

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 OPPOSITION OF JURISDICTION OF APPELLEE
OHIO VALLEY ASSOCIATED BUILDERS AND CONTRACTORS**

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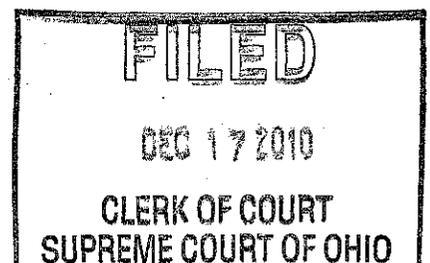
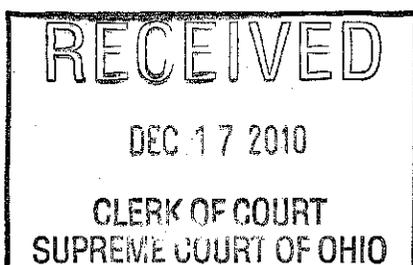


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MEMORANDUM IN OPPOSITION OF JURISDICTION OF APPELLEE
OHIO VALLEY ASSOCIATED BUILDERS AND CONTRACTORS

I. THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST

This case involves a very narrow question of statutory interpretation under Ohio's prevailing wage law. Specifically, the questions before the Sixth District Court of Appeals were: (1) whether or not common law standing principles should be considered when evaluating "interested party" standing to sue under R.C. 4115.03(F)(4) and 4115.16 and (2) whether Ohio Valley Associated Builders and Contractors ("OVABC") qualifies as an "interested party" under the statutory definition of that term. While admittedly a case of first impression, even the Appellant herein implicitly recognizes that these questions are *not* of public and great general interest. Rather, according to Appellant,¹ "this case is ... about harassment of a contractor because of a political battle between Plaintiff-Appellee, Ohio Valley ABC contractors ("ABC") and labor unions." See Defendant-Appellant Industrial Power Systems' Memorandum in Support of Jurisdiction at p. 7.

Either this case is a very narrow one – involving a political battle between two private entities – or it is of "public and great general interest." Defendant-Appellant cannot have it both ways. And it is clear that this case is, *in fact*, a very

¹ Such alleged "harassment" is staunchly denied by Plaintiff-Appellee OVABC. OVABC has simply exercised its rights as granted to it by the Ohio General Assembly.

narrow battle between two private entities over the interpretation of an Ohio statute. The appeals court below issued a well-reasoned decision, applying basic tenants of statutory interpretation, and this matter need not be re-hashed further in front of this Court.

Beyond the above, it is noteworthy that Defendant-Appellant's only two arguments that this matter is one of public and great general interest are based on false assumptions.

Defendant-Appellant's first argument is a supposed conflict between Ohio Civ.R. 17 and R.C. 4115.03. This, of course, ignores completely Ohio Civ.R. 1(C)(7), which states: "These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure ... (7) in all other special statutory proceedings..." As Ohio's prevailing wage statute sets up special, statutory proceedings for the enforcement of prevailing wage law, including interested party lawsuits pursuant to R.C. 4115.16, Ohio Civ.R. 17 is simply inapplicable. *See, e.g., Rankin v. Evans*, 4 Ohio App.3d 30.

Even if Ohio Civ.R. 17 applies to this special, statutory proceeding, however, the language of that Rule itself recognizes statutory standing as a mechanism to become the "real party in interest" for standing purposes: "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, **or a party**

authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought.” (Ohio Civ.R. 17, emphasis added.) As such, whether or not Ohio Civ.R. 17 applies to this matter, there is no conflict between Ohio’s prevailing wage statute’s “interested party” provisions and the “real party in interest” requirements under the Civil Rules.

Defendant-Appellant’s second argument is that the Sixth District’s decision below somehow conflicts with “several other holdings” on the issue of interested party standing under the prevailing wage statute. This is, quite simply, untrue. At present, there are only two decisions² in all of Ohio that contradict the Sixth District’s decision below. Both of these decisions are lower court decisions on summary judgment and both of them are pending before the Courts of Appeals for review. The first, *OVABC v. Rapier Electric, Inc.*, Twelfth Appellate District Case Nos. CA 2010-08-0217 and -0219, went to oral argument on December 13, 2010. The second, *OVABC v. DeBra-Kuempel*, Second District Case No. CA 24138, is fully briefed at the Second Appellate District and scheduled for oral argument on January 25, 2011. At present, each and every Ohio Court of Appeals that has directly or indirectly ruled on the issue of interested party standing under Ohio’s prevailing wage law has favored OVABC’s position.

² Technically, the Butler County decision is made up of two, identical decisions on summary judgment in sister cases between OVABC and Rapier Electric. These decisions were consolidated for appeal purposes before the Twelfth District Court of Appeals.

The only appellate case cited by Defendant-Appellee as “conflicting” is not truly in conflict at all. The Sixth Appellate District has already found that *State ex rel. N. Ohio Chptr. & Contrs., Inc. v. Barberton City Sch. Bd. of Educ.*, 2010 Ohio 1826 (Ohio Ct. App., Summit County Apr. 28, 2010) does *not* conflict with its decision below. See copy of the Sixth Appellate District’s decision denying Defendant-Appellee’s request to certify a conflict, attached hereto as Exhibit A. This makes perfect sense, as the *Barberton* decision is based on a completely different standard than the case at issue herein.

In *Barberton*, a contract bidder, a trade association, and taxpayers sued a school board and the Ohio School Facilities Commission (OSFC), in the Summit County Court of Common Pleas (Ohio), to enjoin the board and the OSFC from applying Ohio’s prevailing wage requirement to the construction of a school. In *Barberton*, the school board required bidders to comply with Ohio prevailing wage law on the project at issue, despite the fact that school construction projects are *expressly exempt* from Ohio prevailing law. R.C. 4115.04(B)(3).³ The plaintiffs therein sought to prove in court that school boards do not have the legal authority to choose to apply Ohio prevailing wage law to school construction projects in the face of the statute’s express exemption.

³ “Sections 4115.03 to 4115.16 of the Revised Code do not apply to: *** (3) Public improvements undertaken by, or under contract for, the board of education of any school district or the governing board of any educational service center;”

OVABC, in the case at bar, did not bring suit against a school board or the OSFC, nor did OVABC seek to enjoin a school board's application of prevailing wage to a project. *Barberton* does not involve, nor even mention; "interested party" standing, violations of prevailing wage law, R.C. 4115.16(B), nor R.C. 4115.03(F). *Barberton* does *not* involve a union or trade association bringing suit against a contractor who violated prevailing wage on a public improvement where Ohio prevailing wage is actually applicable. In fact, *Barberton* was not brought to enforce Ohio Prevailing Wage on the project *at all*, but rather as a challenge to a school board's authority to apply prevailing wage to a project as a matter of contract, in spite of the statutory exemption.⁴

Given the procedural posture of the *Barberton* case, the Ninth District correctly applied common law principals of standing to determine whether the plaintiffs therein had the right to bring their challenge. In the case before this

⁴ To provide some background, for many years, the OSFC took the statutory exemption to mean that school districts are prohibited from requiring the payment of prevailing wages on school construction projects. In 2007, the OSFC passed a resolution which reversed this position and, for the first time, indicated that school districts are free to require bidders for school construction projects within their districts to pay workers at prevailing wage rates. A school board choosing to do this typically issues a new standard for "responsible and responsive" bidders, requiring bidders to agree *by contract* to adhere to Ohio's prevailing wage law. The statutory exemption still applies to such projects, and the only means of enforcing prevailing wage standards in such cases is through a breach of contract action. There is no right for any person or entity – whether an employee, contractor, or interested party – to file an administrative claim with the Ohio Department of Commerce (or a lawsuit arising therefrom) to enforce prevailing wage requirements on a school project.

Court, in contrast, the Sixth District interpreted and applied a specific statutory exception to common law standing (i.e., “interested party” standing pursuant to R.C. 4115.03(F)(4)). *Barberton* is simply an entirely different kind of case that happens to deal, indirectly, with Ohio prevailing wage law. The Ninth District’s decision applying common law standing principals in *Barberton* therefore does not conflict with the Sixth District’s application of a specific, statutory abrogation of those principals.

All Ohio appellate authority agrees with the Sixth District Court of Appeals on the issue of “interested party” standing under Ohio’s prevailing wage statute. The dispute here is between two, private entities over a very narrow issue. As such, it is clear that this matter is *not* of public and great general interest and this Court need not review the Sixth District’s well-reasoned decision below.

II. STATEMENT OF THE CASE AND FACTS

OVABC concurs, generally, with the Statement of the Case and Facts set forth by Defendant-Appellee, but makes the following comments and corrections:

1. At pages 7 and 9, Defendant-Appellee falsely states to this Court that OVABC has “admitted” it seeks only attorneys’ fees in the case at bar.

The truth is that OVABC seeks the following remedies:

- That the trial court find Defendant-Appellee violated Ohio’s prevailing wage law on the Project;
- That the trial court grant preliminary and permanent injunctive

relief ordering Defendant-Appellee to comply with Ohio's prevailing wage law;

- That the trial court require Defendant-Appellee to pay back wages calculated as the difference between the fixed prevailing rate of wages and the amount paid to each employee that Defendant suffered, permitted, or required to perform work on the Project pursuant to R.C. 4115.10(A);
- That the trial court require Defendant-Appellee to pay an additional sum to such employees equal to twenty-five percent of the amount they are required to pay as back-pay pursuant to R.C. 4115.10(A);
- That the trial court require Defendant-Appellee to pay a penalty to the Director of Commerce equal to seventy-five percent of the amount they are required to pay as back-pay pursuant to R.C. 4115.16(A);
- That the trial court require Defendant-Appellee to pay to Plaintiff-Appellant its attorney fees and court costs, pursuant to R.C. 4115.03 to 4115.16; and
- That the trial court award any other legal or equitable relief it deems just and proper.

(See Complaint at p. 4-5.)

2. At page 8, Defendant-Appellee argues that Plaintiff's suit is merely a "fishing expedition." This cannot be further from the truth, as the Motion for Summary Judgment pleadings clearly spell out.
3. At page 9, Defendant-Appellee contends that OVABC has "admitted" that it claims no damages with respect to any individual employee or with respect to any contractor. Again, this is simply a lie. OVABC certainly argues that Defendant-Appellee's own employees were underpaid, suffering damages. While neither OVABC nor its member suffered any "damages," that is the nature of this type of suit. No interested party, under the prevailing wage statute, could ever prove actual damages in enforcing Ohio's prevailing wage law. Even a bidder who bid for the exact same contract as a defendant does not thereby suffer damages recoverable at common law. *State ex rel. N. Ohio Chptr. & Contrs., Inc. v. Barberton City Sch. Bd. of Educ.*, 2010 Ohio 1826 (Ohio Ct. App., Summit County Apr. 28, 2010).

III. ARGUMENTS REGARDING THE PROPOSITION OF LAW

Defendant-Appellant essentially repeats its arguments at the trial court and appeals courts level in this portion of its Memorandum asking this Court to assume jurisdiction. These arguments – and the reasons that each fail – are laid out, in detail, by the Sixth District in its decision below. OVABC will not waste this Court's time repeating them here.

However, one entirely new argument is presented in Defendant-Appellant's Memorandum. Specifically, Defendant-Appellant has raised, for the first time in this case, a question of whether the Ohio prevailing wage statute's standing provisions violate the Modern Courts Amendment to the Ohio Constitution, Article IV, Sec.5(B). It is axiomatic that a party may not raise a new argument for the first time on appeal. As such, this Court should disregard this constitutional argument.

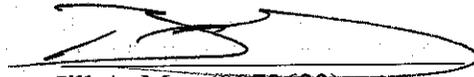
Furthermore, to ask that a court declare a statute, or the interpretation of a statute, as unconstitutional, the party asking for such a declaration must do so in a Complaint, and serve a copy of that Complaint on the Ohio Attorney General. *Cicco v. Stockmaster*, 89 Ohio St. 3d 95 (Ohio 2000). It is uncontested that the Defendant failed to counterclaim alleging unconstitutionality, and further that it served no document on the Ohio Attorney General regarding such an argument. As such, this Court lacks jurisdiction to address this argument.

IV. CONCLUSION

The Sixth District Court of Appeals thoroughly discussed the standing issues before it and came to the correct conclusion: Ohio's prevailing wage statute, as a special, statutory proceeding, properly grants standing to an "interested party," and OVABC qualified as an "interested party" for purposes of standing. By Defendant-Appellant's own admission, this case is not of public and great general interest. Rather, it is a narrow issue between two private parties. As

such, this Court should not entertain discretionary jurisdiction in this matter and should let the well-reasoned decision of the Sixth District stand.

Respectfully submitted,



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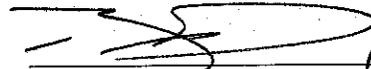
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Certificate of Service

I hereby certify that on December 16, 2010, a copy of the foregoing has been served upon counsel for Defendant/Appellee, Luther L. Liggett, Jr., Matthew T. Anderson, Luper, Neidenthal & Logan, 50 West Broad Street, Suite 1200, Columbus, Ohio 43215.



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(0084707) for

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COMMON PLEAS COURT
BERNARD QUILTER
CLERK OF COURTS

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

OHIO VALLEY ASSOCIATED
BUILDERS AND CONTRACTORS,

CASE NO. L-10-1099

PLAINTIFF-APPELLANT,
CROSS-APPELLEE,

v.

INDUSTRIAL POWER SYSTEMS, INC.,

JUDGMENT
ENTRY

DEFENDANT-APPELLEE,
CROSS-APPELLANT.

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This cause comes on for determination of Appellee/Cross-Appellant's motion to certify a conflict to the Ohio Supreme Court as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Constitution of Ohio, and Appellant/Cross-Appellee's memorandum in opposition to the motion to certify.

Upon consideration the Court finds that there is no true and actual conflict on a rule of law between the decision in the instant case and the decision of the Ninth Appellate District in *State ex rel. N. Ohio Chapter of Associated Builders & Constrs., Inc. v. Barberton City Sch. Bd. of Educ.*, 9th Dist.No. 24898, 2010-Ohio-1826. The Court finds that factual distinctions between the cases result in a rule of law in *Barberton* that is not in conflict with the instant case. See *Whitelock v.*

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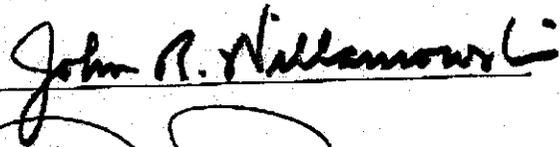


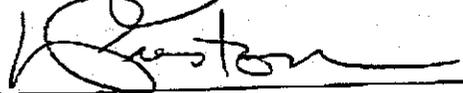
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Case No. L-10-1099

Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594. Accordingly, the motion to certify is not well taken.

It is therefore **ORDERED** that the motion to certify a conflict be, and the same hereby is, overruled.




JUDGES

DATED:

/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.