

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

Ohio Valley Associated Builders and  
Contractors,

Plaintiff-Appellee,

v.

Industrial Power Systems, Inc.,

Defendant-Appellant.

: Supreme Court Case No.

: **10-2001**

: On Appeal from the  
: Lucas County Court of Appeals,  
: Sixth Appellate District,  
: Court of Appeals No. L-10-1099

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT INDUSTRIAL POWER SYSTEMS

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Jill A. May (0072623)  
Bradley C. Smith (0023936)  
Brock A. Schoenlein (0084707)  
Flanagan, Lieberman, Hoffman & Swaim  
15 W. Fourth St., Suite 100  
Dayton, Ohio 45402  
(937) 223-5200  
Fax: (937) 223-3335  
jmay@flhslaw.com

Attorneys for Plaintiff-Appellee OVABC

Luther L. Liggett, Jr. (0004683)  
Matthew T. Anderson (0082730)  
LUPER NEIDENTHAL & LOGAN  
50 W. Broad St., Suite 1200  
Columbus, Ohio 43215-3374  
(614) 229-4423  
lliggett@lnlattorneys.com  
(614) 229-4473  
manderson@lnlattorneys.com  
Fax: (866) 345-4948

Attorneys for Defendant-Appellant IPS

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OF APPELLANT INDUSTRIAL POWER SYSTEMS

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A construction trade association, having a member contractor who submits a bid on any aspect of a public construction project, enjoys no standing pursuant to R.C. §4115.03(F) to challenge an individual contract awarded to another contractor for another contract, if the member contractor did not bid on that other contract, suffered no damage or injury by the award of that contract, had no personal stake in the outcome, and has no actual dispute with the other contractor.

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Exhibit A: Opinion and Judgment Entry, October 8, 2010, 6th Dist. Court of Appeals No. L-10-1099, *Ohio Valley Associated Builders & Contrs. v. Indus. Power Sys.*, 2010-Ohio-4930.

Exhibit B: Opinion and Judgment Entry, March 8, 2010, Lucas County Common Pleas Court No. CI09-1366, *Ohio Valley Associated Builders & Contrs. v. Indus. Power Sys.*

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT INDUSTRIAL POWER SYSTEMS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
AND GREAT GENERAL INTEREST

This is a case of first impression, and involves standing to sue under Ohio's Prevailing Wage law. Specifically, the issue at bar is whether Ohio statute confers standing upon a construction trade association to challenge another contractor's compliance with Prevailing Wage law where the trade association's member contractor did not bid on the contract awarded to the purported violator, and has suffered no damages.

The Sixth District Court of Appeals' ruling is in direct contravention of the Modern Courts Amendment to the Ohio Constitution, Art. IV, Sec. 5(B). The Modern Courts Amendment provides that rules prescribed by the Supreme Court of Ohio governing practice and procedure in the courts of this State (i.e. the Ohio Civil Rules) take precedence over any and all laws in conflict.

The Sixth Appellate District disregards the Ohio Constitution, instead holding that "the only issue is whether ABC is an interested party as defined in R.C. 4115.03(F), common law standing notwithstanding." However, "interested party" standing afforded by Ohio's Prevailing Wage law cannot be held to abrogate the basic tenets of standing under Ohio Civil Rule 17, promulgated by this Court.

Civil Rule 17 and R.C. 4115.03 must be read *in pari materia* if possible, rather than

create a conflict. Yet the Sixth Appellate District does not do this, instead choosing to disregard, completely, standing established under Civil Rule 17 and the applicable common law.

Whether the statute should be read consistently with standing principles or in contrast is the issue. This case is therefore one of public and great general interest, and has far-reaching implications.

In addition, the Sixth Appellate District's opinion is in direct conflict with several other holdings of Ohio Courts regarding the application of "interested party" standing under Ohio's Prevailing Wage law, R.C. 4115.16. The opinion rendered by the Sixth Appellate District gives uncertainty to the building industry as to exactly who can file suit to redress a purported violation of Ohio's Prevailing Wage law, and is therefore an issue of public and great general interest, and especially considering the inconsistency with which Ohio's Prevailing Wage law has been applied by the Sixth District Court of Appeals, compared to other Ohio Courts.

In order to redress an alleged violation of R.C. Chapter 4115, a plaintiff must be an "interested party." R.C. 4115.16(B). As applicable at bar, an "interested party" is defined as an association having a member that "submits a bid for the purpose of securing the award of a contract for construction of the public improvement." R.C. 4115.03(F)(4).

This provision thus provides a remedy for those persons that bid against the

purported violator of Ohio's Prevailing Wage Law. The statute does not confer standing to a contractor working on an unrelated project, or for an unrelated owner.

Clearly intended by the General Assembly is that the party/plaintiff must have an actual interest in the controversy, not merely the curiosity of an interested bystander.

At bar, the Lucas County Common Pleas Court held the rule of law to be:

The Court finds that IPS is entitled to summary judgment because ABC lacks standing under R.C. 4115.03(F)(4) to bring an interested-party prevailing-wage action against IPS. \*\*\* [However,] ABC admits that it claims no damages with respect to any individual employee or contractor and "that neither it nor any of its members have suffered any specific monetary damage as a result of IPS's actions as alleged in Plaintiff's complaint" Opinion and Judgment Entry, pp. 4, 7-8, Exhibit B hereto.

This Sixth District Court of Appeals reversed, holding the rule of law to be:

By enacting R.C. 4115.16(B) the Ohio Legislature conferred a specific statutory grant of authority for "interested parties," as defined in R.C. 4115.03(F), to file a prevailing-wage action in the common pleas court in the event the commerce director fails to rule on the administrative complaint within sixty (60) days. [Citation omitted.] As such, the only issue is whether ABC is an interested party as defined in R.C. 4115.03(F), common law standing notwithstanding. Opinion, p. 14, Exhibit A hereto.

The Sixth District Court of Appeals concluded:

ABC is an interested party under R.C. 4115.03(F)(1) & (4)'s plain language since ABC is *any* (of whatever kind) association having as members *any* (of whatever kind) person [Westfield Group] who submitted a bid for the purpose of securing the award of a contract for construction of the University of Toledo public improvement projects. [Citation omitted.] As such, ABC had standing to file a complaint with the director of commerce and subsequently file a complaint in the court of common pleas pursuant to R.C. 4115.16(A)-(B). [Emphasis in original.]

However, the Ninth District Court of Appeals ruled otherwise in *State ex rel. N. Ohio Chptr. & Constrs., Inc. v. Barberton City Sch. Bd. of Educ.*, 2010-Ohio-1826, ¶¶ 14, 20.

In that case, an affiliated trade association and an unsuccessful contractor challenged two public agencies and the successful bidder for violation of Ohio's Prevailing Wage law. In upholding dismissal of the unsuccessful bidder, the Ninth District Court of Appeals held the rule of law to be:

Though Fechko [unsuccessful bidder] provides ample citations to case law which support its assertion that a party must have actually bid on a project in order to have standing to later challenge the bid award, those cases provide only the threshold requirement necessary to challenge the propriety of a bid award. [Citations omitted.] That is, while Fechko correctly notes that a bidder must, in fact, submit a bid on a project in order to have standing and allege an actual injury, it incorrectly concludes that if a party submits a bid, it is able to demonstrate actual injury simply by having done so. Such is not the case. \*\*\* Based on our determination that Fechko lacked standing to bring this action based on the absence of any actual injury, we necessarily conclude that ABC lacked standing as well. 2010-Ohio-1826, at ¶¶ 14, 20.

The Supreme Court of Ohio refused a discretionary appeal on the following

Proposition of Law:

Proposition of Law No. 2: A contractor that submitted a bid for a contract on a school construction project and a trade association representing that contractor and other contractors who intend to bid on the project, have standing to challenge unlawful bid specifications included on that school construction project by a school board and the OSFC. *State ex rel. N. Ohio Chapter of Associated Builders & Constrs., Inc. v. Barberton City Sch. Bd. of Educ.*, 2010-Ohio-4542.

Because the Supreme Court rejected appeal on the issue of standing for lack of damages, the law of the Ninth District remains directly opposite the Sixth District Court of Appeals decision herein.

Consistent with the Ninth District, the Montgomery County Common Pleas Court held in *Ohio Valley Associated Builders and Contractors v. DeBra Kuempel* (C.P. Montgomery; June 17, 2010), Case No. 2009-CV-448, now on appeal to the Second District Court of Appeals, Case No. CA 24138:

The Court finds the holding in *Ohio Valley Associated Builders And Contractors v. York* [Butler County Common Pleas No. CV 2009-01-0303, December 16, 2009] persuasive and adopts it herein. The court in *York* found that the plaintiff was not an "interested party" under O.R.C. 4115.03 because none of plaintiff's members bid on the same contract for the project as defendant. The court reasoned that "\*\*\*\* OVABC would have this court allow an association having a member that submits a bid on any aspect of a public construction contract to have standing to challenge any contract awarded to another entity for any other work, even if, as here, that other work is unrelated to what the member bid on. This court can not countenance that interpretation of R.C. 4115.03(F). Such an interpretation is contrary to basic principles of standing." Decision, Order and Entry, pp. 6-7.

Also consistent with the Ninth District, the Butler County Common Pleas Court held in *Ohio Valley Associated Builders and Contractors v. Rapier Electric* (C.P. Butler; August 10, 2010) Case No. CV2009-09-4241, now on appeal to the Twelfth District Court of Appeals, Case No. CA 2010-08-217:

Essentially, OVABC would have this Court allow an association having a member that submits a bid on *any* aspect of a public construction contract to have standing to challenge *any* contract awarded to another entity for any other work, *even if, as here, that other work is unrelated to what*

*the member bid on.* This Court cannot uphold that interpretation of R.C. 4115.03(F). Such an interpretation is contrary to basic principles of standing. \*\*\* Otherwise, HGC and consequently OVABC, could contest Defendant's electrical contract even though they suffered no damage or injury by the award of that contract, had no personal stake in the outcome, and have no actual dispute with Defendant, a result adverse to the basic principles of standing. Decision and Entry, pp. 4-6. [Emphasis in original.]

The practical effect of the Sixth Appellate District's ruling at bar is that any person, no matter how far removed from the public improvement contract at issue, qualifies as an "interested party" and can file a lawsuit for alleged violations of Ohio's Prevailing Wage law, despite having suffered no damages, despite having no personal stake in the outcome, and despite having no actual dispute with the purported violator.

To the contrary, Ohio's Prevailing Wage law, R.C. Chapter 4115, does not grant such broad standing to sue. Moreover, and as or more importantly, under the Ohio Constitution, "interested party" standing conferred by Ohio's Prevailing Wage law cannot supersede rules of court promulgated by this Court. Given the far-reaching implications of the Sixth District's opinion, and compared to the interpretation afforded to "interested party" standing by other Ohio Courts, this matter is of public and great general interest.

## STATEMENT OF THE CASE AND FACTS

This case is not about an injured party seeking a remedy, but about harassment of a contractor because of a political battle between Plaintiff-Appellee, Ohio Valley ABC contractors ("ABC") and labor unions. ABC suffered no harm, sought no damages, and by its own admission, desires to use the Courts to effect legislative changes to Ohio's prevailing wage laws.<sup>1</sup> ABC claimed only attorney's fees for bringing this action.

The trial court correctly granted summary judgment to IPS on the basis that ABC lacks standing under R.C. 4115.03(F)(4) to bring an interested-party prevailing wage complaint against IPS. The trial court based its holding on ABC's admission that neither it nor any of its members suffered any damages resulting from IPS's alleged non-compliance with Ohio's Prevailing Wage law.

The Appellate Court reversed, holding:

ABC is an interested party under R.C. 4115.03(F)(1) & (4)'s plain language since ABC is *any* (of whatever kind) association having as members *any* (of whatever kind) person [Westfield Group] who submitted a bid for the purpose of securing the award of a contract for construction of the University of Toledo public improvement projects. \*\*\* As such, ABC had standing to file a complaint with the director of commerce and subsequently file a complaint in the court of common pleas pursuant to R.C. 4115.16(A)-(B).<sup>2</sup> [Emphasis in original.]

As a contractor, IPS successfully bid on two HVAC/Plumbing Contracts at the

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<sup>1</sup> Defendant's Motion for Summary Judgment, News Article, "Ohio Valley goes to war against prevailing-wage law," Cincinnati Business Courier, October 16, 2009, Exhibit A.

<sup>2</sup> *Ohio Valley Associated Builders & Contrs. v. Indus. Power Sys.*, 2010-Ohio-4930, ¶ 26.

University of Toledo in January and February of 2007. IPS completed both Projects in accordance with Ohio's Prevailing Wage laws.

Without either an initial demand or notice to IPS, ABC filed with the Department of Commerce an administrative complaint against IPS on both projects on October 29, 2008. ABC alleged only conclusively, without stating any facts, "Misclassifications" and "CPR Incorrect/missing info," as reasons for filing each complaint.<sup>3</sup>

Without waiting for the Department of Commerce to resolve the matter administratively, ABC filed two lawsuits with this Court. In each lawsuit, similar to the administrative complaints, ABC offered no factual allegations, only alleging tautologically the legal conclusion that,

19. Plaintiff is informed and believes, and on the basis of such information and belief alleges, that Defendant Industrial Power Systems, Inc. failed to strictly comply with the requirements of R.C. 4115.03 to R.C. 4115.16 and O.A.C. 4101:9-4-01 to O.A.C. 4101:9-4-28 during its work on the Project, including but not limited to the following violations:

A) Work classification is not listed.

B) CPR missing information.

The trial court consolidated the two cases on March 26, 2009.

Given the vagueness of ABC's Complaint, as well as its broad discovery requests not tied to any factual violation, there can be no doubt today that ABC engaged merely on a "fishing expedition."

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<sup>3</sup> Defendant's Motion for Summary Judgment, ABC's Administrative Complaints, Exhibit B.

ABC admits that it claims no damages with respect to any individual employee or with respect to any contractor. ABC also admits that it seeks only attorney's fees.

ABC's member, Westfield, is an electrical contractor and did not bid on any of the contracts for which IPS submitted a bid. Westfield and IPS bid on separate trades packages. In fact, Westfield was the successful bidder on one of its contracts, not losing to IPS or to any other contractor for any reason.

ABC further admits no harm to any of its members, stating,

Plaintiff admits that neither it nor any of its members have suffered any specific, monetary damage as a result of IPS's actions as alleged in Plaintiff's complaint. Plaintiff is an organization dedicated to the advancement of the merit-shop (or non-union) philosophy of construction. Plaintiff and each of its members suffer when laws are enforced unequally against merit-shop contractors. Plaintiff states that construction trade unions have engaged in a pattern and practice of bringing Ohio prevailing wage administrative complaints and lawsuits against merit-shop contractors, including several of Plaintiff's members, resulting in unequal enforcement of Ohio's prevailing wage laws against merit-shop contractors. This suit is designed to ensure that union contractors, like Defendant, are held to the same standards under the law as merit-shop contractors and to remedy monetary and non-monetary violations of the law committed by Defendant.

This bold statement clearly describes ABC's motivation of harassment behind its 101 lawsuits filed in Ohio, including the one before this Court.

IPS appeals from the Court of Appeals' decision that grants interested-party standing to a person that does not even bid against the purported violator of Ohio's Prevailing Wage law.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A construction trade association, having a member contractor who submits a bid on any aspect of a public construction project, enjoys no standing pursuant to R.C. §4115.03(F) to challenge an individual contract awarded to another contractor for another contract, if the member contractor did not bid on that other contract, suffered no damage or injury by the award of that contract, had no personal stake in the outcome, and has no actual dispute with the other contractor.

It is uncontroverted that Westfield Group, an electrical contractor and member of Appellee ABC, and Appellant IPS did not submit competing bids on the two public improvement projects at the University of Toledo.

The sole issue for this Court to consider is whether ABC enjoys standing to sue IPS, despite having no member contractor that bid against IPS or that suffered any damages, and despite having no member contractor with a personal stake in the outcome of this case.

“Interested party” is defined by R.C. 4115.03(F) as a “person who submits a bid for the purpose of securing the award of a contract” for a particular public improvement. The Sixth District Court of Appeals incorrectly determined this phrase to abrogate well-established principles of standing, holding that because ABC’s member Westfield Group bid on “a contract” on the same project, ABC thus has standing to sue on any contract on the same project.

However, Westfield was the successful bidder for the electrical work; Westfield lost nothing. Westfield has no interest in the two HVAC/Plumbing Contracts.

In contrast, if ABC's contractor had bid against IPS for the same two HVAC/Plumbing Contracts awarded to IPS as low bidder, that unsuccessful contractor might claim damages based on an alleged violation of Ohio's Prevailing Wage law, leading to IPS being the lowest bidder artificially. But that is not the case here.

As a general rule, Ohio Civ. R. 17 requires standing to sue: "Every action shall be prosecuted in the name of the real party in interest." That is the "interest" in the actual controversy. ABC certainly could not sue IPS if only working on an unrelated project, or for an unrelated owner. If ABC's member did not bid against IPS on the two HVAC/Plumbing Contracts, it incurred no damages. If IPS committed a Prevailing Wage violation, only those contractors, subcontractors, or laborers who bid against IPS were involved in the controversy of the violation, the real parties in interest.

Regarding the application of Civil Rule 17, in light of "interested party" standing under R.C. 4115.03(F), the Modern Courts Amendment to the Ohio Constitution, Art. IV, Sec. 5(B), provides as follows:

The supreme court shall prescribe rules governing practice and procedure in all courts of the state. \* \* \* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Therefore, pursuant to the Ohio Constitution, "interested party" standing cannot be held to abrogate the basic tenets of standing under Ohio Civil Rule 17.

The Sixth District Court of Appeals does exactly that, holding that "the only issue is whether ABC is an interested party as defined in R.C. 4115.03(F), common law

standing notwithstanding.” The Court of Appeals’ ruling is thus in direct contravention of the Modern Courts Amendment to the Ohio Constitution, Art. IV, Sec. 5(B).

Rather than abrogate common law standing by way of statutory “interested party” standing, Civil Rule 17 and R.C. 4115.03 must be read *in pari materia* if possible, rather than create a conflict. Law relating to the same subject matter must be construed together to give full effect to the provisions. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 46.

Rather than view R.C. 4115.03 as reconciled, *in pari materia* with general standing principles, the appellate decision creates an exception to general standing principles. Whether the statute should be read consistently with standing principles or in contrast is the issue here.

Ohio’s Competitive Bidding law clarifies the particular “interest” in a Prevailing Wage controversy. Ohio statute requires a public authority to award to the lowest qualified bidder. R.C. 153.08. Ohio’s Prevailing Wage law thus acts to ensure bidding fairness. A low bid is awarded upon productivity, and not upon undercutting local wages.

As stated by this Court, “the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.” *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 431 N.E.2d 311. A contractor who loses a low bid

to another contractor who cheated on Prevailing Wage would have standing to sue; such an unsuccessful contractor would have an "interest" in the violation committed, possibly even without R.C. 4115.03(F); the latter statute merely clarifies and supports, rather than creating a conflict. It follows naturally that a bidder which was never harmed by a purported "violator" of Prevailing Wage (i.e. the losing bidder never bid against the purported "violator") does not have standing to sue.

This question of standing depends on whether the party has alleged a "personal stake in the outcome of the controversy." *Middletown v. Ferguson* (1986), 25 Ohio St. 3d 71, 75, 495 N.E.2d 380 (citation omitted). As stated by this Court:

"Standing" is defined at its most basic as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994-Ohio-183, 643 N.E.2d 1088." "[T]he question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

*Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375; 2007-Ohio-5024; 875 N.E.2d 550, ¶ 27.

In further support of its holding, the Court of Appeals relies on its prior holding in *United Bhd. of Carpenters, Local Union No. 1581 v. Edgerton Hardware Co.*, 2007-Ohio-3958, which is distinguishable from the case at bar.

*Edgerton* involved a subcontractor of a contractor who bid directly on the general

contract in controversy. The case supports IPS's position: standing is appropriate in *Edgerton* under R.C. 4115.03(F)(2) because a complaining party actually bid and had potential damages.

As to the Court of Appeals' holding on the unrelated employee in *Edgerton*, the debate centered on a labor union, not on a contractor at all. In *Edgerton*, the trial court refused standing on the basis that the plaintiff-appellant could not bring "an action against [a] defendant whose employees are not persons plaintiff is authorized to represent." *Id.* at ¶ 8. More specifically, the *Edgerton* appeal turned on the trial court's interpretation of R.C. 4115.03(F)(3) (as opposed to R.C. 4115.03(F)(2) or (4), which is at issue here), that an "interested party" must be "a labor organization that represents only those bidding contractors or subcontractors whose union member employees perform the same function on a public improvement." *Id.* at ¶ 10.

Contrary to the Court of Appeals' implication otherwise, there is no specific discussion in the *Edgerton* case regarding the issue of whether a plaintiff can bring a Prevailing Wage claim despite not having bid against the alleged violator, because in fact the prime contractor did bid on the contract in controversy. In addition, *Edgerton* includes no discussion as to whether a plaintiff can bring a Prevailing Wage claim despite having suffered no damages.

In enacting R.C. 4115.03, the Ohio General Assembly did not intend to grant such wide-ranging standing to any person that has performed any work on the project,

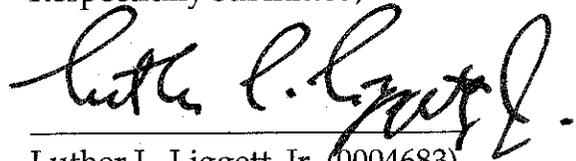
however small or unrelated.

CONCLUSION

Ohio Revised Code Section 4115.03(F), interpreted consistently with Ohio common law and Ohio Civil Rule 17, does not grant standing to a trade association having as its member a contractor that did not bid against the alleged violator of Prevailing Wage law.

Given the far-reaching implications of the Court of Appeals' Opinion, which disregards the Ohio Constitution and which is in conflict with several other opinions issued by Ohio Courts, this issue of public and great general interest can only be resolved with finality by the Supreme Court of Ohio.

Respectfully submitted,



Luther L. Liggett, Jr. (0004683)  
Matthew T. Anderson (0082730)  
LUPER NEIDENTHAL & LOGAN  
50 West Broad Street, Suite 1200  
Columbus, Ohio 43215-3374  
(614) 229-4423  
lliggett@lnlattorneys.com  
(614) 229-4473  
manderson@lnlattorneys.com  
Fax: (866) 345-4948

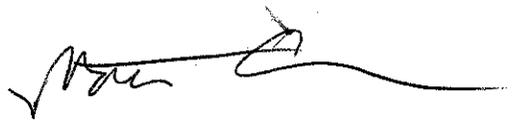
Attorneys for Defendant-Appellant IPS

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been served upon the following counsel of record by depositing it in ordinary United States mail, postage prepaid, this 17th day of November, 2010:

Jill A. May  
Bradley C. Smith  
Brock A. Schoenlein  
Flanagan, Lieberman, Hoffman & Swaim  
15 W. Fourth St., Suite 100  
Dayton, Ohio 45402

Attorneys for Plaintiff-Appellee OVABC



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Matthew T. Anderson (0082730)

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

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OHIO VALLEY ASSOCIATED  
BUILDERS AND CONTRACTORS,

CASE NO. L-10-1099

PLAINTIFF-APPELLANT,  
CROSS-APPELLEE,

v.

INDUSTRIAL POWER SYSTEMS, INC.,

OPINION

DEFENDANT-APPELLEE,  
CROSS-APPELLANT.

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Appeal from Lucas County Common Pleas Court  
Trial Court No. CI09-1366

Judgment Reversed and Cause Remanded

Date of Decision: October 8, 2010

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APPEARANCES:

*Jill A. May*, for Appellant

*Luther L. Liggett, Jr.*, for Appellee



**PRESTON, J.**

{¶1} Plaintiff-appellant/cross-appellee, Ohio Valley Associated Builders and Contractors (hereinafter “ABC”), appeals the Lucas County Court of Common Pleas’ grant of summary judgment in favor of defendant-appellee/cross-appellant, Industrial Power Systems, Inc. (hereinafter “IPS”) on its complaint alleging that IPS violated Ohio’s prevailing-wage laws. Cross-appellant, IPS, appeals both the trial court’s grant of summary judgment and the trial court’s denial of its motion for attorney’s fees. For the reasons that follow, we reverse.

{¶2} The relevant facts of this case are not disputed. The University of Toledo planned two public improvement<sup>1</sup> projects for the renovations of University Hall and the Carlson Library. Westfield Group, an electrical contractor and member of ABC, submitted bids for the award of contracts for the projects. IPS, a heating, ventilation, and air conditioning (HVAC)/plumbing contractor, and not a member of ABC, submitted and was awarded a bid for HVAC contracts for the projects.

{¶3} After IPS began working on the projects, ABC suspected that IPS was in violation of Ohio’s prevailing-wage law. As a result, ABC filed two administrative complaints with the Ohio Department of Commerce, Division of

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<sup>1</sup> The parties herein do not dispute that the projects were public improvements within the meaning of Ohio’s prevailing-wage law, R.C. 4115.03 et seq.

Labor, Bureau of Wage and Hour on or about November 3, 2008.<sup>2</sup> (Complaint, Doc. No. 1, Ex. 1); (Doc. No. 21, Ex. D4). After the director of commerce failed to issue a final determination within sixty (60) days, ABC filed two complaints in the Lucas County Court of Common Pleas pursuant to R.C. 4115.16(B) on January 21, 2009. (Doc. Nos. 1, 2). One complaint was assigned case no. CI09-1366, and the other complaint was assigned case no. CI09-1367.

{¶4} On March 19, 2009, IPS filed a motion to consolidate the cases. (Doc. No. 5). On March 30, 2009, the trial court ordered that both cases be consolidated under case no. CI09-1366 and dismissed case no. CI09-1367. (Doc. No. 6). That same day, IPS also filed a motion to dismiss and motion for a more definite statement in response to ABC's complaint. (Doc. No. 7). On September 4, 2009, the trial court denied both of IPS' motions. (Doc. No. 12).

{¶5} On November 5, 2009, IPS filed a motion for summary judgment, arguing that: ABC lacked standing to pursue a prevailing-wage complaint against it; ABC failed to identify any prevailing-wage violations; ABC failed to exhaust

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<sup>2</sup> The filing date of the two administrative complaints is not clear from the record. The administrative complaints were signed on October 29, 2008, but both civil complaints filed in the trial court and ABC's memo in opposition to the motion for summary judgment claim that the administrative complaints were filed on or about November 6, 2008. (Doc. Nos. 1 & 2, Ex. 1); (Doc. No. 20). In their appellate briefs, however, ABC, along with amicus curiae, Ohio Institute for Fair Contracting ("OIFC"), stated that the administrative complaints were filed on or about November 3, 2008. (Appellant's Brief at 1); (Amicus Brief at 2). Likewise, the record contains a letter dated November 3, 2008 from the Ohio Department of Commerce acknowledging receipt of ABC's complaint. (Plaintiff's Appendix, Doc. No. 21, Ex. D4). The trial court did not specifically find which date the administrative complaints were filed, so we elect to use November 3, 2008 as the filing date for purposes of this appeal. Even if ABC's administrative complaint was filed on the latest date of November 6, 2008, both of ABC's civil complaints were filed on January 21, 2009, which was well beyond R.C. 4115.16(B)'s 60-day waiting period.

its administrative remedies; and it was entitled to attorney's fees under R.C. 4115.16(D) and Civ.R. 11 for defending the action. (Doc. No. 17).

{¶6} On December 14, 2009, ABC filed its memorandum in opposition, arguing that: it had standing as an interested party under R.C. 4115.03(F)(4); R.C. 4115.16(B) permitted it to file the complaint; a material question of fact concerning IPS' failure to follow Ohio's prevailing-wage law prevented summary judgment; and that IPS was not entitled to attorney's fees because IPS failed to show that it did not violate Ohio's prevailing-wage law, and ABC's complaint was filed in good faith based on ample evidence of IPS' violations. (Doc. No. 20).

{¶7} On March 10, 2010, the trial court granted IPS' motion for summary judgment, finding that ABC lacked standing, but the trial court denied IPS' request for attorney's fees, finding that issue moot in light of the dismissal. (Doc. No. 35).

{¶8} On April 7, 2010, ABC filed its notice of appeal. (Doc. No. 38). IPS filed its notice of cross-appeal on April 15, 2010. On June 25, 2010, this Court granted the Ohio Institute for Fair Contracting ("OIFC") leave to file an amicus brief.

{¶9} ABC appeals raising one assignment of error. IPS appeals raising two assignments of error. We will combine ABC's assignment of error with IPS' second assignment of error on cross-appeal for discussion.

**ABC'S ASSIGNMENT OF ERROR**

**THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT/APPELLEE IPS'S MOTION FOR SUMMARY JUDGMENT.**

**CROSS-APPELLANT IPS' ASSIGNMENT OF ERROR NO. II**

**THE TRIAL COURT ERRED BY NOT HOLDING THAT ABC LACKS STANDING FOR FAILING TO BID AGAINST IPS ON ITS HVAC/PLUMBING BID, THE VERY REASON THAT ABC SUFFERED NO DAMAGES.**

{¶10} In its sole assignment of error, ABC argues that the trial court erred in granting IPS' motion for summary judgment on the basis of standing since it was an "interested party" under R.C. 4115.03(F)(4). Specifically, ABC argues that one of its members, Westfield Group, submitted a bid for a contract to perform electrical work on the two University of Toledo public improvements, which grants it standing under the statute. ABC also argues that R.C. 4115.03(F) does not require "specific monetary damages" for interested party status as the trial court found.

{¶11} Cross-appellant IPS, in its second assignment of error, argues that ABC lacks standing to pursue its prevailing-wage complaint because ABC's member, Westfield Group, never bid on the HVAC/plumbing contracts from which the alleged prevailing-wage violations stem. Rather, Westfield Group was a successful bidder on electrical contracts for the public improvement. IPS argues that R.C. 4115.03(F)(1)'s phrase "a contract" requires that the interested party bid on the *same contract* from which the alleged prevailing-wage violation stems—not

merely *any contract* for the public improvement. IPS argues that this interpretation of R.C. 4115.03(F)'s definition of interested party is consistent with common law standing and Civ.R. 17's requirement that actions be prosecuted by the "real party in interest."

{¶12} OIFC argues that ABC was an interested party under R.C. 4115.03(F)(4)'s plain language since its member, Westfield Group, submitted a bid for a contract for the public improvement. OIFC further argues that the trial court's reliance upon common law standing was misplaced since ABC has statutory standing. OIFC also contends that IPS' limited interpretation of interested party standing is contrary to the purposes of the prevailing-wage law.

{¶13} An appellate Court reviews a lower court's decision to grant summary judgment de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243. Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150. Likewise, both standing and statutory interpretation are questions of law reviewed de novo on appeal. *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶23 (standing); *Monroeville v. Wheeling & Lake Erie Ry. Co.*, 152

Ohio App.3d 24, 2003-Ohio-1420, 786 N.E.2d 504, ¶9 (statutory interpretation); *State v. Consillio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶8 (same). De novo review is independent and without deference to the trial court's judgment. *Monroeville*, 2003-Ohio-1420, at ¶9. See, also, *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949, citations omitted.

{¶14} Ohio's prevailing-wage laws are codified in Chapter 4115. These provisions generally require contractors and subcontractors for public improvement projects to pay laborers and mechanics the "prevailing-wage" in the locality where the project is to be performed. *State ex rel. Associated Builders & Contrs. of Cent. Ohio v. Franklin Cty. Bd. of Commrs.*, 125 Ohio St.3d 112, 2010-Ohio-1199, 926 N.E.2d 600, ¶10, citing R.C. 4115.03 through 4115.21 and *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 349, 691 N.E.2d 655. "[T]he legislative intent of the prevailing-wage law in R.C. Chapter 4115 is to 'provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-a-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state.'" *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-Ohio-622, 925 N.E.2d 116, ¶10, quoting *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 431 N.E.2d 311 (plurality opinion). The law's primary purpose "is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." *Bergman* at ¶10, quoting *Moore* at 91.

{¶15} R.C. 4115.16(A) authorizes an “interested party” to file a complaint with the director of commerce alleging a prevailing-wage violation. *Sheet Metal Workers’ Internatl. Assn., Local Union No. 33 v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444,

¶11. If the director has not ruled on the merits of the complaint within sixty (60) days, the “interested party” may file a complaint in the court of common pleas of the county in which the violation allegedly occurred pursuant to R.C. 4115.16(B).

Id. An “interested party” with respect to a particular public improvement is defined as:

- (1) **Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;**
- (2) **Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;**
- (3) **Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;**
- (4) **Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.**

R.C. 4115.03(F)(1)-(4) (emphasis added); Ohio Adm. Code 4101:9-4-02(Q).

“Courts have construed the definition of an interested party broadly to further the purposes of the prevailing-wage law.” *International Assn. of Bridge, Structural,*

*Ornamental & Reinforcing Iron Workers, Local 371, AFL-CIO v. Sunesis Construction Co.*, 183 Ohio App.3d 438, 2009-Ohio-3729, 917 N.E.2d 343, ¶5.

{¶16} The trial court here granted IPS' motion for summary judgment, finding that ABC lacked standing to file a prevailing-wage complaint against IPS. (Doc. No. 35). Although the trial court found that ABC had exhausted its administrative remedies and that "it is arguable that ABC technically qualifies as an 'interested party' under R.C. 4115.03(F)(4)," the trial court, nevertheless, found that ABC lacked standing because ABC failed to allege that Westfield Group or any of ABC's members had suffered any actual damages or concrete injury as a result of IPS' alleged prevailing-wage violations. (Id.). The trial court also noted that ABC's complaint sought to redress damages allegedly sustained by *IPS* employees, but ABC could not represent IPS employees since it was not a labor organization. (Id.). The trial court also found that there was no evidence that any IPS employee was a member of ABC or that any IPS employee authorized ABC to bring the prevailing-wage complaint on their behalf. (Id.).

{¶17} First, we must determine whether the trial court's reliance upon common law standing was appropriate in this case. This Court's opinion in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc., dba JMS Mechanical Co.* is instructive. 6th Dist. No. WM-06-17, 2007-Ohio-3958. In that case, this Court was presented with the question of whether a carpenters and joiners' union ("Local 1581") had standing to

assert a prevailing-wage complaint on behalf of JMS Mechanical Co. (“JMS”) employees who performed plumbing and sheet metal work on a city hall project. 2007-Ohio-3958, at ¶¶1, 5, 10. In support of its complaint, Local 1581’s business manager submitted an affidavit wherein he averred that Duerk Construction, a company that employed members of Local 1581, submitted a bid for the construction of the city hall, but it was not a successful bidder. *Id.* at ¶5. Despite that fact, the trial court reasoned that Local 1581 lacked standing to bring an action against JMS pursuant to R.C. 4115.16(B) because JMS’ employees would have been members of a different union than those employees represented by Local 1581. *Id.* at ¶10.

{¶18} On appeal, this Court found that the trial court “interpreted ‘interested party’ as it relates to R.C. 4115.03(F)(3) to be a labor organization that represents only those bidding contractors or subcontractors whose union member employees *perform the same function on a public improvement.*” *Id.* (Emphasis added). This Court ultimately rejected the trial court’s interpretation of R.C. 4115.03(F)(3). Although this Court began its standing analysis by acknowledging the common law “personal stake” doctrine, in the paragraphs immediately following this Court stated:

**{¶ 12} *In the case before us, R.C. 4115.03, et seq, is determinative of the question of whether Local 1581 has standing to bring an action based upon appellee’s alleged failure to pay a prevailing wage to its employees who worked on the construction of the public improvement, a city hall. Thus, this cause involves a question of statutory interpretation.***

\* \* \*

**{¶ 14} In order to have standing to institute a claim founded on JMS' failure to pay a prevailing wage, Local 1581 must be an "interested party" within the meaning of R.C. 4115.03 \* \* \***

Id. at ¶11, citing *Ohio Constrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 and *City of Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 495 N.E.2d 380; Id. at ¶¶12, 14 (emphasis added). Thereafter, this Court examined R.C. 4115.03(F)'s definition of "interested party" and simply concluded:

**Words used in a statute are to be taken in their usual, normal, and customary meaning. R.C. 1.42. If those words are plain and unambiguous, we cannot engage in statutory interpretation. *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. "Any" is defined as "one or some indiscriminately of whatever kind" and is "used to indicate one selected without restriction." Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 53. As applied to the present case, and keeping in mind the legislative intent in enacting prevailing wage law, the uncontroverted evidence offered by Local 1581, which is *any* (of whatever kind) labor organization, establishes that its members work for Duerk Construction Company, that is, *any* (of whatever kind) person. Duerk Construction Company submitted a bid on a contract for the construction of a city hall in Holiday City, Williams County, Ohio. Consequently, Local 1581 is an "interested party" within the meaning of R.C. 4115.03(F) and has the standing required to pursue administrative and civil remedies under R.C. 4115.16.**

Id. at ¶19 (emphasis in original). Therefore, it is clear that this Court's standing analysis in *Edgerton* focused *exclusively* on whether Local 1581 was an interested party as defined in R.C. 4115.03(F), as a matter of statutory interpretation. Id. at

¶12. Since Local 1581 was an interested party under R.C. 4115.03(F)'s plain language, this Court found that Local 1581 had standing to pursue administrative and civil remedies under R.C. 4115.16 and reversed the trial court's decision. *Id.* at ¶¶19-20.

{¶19} The trial court sub judice acknowledged this Court's opinion in *Edgerton*, *supra*, noting that "[p]ursuant to *Local 1581 v. JMS*, the fact that ABC's member (Westfield Group) bid only on electrical contracts for the project while IPS bid only on the HVAC/plumbing contracts is insufficient to deny ABC standing to bring a prevailing-wage action against IPS." (Mar. 10, 2010 JE, Doc. No. 35). The trial court even acknowledged that "it is arguable that ABC technically qualifies as an 'interested party' under R.C. 4115.03(F)(4) because it is an association that has a member (Westfield Group) that submitted a bid for the purposes of securing the award of a contract for construction of the subject University of Toledo public improvements." (*Id.*). However, the trial court found this Court's citation to the personal stake standing doctrine in *Edgerton* required that ABC not only be an interested party under the statute but also have standing under common law. (*Id.*).

{¶20} Specifically, the trial court found the Ohio Supreme Court's decision in *Ohio Constrs. Assn. v. Bicking*, cited in *Edgerton*, controlling. (*Id.*); *Edgerton*, 2007-Ohio-3958, at ¶11, citing *Bicking*, 71 Ohio St.3d at 320. The facts and procedural posture of this case, however, are easily distinguishable from *Bicking*,

71 Ohio St.3d 318. To begin with, *Bicking* did not involve an interested party prevailing-wage action under R.C. 4115.16(B) like the case at bar. Rather, the Ohio Contractors Association (OCA) in *Bicking* brought an action against the Village of South Point seeking *injunctive and declaratory relief* for the village's alleged violations of R.C. Chapter 731 and other statutory provisions governing competitive bidding. 71 Ohio St.3d at 319; *Ohio Contractor's Ass'n. v. Bicking* (Sept. 21, 1993), 10th Dist. No. 93AP-939. That fact, in and of itself, makes *Bicking* inapplicable here. Nevertheless, the facts of this case are further distinguishable from *Bicking*, because it is undisputed here that ABC's member, Westfield Group, submitted a bid for the purpose of securing a contract for the public improvement projects at the University of Toledo. OCA's member-contractors never submitted bids for the public improvement project in *Bicking*. 71 Ohio St.3d at 319-21. In fact, the Court in *Bicking* found that OCA lacked standing *precisely because* its member-contractors never submitted or even intended to submit a bid for the project. *Id.* Thus, any reliance upon *Bicking* here is misplaced.

{¶21} We must also reject the trial court's incorporation of common law standing principles for a far more fundamental reason. As the Ohio Supreme Court has noted:

**Standing does not flow from the common-law "personal stake" doctrine alone. As the United States Supreme Court has recognized, standing may also be conferred by a specific statutory grant of authority:**

**“Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged \* \* \* a ‘personal stake in the outcome of the controversy’ [citation omitted] \* \* \*. Where, however, \* \* \* [a legislative authority] has \* \* \* provided by statute for judicial review \* \* \*, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.” *Sierra Club v. Morton* (1972), 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636.**

*City of Middletown v. Ferguson*, 25 Ohio St.3d at 75-76. See, also, *Doran v. Northmont Bd. of Edn.*, 153 Ohio App.3d 499, 2003-Ohio-4084, 794 N.E.2d 760, ¶20 (statutory right to bring an alleged Sunshine Law violation pursuant to R.C. 121.22(I)(1)); *State ex rel. Mason v. State Emp. Relations Bd.* (1999), 133 Ohio App.3d 213, 217, 727 N.E.2d 181 (same); *ACLU v. National Sec. Agency* (C.A. 6, 2007), 493 F.3d 644, Fn. 19 (distinguishing statutory standing from Article III standing). By enacting R.C. 4115.16(B) the Ohio Legislature conferred a specific statutory grant of authority for “interested parties,” as defined in R.C. 4115.03(F), to file a prevailing-wage action in the common pleas court in the event the commerce director fails to rule on the administrative complaint within sixty (60) days. *Sunesis*, 2009-Ohio-3729, at ¶11. As such, the only issue is whether ABC is an interested party as defined in R.C. 4115.03(F), common law standing notwithstanding. *Id.* (rejecting contractor’s “personal stake” and Civ.R. 17(A)

“real party in interest” standing arguments); *Edgerton*, 2007-Ohio-3958, at ¶12 (R.C. 4115.03, et seq., is “determinative” of whether party has standing to bring a prevailing-wage complaint). To incorporate common law standing principles where the legislature has specifically authorized a party to bring suit is simply inappropriate. It is telling that the Ohio Supreme Court has resolved issues of standing in prevailing-wage cases exclusively as matters of statutory interpretation. See, e.g., *Gene’s Refrigeration, Heating, & Air Conditioning*, 2009-Ohio-2747, at ¶¶11-24; *Sheet Metal Workers’ Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, 613, 716 N.E.2d 198 (“This case turns on whether Local 33 meets the requirements of R.C. 4115.03(F)(3) \* \* \*”). For all these reasons, we find that the trial court’s incorporation of common law standing in this case was erroneous.

{¶22} Second, we must reject IPS’ argument that R.C. 4115.03(F)(1)’s phrase “a contract” limits the definition of an interested party to a person who has submitted a bid on the particular contract from which the alleged prevailing-wage violation stems. To begin with, IPS’ interpretation is contrary to the broad interpretation this and other courts have given to R.C. 4115.03(F). *Sunesis*, 2009-Ohio-3729, at ¶5, citing *Edgerton*, 2007-Ohio-3958. In *Edgerton*, this Court found that Local 1581, a union representing carpenters and joiners, could bring an interested party prevailing-wage action on behalf of plumbers and sheet metal workers because Duerk Construction, a company that employed members of Local

1581, submitted a bid as a contractor on the public improvement project. 2007-Ohio-3958, at ¶¶5, 10, 19. This Court found Local 1581 had standing despite the fact that its members would have performed different “functions” on the public improvement. *Id.* at ¶10.

{¶23} Likewise, the Court in *Johnson Controls* found that the Ohio State Association of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (hereinafter “Pipefitters’ Union”), a labor organization representing unions of pipefitters, could bring an interested party prevailing-wage action on behalf of non-union laborers, because members of the Pipefitters’ Union were employed by subcontractors who performed work on the public improvement. 123 Ohio App.3d at 195. In that case, the contractor argued that the Pipefitters’ Union lacked standing to bring a prevailing-wage action on behalf of non-union laborers who did not authorize the union to file a suit on their behalf. *Id.* at 194. The Court rejected this argument, reasoning that:

**\* \* \* a labor organization is given standing to bring a complaint on behalf of any person who is not paid the prevailing wage. To accept [the contractor’s] position would limit a labor organization’s standing to only complain where its membership were not paid the prevailing wage. This position is antithetical to the purpose of the prevailing wage law as well as to the plain meaning of R.C. 4115.03(F). In this case, [Pipefitters’ Union’s] membership was employed by subcontractors who performed work at Gateway. Accordingly, pursuant to R.C. 4115.03(F), [the Pipefitters’ Union] was an interested party to bring a complaint to the Administrator of the Bureau of Employment Services and subsequently had standing to initiate this lawsuit. See R.C. 4115.16(B).**

Id. at 195. Similarly the Court in *Pipefitters Union Local 392 vs. Kokosing Construction Co., Inc.* found that Local 392, a pipefitters' union, could bring an interested party prevailing-wage action on behalf of members of Laborers Local 265 because members of Local 392 were working on the public improvement for successful bidders on other bid packages. (Aug. 23, 1996), 1st Dist. Nos. C-950220, C-950234, overruled on other grounds (1998), 81 Ohio St.3d 214, 690 N.E.2d 515. Kokosing argued that Local 392 lacked standing to file the prevailing-wage suit on behalf of Laborers Local 265, but the Court rejected that argument, reasoning as follows:

**The record in this case indicates that the city provided a series of bid packages for the project, including the general contract for which Kokosing was the successful bidder. *Members of the pipe fitters union were working on the project for successful bidders on the other bid packages.***

**Although the work which is the subject matter of the litigation herein, the process piping, was included in the general contract work as bid upon by Kokosing and was not in any separate specific bid package, we hold that the pipe fitters union was an interested party as defined by R.C. 4115.03(F). The pipe fitters union is a "bona fide organization of labor" that is authorized to represent employees of a person "who submit[ted] a bid for the purpose of securing the award of a contract for construction of the public improvement." The definition of "interested party" is broad enough to include a labor organization whose members worked on the construction of the public improvement *even though those members were working for a contractor who bid on a bid package that did not include the work in dispute.***

**Because the pipe fitters union was an interested party, we hold that it had standing to file this complaint.**

Id. at \*2 (emphasis added). Finally, the Court in *Sunesis* found that Local 372 was an interested party under R.C. 4115.03(F) because SK Construction, a company that employed Local 372 members, submitted a bid on the public improvement; and therefore, Local 372 “could contest the prevailing-wage issues on the entire project.” 2009-Ohio-3729, at ¶¶8, 13.

{¶24} We see no legally valid reason to interpret an association’s interested party status pursuant to R.C. 4115.03(F)(4) on behalf of its members who submit a bid for the purpose of securing the award of a contract for construction of the public improvement narrowly, while interpreting an organization of labor’s interested party status pursuant to R.C. 4115.03(F)(3) on behalf of its members who are employees of persons who submit such bids broadly. To do so where the operative language triggering interested party status is essentially the same would be inconsistent.<sup>3</sup> Aside from being inconsistent with prior precedent, IPS’ position is also antithetical to the purpose of the prevailing-wage law. *Johnson Controls*, 123 Ohio App.3d at 195.

{¶25} As a final matter, we note that the trial court’s observations that ABC was not a labor union, that no IPS employees were members of ABC, and

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<sup>3</sup> The operative language triggering an association’s interested party standing requires its member(s) to be a person(s) who submitted a bid for the purpose of securing the award of a contract for construction of the public improvement. R.C. 4115.03(F)(1), (4). The operative language for a labor organization’s interested party standing requires that its members be *employees of* a person who submits a bid; otherwise, the employees of the person who submitted a bid must have “authorized” the labor organization to bring suit against the person who submits a bid. R.C. 4115.03(F)(1), (3). We note that the cases broadly interpreting labor organizations’ standing cited herein did not involve situations where employees “authorized” the prevailing-wage suit, and therefore, are not distinguishable from this case on that basis.

that no IPS employee authorized ABC to file a prevailing-wage complaint are all irrelevant since ABC never alleged it was an interested party labor organization under R.C. 4115.03(F)(3). It is also irrelevant that ABC's complaint sought to redress damages allegedly sustained by IPS' employees because the plain language of R.C. 4115.03(F) contains no requirement that the complaint redress damages sustained by the complainant's member-employees. See *Johnson Controls*, 123 Ohio App.3d at 194-95 (rejecting contractor's argument that the union interested party must represent the employees who benefit from the lawsuit as "antithetical to the purpose of the prevailing-wage law as well as to the plain meaning of R.C. 4115.03(F)"). See, also, *Mohawk*, 86 Ohio St.3d at 614 (rejecting Appellate Court's interpretation that R.C. 4115.03(F)'s plain language required that the public improvement be "competitively" bid and that the labor organization was a party to a collective bargaining agreement with the employer/contractor in question). Furthermore, Ohio's prevailing-wage laws *require* that any additional wages, plus a twenty-five percent (25%) penalty, be paid to the employees who were not provided prevailing wages—here, IPS employees. R.C. 4115.10(A), (C); R.C. 4115.16(B).<sup>4</sup> The only award to the interested party, other than mere vindication of the prevailing-wage law, is the payment of its attorney's fees if the trial court finds a violation. R.C. 4115.16(D). For these same reasons, it is also

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<sup>4</sup> R.C. 4115.10(A) also imposes an additional monetary penalty upon any contractor/employer who violates the prevailing-wage law, which is deposited into a penalty enforcement fund administered by the Director of Commerce.

irrelevant whether ABC or its members suffered “specific monetary damage” as a result of IPS’ alleged prevailing-wage law violations. Furthermore, “specific monetary damages” is not part of R.C. 4115.03(F)’s definition of an interested party. See *Mohawk*, 86 Ohio St.3d at 614. Therefore, we are not persuaded that ABC lacked standing for these additional reasons given by the trial court.

{¶26} To conclude, ABC is an interested party under R.C. 4115.03(F)(1) & (4)’s plain language since ABC is *any* (of whatever kind) association having as members *any* (of whatever kind) person [Westfield Group] who submitted a bid for the purpose of securing the award of a contract for construction of the University of Toledo public improvement projects. *Edgerton*, 2007-Ohio-3958, at ¶19. As such, ABC had standing to file a complaint with the director of commerce and subsequently file a complaint in the court of common pleas pursuant to R.C. 4115.16(A)-(B).

{¶27} For these reasons, ABC’s assignment of error is sustained, and IPS’ second assignment of error is overruled.

**CROSS-APPELLANT IPS’ ASSIGNMENT OF ERROR NO. I**

**THE TRIAL COURT ERRED BY DENYING IPS ANY CONSIDERATION OF ATTORNEY FEES, BOTH UNDER R.C. 4115.16 AND UNDER CIV.R. 11.**

{¶28} In its first assignment of error on cross-appeal, IPS argues that the trial court erred by failing to consider its motion for attorney fees under both R.C. 4115.16(D) and Civ.R. 11.

{¶29} Since we have found that the trial court erred in granting summary judgment based on ABC's purported lack of standing, we find that IPS' first assignment of error dealing with attorney fees is now moot, and we decline to address it. App.R. 12(A)(1)(c).

{¶30} Cross-appellant IPS' first assignment of error is, therefore, overruled.

{¶31} Having found error prejudicial to the plaintiff-appellant/cross-appellee, ABC, herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

*Judgment Reversed and Cause Remanded*

**WILLAMOWSKI, P.J., concurs in Judgment Only.**  
**ROGERS, J., concurs.**

/jnc

Judges John R. Willamowski, Richard M. Rogers, and Vernon L. Preston, from the Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

FILED  
LUCAS COUNTY  
**THIS IS A FINAL**  
2010 MAR 11 10:48  
**APPEAL**  
COMMON PLEAS COURT  
JENNIE QUILTER  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Ohio Valley Associated Builders and  
Contractors,

Plaintiff,

vs.

Industrial Power Systems, Inc.,

Defendant.

\*  
Case No. CI09-1366  
\*

\* **OPINION AND JUDGMENT ENTRY**

\* Hon. Linda J. Jennings  
\*

\*  
This consolidated action for enforcement of Ohio's prevailing-wage law, which arises out of Defendant Industrial Power Systems, Inc. (IPS)'s work on two public improvement projects for the University of Toledo, is before the Court on IPS's motion for summary judgment.

Also before the Court is Plaintiff Ohio Valley Associated Builders and Contractors (ABC)'s motion to strike IPS's jury demand.

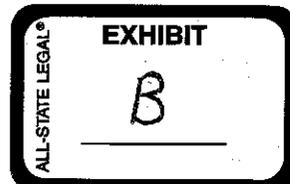
Upon review of the relevant pleadings, the supporting and opposing memoranda, the evidence presented, and the applicable law, the Court grants IPS's motion for summary judgment and denies ABC's motion to strike as moot.

**SUMMARY JUDGMENT ARGUMENTS**

IPS asserts that it is entitled to summary judgment because ABC lacks standing, cannot identify any prevailing-wage violations by IPS, and failed to exhaust its administrative remedy.

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IPS also asserts that it is entitled to reasonable attorney fees, pursuant to R.C. 4115.16(D), because ABC's action is unreasonable or without foundation.

In opposition to IPS's summary judgment bid, ABC notes that the Ohio Department of Commerce's failure to make a final determination with respect to its administrative complaints within 60 days authorized it to initiate court actions.

In addition, ABC posits that IPS has submitted unauthenticated and falsified, altered, or fabricated evidence in support of its motion; that it expressly, and properly, denied several of IPS's requests for admission in accordance with Civ.R. 36; that issues of material fact remain as to whether IPS violated Ohio prevailing-wage law; and that it has standing as an "interested party," pursuant to R.C. 4115.03(F)(4).

ABC's final argument is that IPS is not entitled to attorney fees because it has submitted ample evidence of the good faith basis on which it filed its administrative complaints, as well as evidence of both IPS's prevailing wage violations and its standing to sue IPS.

In reply, IPS focuses primarily on the standing issue, insisting that ABC is not standing in the shoes of any contractor that actually bid against IPS or can claim any harm by IPS and that ABC had no colorable basis for filing the administrative complaints.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is proper only when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after construing the evidence most favorably in the nonmoving party's favor, reasonable minds can only reach a conclusion that is adverse to the nonmoving party.<sup>1</sup>

The party seeking summary judgment bears the initial burden of showing that no

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<sup>1</sup> Civ.R. 56(C); *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370; *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511.

genuine issue of material fact exists for trial<sup>2</sup> and of informing the trial court of the basis for the summary judgment motion and identifying the portions of the record that show the absence of a genuine issue of fact on a material element of the nonmoving party's claim.<sup>3</sup>

The trial court may not consider any evidence other than materials of the type listed in Civ.R. 56(C) -- "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any" -- and those materials must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.<sup>4</sup>

Doubts must be resolved in favor of the nonmoving party,<sup>5</sup> and the summary judgment motion must be denied if the moving party fails to satisfy its initial burden.<sup>6</sup> But once the moving party satisfies its initial burden by supporting its motion with appropriate evidentiary materials, the nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial, may not rest on the mere allegations or denials of its pleadings, and must set forth specific facts showing that there is a genuine issue for trial in order to avoid summary judgment.<sup>7</sup>

## DECISION

IPS's claim that ABC failed to exhaust its administrative remedy is without merit, as R.C. 4115.16(B) provides that if the director of commerce has not ruled on the merits of an interested party's prevailing-wage complaint within 60 days, the interested party may file

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<sup>2</sup> *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

<sup>3</sup> *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 1996-Ohio-107.

<sup>4</sup> Civ.R. 56(C); *Dresher v. Burt*, 75 Ohio St.3d at 292-293.

<sup>5</sup> *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

<sup>6</sup> Civ.R. 56(C); *Dresher v. Burt*, 75 Ohio St.3d at 293.

<sup>7</sup> Civ.R. 56(E); *Dresher v. Burt*, 75 Ohio St.3d at 293.

a complaint in the court of common pleas of the county in which the violation allegedly occurred.

Further, genuine issues of material fact may exist as to whether IPS violated Ohio prevailing-wage law incident to the subject University of Toledo projects.

Nevertheless, ABC's lack of standing to bring this prevailing-wage action against IPS mandates that the Court grant summary judgment to IPS and dismiss ABC's complaints, without ruling on their merits, as discussed below.

### **1. ABC Lacks Standing**

The Court finds that IPS is entitled to summary judgment because ABC lacks standing under R.C. 4115.03(F)(4) to bring an interested-party prevailing-wage action against IPS.

R.C. 4115.03(F) defines "interested party," with respect to a particular public improvement, as:

"(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

"(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

"(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;

"(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section."

ABC purports to have standing as an (F)(4) interested party because it is an association that has as its member a contractor (Westfield Group) that submitted a bid for the purpose of securing the award of a contract on both of the subject University of Toledo public projects. IPS argues, on the other hand, that ABC lacks standing because Westfield

submitted its bid for electrical trade work while IPS bid on and was awarded the plumbing work.

ABC relies on a 2007 Sixth District case – *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1581 v. Edgerton Hardware Co. dba JMS Mechanical Co.*<sup>8</sup> In that case, the trial court's basis for finding that Local 1581 lacked standing to bring a prevailing-wage action against JMS was that JMS's employees would be members of a different union than those represented by Local 1581. Thus, "the trial court interpreted 'interested party' as it related to R.C. 4115.03(F)(3) to be a labor organization that represents only those bidding contractors or subcontractors whose union member employees perform the same function on a public improvement."<sup>9</sup>

The Sixth District rejected the trial court's analysis, deeming it inconsistent with R.C. 1.42's mandate that "words used in a statute are to be taken in their usual, normal, and customary meaning"<sup>10</sup> and the Ohio Supreme Court's rule precluding a court from engaging in statutory interpretation when the statute's words are plain and unambiguous.<sup>11</sup> The Sixth District reasoned:

"'Any' is defined as 'one or some indiscriminately of whatever kind' and is 'used to indicate one selected without restriction.' *Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 53*. As applied to the present case, and keeping in mind the legislative intent in enacting prevailing wage law ["to provide comprehensive administrative and civil rights and remedies for workers employed by 'private contractors, sub-contractors, and materialmen engaged in the construction of public improvements in this state'" and "to uphold 'the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector'"],<sup>12</sup> the

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<sup>8</sup> 6th Dist. No. WM-06-017, 2007-Ohio-3958.

<sup>9</sup> Id. at ¶ 10.

<sup>10</sup> Id. at ¶ 19.

<sup>11</sup> Id., citing *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus.

<sup>12</sup> Id. at ¶ 13, quoting *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91.

uncontroverted evidence offered by Local 1581, which is any (of whatever kind) labor organization, establishes that its members work for Duerk Construction Company, that is, any (of whatever kind) person. Duerk Construction Company submitted a bid on a contract for the construction of a city hall in Holiday City, Williams County, Ohio. Consequently, Local 1581 is an 'interested party' within the meaning of R.C. 4115.03(F) and has the standing required to pursue administrative and civil remedies under R.C. 4115.16."<sup>13</sup>

Before concluding that Local 1581 had standing under R.C. 4115.03(F)(3), the *JMS* court discussed the general principles of standing:

"Before a trial court can consider the merits of a legal claim, a party is required to establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994 Ohio 183, 643 N.E.2d 1088. As applied to this cause, the question of whether Local 1581 has standing depends upon whether it has a 'personal stake in the outcome of the controversy.' *Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 75, 25 Ohio B. 125, 495 N.E.2d 380. The requirement that a party have standing ensures that the alleged dispute between the parties to a cause is presented in an adversarial context and in a form that is historically considered justiciable. *Newman v. Enriquez* (2007), 171 Ohio App. 3d 117, 2007 Ohio 1934, 869 N.E.2d 735, ¶ 30, citing *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S. Ct. 1361, 31 L. Ed. 2d 636."<sup>14</sup>

In *Ohio Contrs. Assoc. v. Bicking*,<sup>15</sup> the Ohio Supreme Court held that "a contractor's association lacks standing to pursue a cause of action in a representative capacity where its members fail to bid on the project in question."<sup>16</sup> The *Bicking* court never reached the merits of the case, which challenged "the legality of a village's decision to use its own, regularly employed workforce on a public project and to pay them less than the prevailing wage rather than competitively bid the work to outside contractors" because it found that

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<sup>13</sup> Id. at ¶ 19. Earlier in the opinion, the Sixth District refers to the affidavit in support of Local 1581's complaint, which included an averment that Duerk Construction, Inc., a company that employs members of Local 1581, submitted a bid as a contractor on the public project at issue but was not a successful bidder. Id. at ¶ 5.

<sup>14</sup> Id. at ¶ 11.

<sup>15</sup> 71 Ohio St.3d 318, 1994-Ohio-183.

<sup>16</sup> Id. at 320-321.

the plaintiff contractors association (OCA) lacked standing.<sup>17</sup> The Ohio Supreme Court's rationale in *Bicking* is instructive here:

"The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented. *Warth v. Seldin* (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343, 354.

"In this case, OCA seeks legal redress in its capacity as an association representing private contractors. In *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383, 394, The United States Supreme Court has held that an association has standing on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' However, to have standing, the association must establish that its members have suffered actual injury. *Simon v. E. Kentucky Welfare Rights Org.* (1976), 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450, 460-461; *Warth, supra*, at 511, 95 S.Ct. at 2211-2212, 45 L.Ed.2d at 362. To be compensable, the injury must be concrete and not simply abstract or suspected. See *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424, 8 OBR 544, 548, 457 N.E.2d 878, 883."<sup>18</sup>

Here, it is arguable that ABC technically qualifies as an "interested party" under R.C. 4115.03(F)(4) because it is an association that has a member (Westfield Group) that submitted a bid for the purpose of securing the award of a contract for construction of the subject University of Toledo public improvements.<sup>19</sup> Moreover, pursuant to *Local 1581 v. JMS*, the fact that ABC's member (Westfield Group) bid only on the electrical contracts for the projects while IPS bid only on the HVAC/plumbing contracts is insufficient to deny ABC standing to bring a prevailing-wage action against IPS<sup>20</sup> However, ABC admits that it

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<sup>17</sup> Id. at 320.

<sup>18</sup> Id.

<sup>19</sup> See Plaintiff's Responses to Defendant's First Set of Interrogatories and First Request for Documents, Answer to Interrogatory No. 11.

<sup>20</sup> See discussion at pages 5-6, *supra*.

claims no damages with respect to any individual employee or contractor<sup>21</sup> and "that neither it nor any of its members have suffered any specific monetary damage as a result of IPS's actions as alleged in Plaintiff's complaint."<sup>22</sup> Rather, ABC asserts:

"Plaintiff is an organization dedicated to the advancement of the merit-shop (or non-union) philosophy of construction. Plaintiff and each of its members suffer when laws are enforced unequally against merit-shop contractors. Plaintiff states that construction trade unions have engaged in a pattern and practice of bringing Ohio prevailing wage administrative complaints and lawsuits against merit-shop contractors, including several of Plaintiff's members, resulting in an unequal enforcement of Ohio prevailing wage laws against merit-shop contractors. This suit is designed to ensure that union contractors, like Defendant, are held to the same standards under the law as merit-shop contractors and to remedy monetary and non-monetary violations of the law committed by Defendant."<sup>23</sup>

Thus, ABC has not established that the Westfield Group or any of its other members have suffered any actual or concrete injury as a result of IPS's alleged prevailing-wage violations on the University of Toledo projects. At best, any injury that ABC's members have suffered is abstract or suspected and, hence, not compensable. Accordingly, ABC lacks standing.

Further, it is clear from ABC's discovery responses that it seeks redress for damages allegedly sustained by IPS's employees.<sup>24</sup> It is indisputable that ABC is not a labor union that represents IPS's employees, and ABC has not presented any evidence establishing that any of IPS's employees are members of ABC or have authorized ABC to bring this prevailing-wage action on their behalf. Thus, ABC's action against IPS is subject to dismissal for lack of standing.<sup>25</sup>

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<sup>21</sup> See Plaintiff's Response to Defendant's First Set Requests for Admissions, Answers to Requests for Admission Nos. 2 and 3.

<sup>22</sup> See Plaintiff's Answer to Defendant's Interrogatory No. 12.

<sup>23</sup> *Id.*

<sup>24</sup> See Plaintiff's Answer to Defendant's Interrogatory No. 13.

<sup>25</sup> See *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St. 3d 248, 2009-Ohio-2747, ¶ 2, in which the Ohio Supreme Court held that "a labor organization that is an 'interested party' under R.C. 4115.03(F) may file a prevailing-wage complaint only

**2. An award of attorney's fees is not warranted.**

ABC seeks an award of attorney's fees, pursuant to R.C. 4115.16(D), which states:

"Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may award court costs and attorney fees to the prevailing party, other than to the director or the public authority, where the court finds the action brought was unreasonable or without foundation, even though not brought in subjective bad faith."

Here, the Court has not decided whether or not a prevailing-wage violation has occurred because ABC's lack of standing renders the question moot. Accordingly, the Court will not award attorney's fees to either ABC or IPS.

**ORDER**

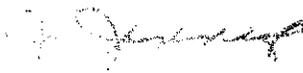
It is ORDERED that Defendant's Motion for Summary Judgment, filed November 5, 2009, is GRANTED.

It is further ORDERED that Plaintiff's Complaints for Enforcement of the Prevailing Wage Law in this consolidated action, both filed January 21, 2009, are DISMISSED WITH PREJUDICE.

It is further ORDERED that Plaintiff's Motion to Strike Jury Demand, filed December 29, 2009, is DENIED AS MOOT.

It is further ORDERED that the Clerk of Courts shall allocate all court costs to Plaintiff.

March 8, 2010

  
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Judge Linda J. Jennings

cc: Jill A. May, Esq., Bradley C. Smith, Esq., and Brock A. Schoenlein, Esq. (Counsel for Plaintiff)  
Luther L. Liggett, Jr., Esq. and Gregory J. Lestini, Esq. (Counsel for Defendant)

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on behalf of the employee who specifically authorized the action."