiating with Miami University to recover the wages due to Salyers' employees caused by Miami University's violation of R.C. 4115.05.

ARGUMENT

Proposition of Law No. 1: When a civil action is filed to enforce the provisions of Ohio's Prevailing Wage Law, the trial court assumes the authority and role of the director of the Department of Commerce under the statute and has the discretion to determine whether or not to assess penalties and interest against a contractor or subcontractor pursuant to R.C. 4115.13(C) depending upon the particular facts of the case.

A. The trial court has the same authority as the director of the Ohio Department of Commerce under prevailing wage law statutes.

Many Ohio courts, including this Court, have recognized that Ohio's Prevailing Wage statute is ambiguous and requires a degree of judicial interpretation in order to decide issues arising under its provisions. See *Sheet Metal Workers Local 33 v. Gene's Refrigeration*, 122 Ohio St.3d

248, 2009-Ohio-2747; *State ex. rel. Harris v. Williams* (1985), 18 Ohio St.3d 198; *Rausch v. Farrington Construction* (1988), 51 Ohio App.3d 127; and *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24. As such, this Court has held prevailing wage law requirements must be read *in pari materia* in order to discover and carry out the legislative intent. *Gene's Refrigeration* at ¶38. See also, *State v. Moaning* (1996), 76 Ohio St.3d 126, 128; *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535, 1998 Ohio 190, 696 N.E.2d 1079 (statutes pertaining to the same general subject matter must be construed *in pari materia*).

Moreover, in construing a statute, it is presumed that the Legislature intended compliance with the state and federal constitutions; intended the entire statute to be effective; intended a just and reasonable result from its construction; and intended a result feasible of execution. See R.C. 1.47. To accomplish these goals this Court will consider the following factors in analyzing an ambiguous statute: (A) the object sought to be attained; (B) the circumstances under which the statute was enacted; (C) the legislative history; (D) the common law or former statutory provisions, including laws upon the same or similar subjects; (E) the consequences of a particular construction; and (F) the administrative construction of the statute. See R.C. 1.49 and *Gene's Refrigeration Supra* at ¶29.

This Court has held that courts must avoid statutory interpretations that create absurd or unreasonable results. See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St. 3d 262, 2005 Ohio 6432, 838 N.E.2d 658. When possible, courts should also avoid interpretations that create confusion or uncertainty. See *Crawford Cty. Bd. of Commrs. v. Gibson* (1924), 110 Ohio St. 290, 298-299, 2 Ohio Law Abs. 341, 144 N.E. 117.

In this case, the starting point of the analysis of the issues presented begins with ascertaining the role of the trial court in a prevailing wage lawsuit. ABC submits that when a civil

action is filed under R.C. 4115.10 or R.C. 4115.16, the trial court “steps into the shoes” of the director of the Department of Commerce to investigate and determine whether a violation of Ohio’s Prevailing Wage Law has occurred. R.C. 4115.10 does not specifically define the role of the trial court when a civil action is filed by an employee, but R.C. 4115.16, which is an analogous and deals with civil actions filed by “interested parties” clearly defines the trial courts role. Because of the ambiguity contained in R.C. 4115.10, these statutory sections must be construed *in pari materia*. R.C. 4115.16(B) provides in pertinent part:

If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director...The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code.

(Emphasis added).

R.C. 4115.16(B) explicitly provides that when a civil action is filed, the trial court “shall hear and decide the case” and that “the court’s finding that a violation has occurred shall have the same consequences as a like determination by the director.” When a civil action is filed by an employee or an interested party, this statutory language specifically used by the Legislature vests the trial court with the same investigatory and enforcement powers of the director to carry forth the purpose of the statute. As such, the Sixth District’s decision in *IBEW, Local Union No. 8 v. Stollsteimer Elec., Inc.*, 168 Ohio App. 3d 238, 243-244 finding that the trial court does not have the same authority of the director of the Ohio Department of Commerce to make determinations under R.C. 4115.13 is flawed in its reasoning and should be overruled.

In *Stollsteimer Electric*, the Sixth District held that R.C. 4115.13 was clear and unambiguous in deciding whether a trial court had jurisdiction under the statute to determine that a contractor's violation of Ohio Prevailing Wage Law was due to an erroneous preparation of payroll or a misinterpretation of statute pursuant to R.C. 4115.13(C). The Sixth District held that R.C. 4115.13(C) specifically referenced actions undertaken exclusively by the director of the Department of Commerce, and not to actions by the trial court. *Id.* Accordingly, the court found the trial court had erred in finding that a contractor had inadvertently violated the law under R.C. 4115.13(C), by refusing to assess 100% penalties against the contractor under R.C. 4115.10 and in denying the union its attorney's fees under R.C. 4115.16(D).

Specifically, the Sixth District held, "R.C. 4115.13(C), when read *in pari materia* with the other provisions of the prevailing wage law, clearly only applies to those situations in which the Director of Commerce has made a finding that an underpayment of wages was the result of a misinterpretation of the prevailing wage law or an erroneous preparation of payroll documents and the employer who made the mistake has made restitution for its error. In the present case, the director made no such finding." *Id.* at 243-244 (emphasis added). However, in reading the statute *in pari materia*, the Sixth District never addressed the language contained in R.C. 4115.16(B) which vests the trial court with the powers of the director to make "like determinations" when a civil action is filed. Furthermore, the Sixth District's interpretation of the statute is in direct conflict with this Court's holding 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.

In *National Electrical Contractors Association*, this Court held that an electrical contractor association who filed an action in mandamus against the OBES to force the OBES to

render a ruling with regard to whether certain contractors had intentionally violated Ohio's Prevailing Wage Law had an adequate remedy at law in filing a civil action under R.C. 4115.16(A) or (B). Specifically this Court held:

Insofar as appellants challenge the OBES Administrator's determinations that no violations of the prevailing wage law have occurred, that the violations were not intentional, or that the administrator has not ruled on the merits of the interested parties' complaints, the court of appeals correctly held that R.C. 4115.16 provides an adequate remedy in the ordinary course of law precluding extraordinary relief in mandamus. See R.C. 4115.16(A) and (B). In this regard, after construing R.C. 4115.13 and 4115.16 in pari materia, the "merits" of the complaint to be ruled on by the administrator include the determination whether any violation of the prevailing wage law provisions was intentional. Appellants thus have an adequate remedy by filing a complaint in the court of common pleas under R.C. 4115.16(B) if the administrator has not made this determination within the specified sixty-day period.

(Id. at 183, emphasis added).

Intentional violations are addressed in R.C. 4115.13 and provide in part:

(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 to the contractor, subcontractor, or officer of the contractor or subcontractor which also shall state that the contractor, subcontractor, or officer of the contractor or subcontractor may file with the director an appeal of the recommendation within thirty days after the date the notice was received.

(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 documents, the director or designated representative may make a decision ordering the employer to make restitution to the employees, or on their behalf, the plans, funds, or programs for any type of fringe benefits described in the applicable wage determination. In accordance with the finding of the director that any underpayment was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll documents, employers who make restitution are not subject to any further proceedings pursuant to sections 4115.03 to 4115.16 of the Revised Code.

(D) If the director or designated representative makes a decision, based upon findings of fact, that a contractor, subcontractor, or officer of a contractor or subcontractor has intentionally violated sections 4115.03 to 4115.16 of the

Revised Code, the contractor, subcontractor, or officer of a contractor or subcontractor is prohibited from contracting directly or indirectly with any public authority for the construction of a public improvement or from performing any work on the same as provided in section 4115.133 [4115.13.3] of the Revised Code.

* * *

(G) In determining whether a contractor, subcontractor, or officer of a contractor or subcontractor intentionally violated sections 4115.03 to 4115.16 of the Revised Code, the director may consider as evidence either of the following:

* * *

(Emphasis Added).

After reviewing the language used in the statute under R.C. 4115.16(B) and R.C. 4115.13, and in order to render the holding in *National Electrical Contractors Association* that the contractors association had an adequate remedy at law under R.C. 4115.16(B), this Court reasoned that trial court has the same authority as the director to determine intentional violations, even though the statute only mentions the term “director.” Hence, the Sixth District’s interpretation that R.C. 4115.13(C) only applies to actions undertaken by the director is clearly incorrect.³

This Court’s rationale in *National Electrical Contractors*, vesting the trial court with the same investigatory powers as the director under R.C. 4115.13 is fully supported by the Fourth District’s decision in *International Brotherhood of Electrical Workers Local 317 v. Southeastern Electrical Construction*, Dec. 30, 1986, 4th Dist. App. No. 85 CA 12, 1986 Ohio App. Lexis 9948.

³ If the Sixth District in *Stollsteimer Electric* is correct in its interpretation of R.C. 4115.13, then the trial court is without jurisdiction to hear intentional violation claims arising under Ohio’s Prevailing Wage Law pursuant to R.C. 4115.16(B), except for those provisions providing for an appeal from the Director’s decision on an intentional violation as provided for in R.C. 4115.13 and R.C. 4115.16(A). In other words, the statute cannot be interpreted to allow an “interested party” to have its cake and eat it too. Either the trial court “steps into the shoes of the director” pursuant to the provisions of R.C. 4115.13 to determine intentional violations and also to afford contractors the safe harbor protection in R.C. 4115.13(C), or it does not. The R.C. 4115.13 cannot be inconsistently interpreted to mean “director” for one section and not for another.

In *Southeastern Electrical Construction*, the Fourth District held that “The evident purpose of this Section [R.C. 4115.16(B)] is, in effect, to substitute the court in place of the director who has not promptly acted upon the complaint and to enter appropriate orders to enforce the act.” *Id.* at 16. The court stated that R.C. 4115.10 and R.C. 4115.16 must be read *in pari materia* and that if an interested party filed a lawsuit under R.C. 4115.16(B), and the court found that a violation existed, then the court must order the director to take action under R.C. 4115.10. This predicates that the trial court has the same investigatory and enforcement powers of the director when a civil action is filed.

Contrary to the holding in *Stollsteimer Electric*, the trial court “steps into the shoes of the director” to make determination under R.C. 4115.13(C). To hold otherwise would render the provisions of R.C. 4115.13(C) useless in all civil actions filed under R.C. 4115.10 or R.C. 4115.16. For instance, R.C. 4115.16(B) provides that if an interested party files a civil action, the interested party shall file a complaint with the trial court and serve upon the director a copy of the civil complaint. Upon receiving a copy of a filed civil complaint, the “director shall cease investigating or otherwise acting upon the [administrative] complaint filed pursuant to division (A) of this section.” In the interim the court shall hear and decide the merits of the civil complaint and shall like determinations of the director. R.C. 4115.16(B) then concludes that “upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.” Thus, if the trial court were unable to assume the authority of the director to make determinations under R.C. 4115.13(C) in a civil action, as was decided by the Sixth District in *Stollsteimer Electric*, at no time during or after the lawsuit is filed will the director be afforded an opportunity to make the determination under R.C. 4115.13(C), rendering its application completely useless. This was not the intent of the Legislature.

It is clear from the above statutory analysis that the trial court has the same powers of the director to make determinations when a civil action is filed by an employee or an interested party to enforce prevailing wage laws. As such, R.C. 4115.13(C) determinations and R.C. 4115.05 determinations are within the purview of the trial court to decide in this case and are dispositive of the issues discussed below.

1. Assessing penalties and interest is in the discretion of the trial court.

Appellants and their *Amici* make much to do over the definitions of the terms “may” and “shall” as used in the prevailing wage law statute, while ignoring specific language used by the Legislature in R.C. 4115.10 which renders their lengthy analysis meaningless to the facts of this case. R.C. 4115.10 provides in 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, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement, **except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code**, 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 employee may file suit for recovery within ninety days of the director's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(Emphasis Added).

R.C. 4115.13(C) provides the following:

If any underpayment by a contractor or subcontractor was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll

documents, the director or designated representative may make a decision ordering the employer to make restitution to the employees, or on their behalf, the plans, funds, or programs for any type of fringe benefits described in the applicable wage determination. In accordance with the finding of the director that any underpayment was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll documents, employers who make restitution are not subject to any further proceedings pursuant to sections 4115.03 to 4115.16 of the Revised Code.

(Emphasis added).

R.C. 4115.13(C) is direct evidence of the Legislature's intent not to penalize employers who have inadvertently underpaid their employees due to a misinterpretation of statute or an erroneous preparation of payroll documents. R.C. 4115.13(C) allows the trial court or the director to make a determination and order restitution to be made which provides a contractor or subcontractor with a "safe harbor." "Further proceedings" under R.C. 4115.03 to R.C. 4115.16 include findings that the employer committed a "violation" of Ohio's Prevailing Wage Law or subjecting the employer to 100% penalties or attorneys' fees. In enacting R.C. 4115.13(C), the Legislature was cognizant that every contractor, even the most diligent, may have some minor inadvertent payroll errors and intended this section to provide "discretion" for the director and the trial court to carry forth the true purpose of the statute, avoiding findings of a "violation" for negligent mistakes or other trifling non-conformities with the law.

It is axiomatic that the primary purpose of Ohio's Prevailing Wage Law is to "prevent the undercutting of employee wages in the private construction sector" and to ensure the competitive bidding process for public improvement projects is protected. *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 431 N.E.2d 311; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26 550 N.E.2d 461, 463. This case does not present a situation where employee's wages have been undercut by Monarch, nor does assessing penalties and interest against Monarch serve to protect the competitive bidding process.

Here, Salyers underpaid its employees who performed work on the Project, not Monarch. Monarch is being held liable for Salyers underpayments because it was a subcontractor of Monarch. This remedy was judicially created and was not intended by the Legislature when drafting R.C. 4115.13(C). Surely, if the Legislature intended to forgive contractors when underpaying its own employees due to payroll errors or from a misinterpretation of statute, the Legislature would have also intended to protect employers who were not at all culpable, and where the underpayments to employees were solely caused by the actions of another employer. More so, the imposition of 100% penalties by the trial court would be done when the court, in its discretion, determines such action is needed to “prevent further violation” of the statute. See R.C. 4115.16(B). Here, because Monarch is not culpable for the underpayments in any way to Salyers’ employees, imposing 100% penalties against Monarch would in no way serve to “prevent further violation” of the statute, because Monarch never violated any provision of the statute to begin with.

Both the trial court and the Court of Appeals recognized in this case that Monarch was not culpable in any way for the underpayments due to Salyers’ employees. Both courts recognized that R.C. 4115.13(C) allowed the court discretion in determining whether to assess 100% penalties against Monarch. Although the Appellate Court’s reasoning is sound that R.C. 4115.10 25% interest penalty utilizes the word “may” and is clearly discretionary, and that the employees or an interested party would lack standing to seek the 75% penalty on behalf of the Department of Commerce, the Appellate Court missed what should have been the essential holding of the case to wit: A finding that Monarch should not be assessed penalties, interest or attorney’s fees under R.C. 4115.13(C) because the underpayments found in this case were caused solely by the actions of Salyers.

The case law discussed above clearly allows the trial court in a civil action to make determinations under R.C. 4115.13(C). As such, a R.C. 4115.13(C) finding made by the trial court would override the 100% penalties and attorneys fees provisions discussed in R.C. 4115.10 and R.C. 4115.16. A detailed discussion regarding the use of the terms “may” and “shall” is simply not needed in this case given the overriding effect of R.C. 4115.13(C). Affording the trial court the ability to make finding under R.C. 4115.13(C) does not preclude the assessment of 100% penalties or attorney’s fees against an offending employer, it simply allows courts to decide cases brought before them on their particular facts. How the cases are litigated and the actions of the contractor in underpaying its employees will be factors that go into the trial court’s decision, protecting contractors who inadvertently commit an error in preparing their payroll, unintentionally misinterpret a provision of the statute, and protecting those contractors who are held liable for their subcontractor’s underpayments.

Such a result affords contractors and other employers subject to Prevailing Wage Laws with due process, makes the entire prevailing wage statute consistent and effective, and most importantly, provides contractors and subcontractors subject to the statute with a just and reasonable result from its construction. To read the statute otherwise would create absurd or unreasonable results and would only serve to inject confusion and uncertainty into the law with respect to when R.C. 4115.13(C) applies and to whom it would afford effective relief.

Mandating an assessment of 100% the amount underpaid in penalties along with an award of attorneys fees, no matter the reason for the underpayment as requested by Appellants and their *Amici*, is patently unjust and leaves contractors and subcontractor absolutely defenseless in prevailing wage lawsuits. Leaving the trial court with absolutely no discretion regarding whether to assess penalties or attorney’s fees in a civil action under Ohio’s Prevailing Wage Law would

place an inordinate amount of power in the hands of interested parties and attorneys who would seek civil actions under the law solely for profit, or to use such law to deter contractors from bidding public projects or to harass those contractors who are successful in obtaining public contracts. This was clearly not the intent of the Legislature when enacting the statute.

For the reasons stated herein, ABC respectfully requests this Court affirm the decision of the Twelfth District Court of Appeals in favor of Monarch and to adopt Proposition of Law No. 1 as stated herein.

Proposition of Law No. 2: When a civil action is filed to enforce the provisions of Ohio's Prevailing Wage Law, the trial court assumes the authority and role of the director of the Department of Commerce and can determine whether a public authority is liable for any underpayments owed to employees pursuant to R.C. 4115.05.

The trial court has the authority of the director the Department of Commerce in a civil action to make determinations under R.C. 4115.05 regarding the liability of a public authority for failing to notify a contractor or subcontractor of a change in the prevailing wage. The issue presented to this Court is who is required to bring this claim, the affected contractor, employee or both. ABC submits that either the affected contractor or the employee may bring an action against a public authority for a notification violation of R.C. 4115.05. The authority of the director to do so is clearly established by the statute. See R.C. 4115.10. R.C. 4115.05 provides in 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.

It is important to note that in presenting this argument, both the Appellants and *Amicus* Ohio Building Trades Council concede that the trial court has the same authority as the director to make this determination. This concession establishes the trial court's ability to make a "like determination" of the director pursuant to R.C. 4115.13(C) as discussed in detail above.

This Court in *Ohio Asphalt Paving v. Ohio Department of Industrial Relations*, 63 Ohio St.3d 512, 589 N.E.2d 35, held 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 contract even where a public authority fails to include prevailing wage specifications in that contract. *Id.* syllabus ¶1. This Court further held that a contractor may maintain a cause of action in contribution where the facts underlying a particular public contract indicate culpability on the part of the public authority in failing to comply with prevailing wage provisions. *Id.* syllabus ¶2. As such, this Court has already determined that a contractor can bring an action for contribution against a public authority.

The statute is silent as to whether a claim against the public authority may be brought by an employee who was underpaid the so called prevailing wage on a public works project, although all parties, except for the State of Ohio, concede this right is expressly provided to interested parties, contractors and the director by statute. See R.C. 4115.032, R.C. 4115.16 and R.C. 4115.10. However, R.C. 4115.10(A) does expressly provide, "The employee may file suit for recovery within ninety days of the director's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees

allowed by the court.” (Emphasis added). The language used in the statute does not merely encompass underpayment violations pursuant to R.C. 4115.10, but includes any and all violations found throughout R.C. 4115.03 to R.C. 4115.16, including violations of a public authority pursuant to R.C. 4115.05. See also R.C. 4115.10(B) and (C) (actions brought by director on behalf of employees to enforce R.C. 4115.03 to R.C. 4115.16). Further, R.C. 4115.16(B) expressly provides that the public authority may be made a party to a civil action, but not the director.

As such, the trial court did find that a portion of the underpayment due to Salyers employees was caused by Miami University’s violation of R.C. 4115.05. When the Appellants filed their lawsuit, they specifically filed suit against Miami University. Just before trial commenced, Appellants for some reason, did not oppose the Civ. R. 12(b)(6) motion filed by Miami University and Miami University was dismissed from the lawsuit. Appellants did not raise Miami University’s dismissal on appeal as an assignment of error, nor did they otherwise challenge the undisputed fact that Miami University was liable for some of the underpayments due to them. Thus, Appellants have knowingly waived their right to challenge the decision of the trial court when the trial court reduced the back pay Monarch owed due to Miami University’s violation of R.C. 4115.05.

Moreover, the Director’s designated representative Robert Kennedy testified during trial that he was in the process of negotiating with Miami University to recover the wages due to Salyers’ employees caused by Miami University’s violation of R.C. 4115.05. As such, an action may still be brought by the director or by the employees against Miami University to recover wages due to Miami University’s violation of R.C. 4115.05. To allow the Appellants to recover from both Miami University and Monarch would be providing them with double recovery. More

so, holding Miami University primarily liable to a contractor and to employees of the contractor will provide an incentive for public authorities to ensure they are fulfilling their statutory obligations under the Prevailing Wage Law statute.

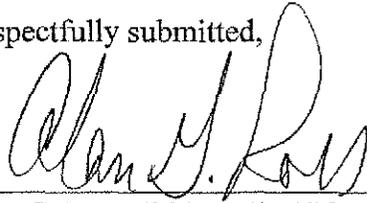
In essence, the manner in which counsel for Plaintiffs or for the Defendant choose to litigate this case or to prosecute their claims against the public authority does not in any way contravene the authority and jurisdiction of the common pleas court to make a determination regarding a public authority's liability in a civil action pursuant to R.C. 4115.05. ABC submits that both the employee and the contractor can maintain a civil action against a public authority for violation of R.C. 4115.05. In failing to challenge Miami University's dismissal from the lawsuit, Appellants waived their right to recover these sums from Monarch and should be estopped from doing so on appeal.

ABC respectfully requests this Court to affirm the Twelfth District Court of Appeals decision in favor of Monarch regarding this issue and to adopt ABC's Proposition of Law No. 2 as stated herein.

CONCLUSION

ABC respectfully requests this Court to adopt the two propositions of law presented by ABC herein and affirm the Court of Appeals decision in favor of Appellee Monarch Construction Company.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that one copy of the foregoing Amicus Brief of ABC of Ohio, Inc. and Associated Builders & Contractors of Ohio, Inc. was served this 1st day of September 2009 via U.S. Mail, postage prepaid, upon the following:

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