IN THE SUPREME COURT OF OHIO

GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.	:	**Case No. 2008-0780**
Appellant,	:	On Appeal from the Medina County Court of Appeals, Ninth Appellate District
v.	:	Case No. 06CA0104-M
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33,	:	
Appellee.	:	

REPLY BRIEF OF AMICUS CURIAE, ASSOCIATED BUILDERS & CONTRACTORS OF OHIO, INC. IN SUPPORT OF APPELLANT GENE'S REFRIGERATION, HEATING AND AIR CONDITIONING, INC.

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ABC of Ohio and the Ohio Chambers of Commerce[1] submit this reply brief in response to the arguments raised by *Amicus Curiae* The Ohio State Building and Construction Trade Council, AFL-CIO, the Building and Construction Trades Department, AFL-CIO, SMACNA and SMRCA (collectively referred to as "Amicus") who have come out in support of the positions taken by Appellee Sheet Metal Workers Local Union No. 33 ("Local 33") in this action.

A. Proposition of Law No. 1

The Amicus argue that the purpose of Ohio's Prevailing Wage Law (the "PW Law") is to support the integrity of the collective bargaining process and prevent the undercutting of employees wages in the private sector, citing *State Ex. Rel. Evans v. Moore*, 69 Ohio St.2d 88 (1982). Although this statement is true, it is not applicable to this case. The Amicus represent construction industry employees performing construction work on jobsites. What they are requesting this Court to do is extend the application of their collective bargaining agreements to other manufacturing, delivery and fabricating industries so that their members can obtain new work, which is undoubtedly not "construction" work covered by the prevailing wage statute.

For example, if the Sheet Metal Workers Union suddenly decided that they were going to represent employees of a paper mill who manufacture wallpaper, and that wallpaper is then sold to a public authority to be installed on a public project, could the Sheet Metal Workers then be able to claim that the public authority must now pay the paper mill employees construction industry prevailing wages of a Sheet Metal Worker simply because the wallpaper manufactured was subsequently "used in or in connection with" the construction of a public work? Of course not, the proposition is absurd. The simple fact is that these employees, the paper mill worker and the

[1] The Ohio Chambers of Commerce include: the Ohio Chamber of Commerce, the Dayton Area Chamber of Commerce, the Council of Smaller Enterprises, the Greater Akron Chamber of Commerce, the Youngstown/Warren Regional Chamber, the Toledo Regional Chamber of Commerce, and the Cincinnati USA Regional Chamber of Commerce.

construction industry sheet metal worker are employed in two different and distinct industries, one is engaged in manufacturing and the other is engaged in construction industry installation work.

This same common sense reasoning applies to the facts here. Gene's has manufacturing/fabrication employees who simply bend and cut metal sheets into varying shapes, and it has construction industry installation workers who independently measure, fit and assemble the metal sheets into duct work that will be installed into a building according to complex drawing and plans. The latter construction industry employee also will install and wire the attendant heating and cooling equipment. The skills levels and the training of these two employees is clearly not the same and this fact is reflected by their pay rates. Simply because both employees happen to work for the same employer or happen to be represented by a construction industry labor union is irrelevant. Manufacturing, fabrication and delivery work is not "construction" work covered by the prevailing wage statute, plain and simple.[2] See O.A.C. Ann. 4101:9-4-02(G)(2).

1. Statutory Interpretation.

Except for arguing that the holding of *Clymer v Zane* was *legislatively superseded* by an amendment to R.C. 4115.05 in 1935, and relying on a "proximity in time" argument, the Amicus unions and Local 33 offer this Court no other evidence, case law, administrative provisions, or other authority to support the notion that R.C. 4115.05 applies to offsite manufacturing or delivery work, nor have they explained why the other portions of the statute and Administrative Code (the "Code") adopted after 1935 continue to refer to work performed "at," "upon" or "on" the jobsite of the

[2] O.A.C. Ann. 4101:9-4-02(G)(2) provides: Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement...Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement. (Emphasis Added).

public improvement.[3] Surely, in 73 years there would be one example, one case or some administrative agency edict conjured up by the Amicus and Local 33 to support their position.

As such, the Amicus fail to address the analysis of the statutory language contained in other portions of the statute and the Code that directly limit the application of Ohio's prevailing wage laws to the jobsite of the public improvement. Furthermore, no Amicus attempted to address Ohio case law cited to by Gene's which holds that PW Law applies to the work performed at jobsite of the public improvement project.[4]

The Amicus also fail explain why in 1990, the newly drafted and enacted Code, interpreting each and every provision of the PW Law, failed to include any provisions interpreting or mandating that the one sentence contained in R.C. 4115.05 applies to offsite manufacturing or delivery work. In fact, the sections contained in the Code refer specifically to work performed on the jobsite, and

[3] See R.C. 4115.10(A) which states, "[a]ny employee upon any public improvement who is paid less than the...[prevailing wage] may recover...; R.C. 4115.10(B) continues, "Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the director...;" R.C. 4115.032 that states "Construction on any project, facility, or project facility...All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code..."; and R.C. 4115.05, which begins with, "[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section." (Emphasis added).

[4] See *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167 Ohio App.3d 634, 643, 2006-Ohio-3381, 856 N.E.2d 312 ("The prevailing rate of wages for a specific jobsite is then set forth in a prevailing wage rate schedule which is posted at the jobsite. That schedule is to include the ratio of apprentices to skilled workers allowed on the jobsite. Ohio Adm.Code 4101:9-4-16(H).") (Emphasis added); see *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, 6th Dist. App. No. WD-07-026, 2008-Ohio-2992, ¶41 (the Defendant properly posted the name of the prevailing wage coordinator on the "job box" located at the site of the construction project giving proper written notice of the coordinator's identity to its employees pursuant to R.C. 4115.05).

have purposefully excluded any reference to offsite manufacturing or delivery work.[5] The Code interpreting PW Law remains completely unrebutted by the Legislature, and conclusively proves that PW Law is intended to apply only to construction work performed at the jobsite.[6] If the Legislature disagreed with the Department of Commerce's ("Department") interpretation regarding offsite manufacturing and delivery work as stated in the Code, it would have "swiftly acted" to correct the misinterpretation and misapplication of the PW Law.

No party refutes that before the Code was enacted in 1990, extensive hearings were held and testimony was taken from members of organized labor, construction industry employer groups and other stakeholders regarding the meaning, extent and interpretation of R.C. 4115.03 to 4115.16. These Code sections are the most recent comprehensive enactment to Ohio's PW Law and the specific language used, or the purposeful exclusion of "offsite" language from the Code interpreting R.C. 4115.05, make it absolutely clear that prevailing wages do not apply to any manufacturing, fabrication, supply or delivery work performed off-site from the public improvement.

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[5] See O.A.C. 4101:9-4-02(GG) which defines "'subcontractor' to mean any business association hired by a contractor to perform construction on a public improvement…; O.A.C. 4101:9-4-09(A), which explicitly states "the director shall determine the prevailing rate of wages to be paid for a legal day's work to employees upon public works;" O.A.C. 4101:9-4-21(A), provides "Each contractor and subcontractor performing work on a public improvement shall keep, maintain for inspection, and preserve accurate payroll records in accordance with these rules;" O.A.C. 4101:9-4-21(C), any records maintained by contractors and subcontractors concerning wages paid each employee or the number of hours worked by each employee on a public improvement shall be made available for inspection…; and O.A.C. 4101:9-4-23, a complaint may be filed with commerce by any employee upon a public improvement... (Emphasis added).

[6] PW Law has been amended eight times since 1935 and the Legislature has had ample opportunities to express its intent considering no court, administrative agency, or public authority has ever required employees to be paid construction industry prevailing wages for offsite work See GC § 17-4a; 116 v 206; 118 v 587; Bureau of Code Revision, 10-1-53; 128 v 935 (Eff 11-9-59); 131 v 992 (Eff 11-3-65); 135 v H 1171 (Eff 9-26-74); 137 v H 1129 (Eff 9-25-78); 141 v H 238 (Eff 7-1-85); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

Pursuant to R.C. 1.49(F), when the language of a statute is ambiguous, one may consider the administrative construction of the statute in determining the intention of the General Assembly. As stated in *Wadsworth v. Dambach*,[7] "Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so."[8] An administrative agency's construction of a statute that the agency is empowered to enforce must be accorded due deference.[9] In this case, the intent of the Legislature is clearly established by the express language of the 1990 regulations and the purposeful exclusion to any reference to manufacturing or delivery work performed offsite from prevailing wage coverage.

The Amicus further fail to any explain why the definition of "construction" contained in O.A.C. Ann. 4101:9-4-02(G) and R.C. 4115.03 (B) does not to include any mention to offsite work, including manufacturing, delivery, fabrication or supply activities,[10] although the definition specifically mentions jobsite activities such as demolition, installation, clean up, drilling, landscaping etc... ABC and its Amici submit that if it were the intent of the Legislature to extend prevailing wage law to cover work performed offsite; these specific activities would have been included in the definition of "construction" or otherwise defined in the statute or Code. It is

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[7] *Wadsworth v. Dambach* (1954), 99 Ohio App. 269, 280, 133 N.E.2d 158.

[8] See *Rose Hill Chapel-Ciriello Funeral Home v. Ohio Bd. of Embalmers & Funeral Directors*, 105 Ohio App. 3d at 218, 663 N.E.2d at 981.

[9] See, e.g., *Leon v. Ohio Bd. Of Psychology* (1992), 63 Ohio St. 3d 683, 687, 590 N.E.2d 1223; *Chaney v. Clark Cty. Agricultural Soc., Inc.* (1993), 90 Ohio App. 3d 421, 426, 629 N.E.2d 513.

[10] O.A.C. Ann. 4101:9-4-02(G)(2) provides in part: "Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement."

irrefutable that "construction" of a "public improvement" are the quintessential elements of any public project which triggers the application of PW Law. The fact that manufacturing, fabrication, delivery and supply are excluded from the definition of "construction," coupled with the fact that various sections of the statute refer to "on" or "upon" a public improvement establishes the continuing intent of the Legislature that prevailing wages are to be paid only for "construction" work performed at the jobsite of the public improvement project.

2. Judicial Legislation.

Local 33 and its Amici claim that R.C. 4115.05 as judicially limited by the Ninth District creates a workable and enforceable standard to apply PW Law to offsite work. This is so because the Ninth District rewrote R.C. 4115.05 to apply to manufacturing and fabrication work performed offsite. However, nowhere in R.C. 4115.05 does the statute mention "offsite" manufacturing or delivery work and no where in the rest of the statute or Code is there a reference mandating prevailing wage applicability to work performed offsite. Certainly, such a monumental statutory undertaking such as mandating that offsite manufacturing work to be paid at construction industry prevailing wages would find support in other sections of the statute that define a contractor's prevailing wage obligations under PW Law, (such as in document retention, contractor responsibilities or in prevailing wage audits provisions), or in the definitions of "construction" or "public improvement." As discussed in detail above, no such reference to this type of offsite manufacturing or delivery work is found.

Although both Local 33 and its Amici state that this Court "is not permitted to read words into or out of a statute," they all condone and praise the Ninth District's interpretation of R.C. 4115.05 where the Court had to read into the law by legislating limitations and exceptions into the language of R.C. 4115.05 to fashion what the Court felt was feasible and workable, while ignoring

other relevant parts of the PW Law and the Code. However, Gene's interpretation of R.C. 4115.05 that applies the PW Law to work performed at the jobsite does not require this Court to judicially legislate exceptions for offsite work and is supported by other sections of the PW Law and the Code. Frequently, "materials" are manufactured, fabricated, assembled or moved on the jobsite. Hence, the purpose of R.C. 4115.05 is meant to cover this type of work performed at the jobsite.[11]

Local 33 and its Amici state that the "horrors" contemplated by Gene's that PW Law would apply to all businesses who manufacture, fabricate, supply or deliver "materials used in or in connection with" a public improvement project are absurd and unfounded.[12] They suppose that a business can track its labor costs for manufacturing, delivering, supplying all "materials" that have an "intimate connection" with a public project. Yet with their expansive reading of the PW Law, somehow, Local 33 and the Ninth District agree and conclude that PW Law would not apply to any "prefabricated materials" which come from stock or inventory. This supposition is simply irrational as the Ninth District's expansion of the PW Law is not limited in any way by the language of the one sentence being interpreted.

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[11] Local 33's claims that Gene's is expanding the reach of the Ninth District's decision to create absurd results is without merit, as the Ninth District judicially expanded the reach of prevailing wage law to offsite work based upon an ambiguous sentence read in isolation from the rest of the statute. Gene's interpretation of the statute is not superfluous, nor does it collapse sections of the statute into one. Gene's merely reads the statute and administrative regulations as a whole to determine the intent of the statute and its applicability to offsite work as required by the rules of statutory construction.

[12] The "horrors" contemplated by Gene's are real. O.A.C. 4101:9-4-02(H) defines "Contractor" to mean "any business association that is involved in construction of a public improvement. Contractor includes an owner, developer, recipients of publicly issued funds, and any person to the extent he participates in whole or in part in the construction of a public improvement..." Hence, if this Court determines that R.C. 4115.05 requires the payment of prevailing wages for offsite work done in or connection with a public improvement project it would clearly apply to any and all business entities supplying, delivering, manufacturing or fabricating materials for the project.

This is the precisely the problem with Local 33 and the Ninth District's interpretation of the R.C. 4115.05. To make the PW Law feasible, workable, and to avoid absurd results, this Court is called upon to "judicially" limit the effect of a language added in 1935, in other words, this Court is asked to legislate exceptions to ambiguous language. Local 33 and its Amici seek an interpretation of the R.C. 4115.05 that benefits their own interests, but requests that this Court legislate into the statute enough exceptions and limitations to keep the one sentence in R.C. 4115.05 from being declared void, infirm and unworkable. The Court should decline this invitation to save the ambiguous sentence contained in R.C. 4115.05 by engaging in judicial activism and legislating exceptions and conditions from the bench, such as applying R.C. 4115.05 only to contractors or subcontractors who perform construction work on the jobsite.

3. Constitutionally Void for Vagueness.

Local 33 and its Amici state that R.C. 4115.05 as interpreted by the Ninth District will not produce absurd or unwieldy results. Yet, they readily admit that this is the first time in 74 years that this issue regarding R.C. 4115.05 has been raised to a Court in the State of Ohio. They argue that the Ninth District's judicially imposed mandate that R.C. 4115.05 would exclude all "prefabricated materials" and would only apply to "materials" manufactured or fabricated that have an "intimate connection" to the project is a correct interpretation of the statute that would be enforceable. However, this is clearly not what the one sentence in R.C. 4115.05 provides. The one sentence in R.C. 4115.05, when read in isolation from the rest of the statute provides, is clearly an "all or nothing" approach which requires that all labor on "all materials used in or in connection with" a public improvement project must be paid at prevailing wages. Hence, without the Ninth District's judicially legislated mandates, limiting the effect of the ambiguous statutory language, the sentence would certainly be deemed constitutionally void for vagueness.

This Court has held PW Law is penal in nature and should be narrowly construed.[13] In fact, PW Law provides for criminal liability for intentional violations apart from the administrative penalties.[14] Hence, this Court given the facts presented herein may determine that the one sentence ambiguous contained in R.C. 4115.05 is "constitutionally void for vagueness." The simple fact that this one sentence in R.C. 4115.05 was not enforced or interpreted to apply to offsite manufacturing or delivery work for over 73 years is clear proof that a "reasonable person of ordinary intelligence" was deprived fair notice, sufficient definition and guidance to enable him/her to conform their conduct to the law.

Due process demands that the State provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached.[15] Implicitly, the law must also convey an understandable standard capable of enforcement in the courts, for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct.[16]

Although the vagueness doctrine is perhaps most familiar in the context of criminal law, "[v]ague laws in any area suffer a constitutional infirmity."[17] As the United States Supreme Court has explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the

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[13] See *Clymer v. Zane* (1934), 128 Ohio St. 359, syllabus; *Dean v. Seco Electric Co.* (1988), 35 Ohio St.3d 203.

[14] See R.C. 4115.99.

[15] See, generally, *Kolender v. Lawson* (1983), 461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.Ed.2d 903; *Colten v. Kentucky* (1972), 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584.

[16] *Giaccio v. Pennsylvania* (1966), 382 U.S. 399, 403, 86 S.Ct. 518, 15 L.Ed.2d 447.

[17] *Ashton v. Kentucky* (1966), 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469.

> person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[18]

When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence; and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.[19] The determination of whether a statute is impermissibly imprecise, indefinite, or incomprehensible, must be made in light of the facts presented in the given case and the nature of the enactment challenged.[20] In undertaking that inquiry into the statute or ordinance at issue, the courts are to apply varying levels of scrutiny. "The difference between the various levels of scrutiny for vagueness has never been definitively spelled out, as in equal protection jurisprudence."[21] Though the degree of review is not described with specificity, regulations that are directed to economic matters and impose only civil penalties are subject to a "less strict vagueness test," but if the enactment "threatens to inhibit the exercise of constitutionally protected rights," a more stringent vagueness test is to be applied.[22]

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[18] *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222.

[19] *Kolender*, 461 U.S. at 357, 103 S.Ct. 1855, 75 L.Ed.2d 903.

[20] See *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005 Ohio 2166, 826 N.E.2d 811, P 19; *Coates v. Cincinnati* (1971), 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214; *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362, and fn. 7.

[21] *ABN 51st St. Partners v. New York*, 724 F.Supp. 1142, 1147, (S.D.N.Y.1989).

[22] *Hoffman Estates*, 455 U.S. at 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362.

In either rubric, however, a statute is not void simply because it could be worded more precisely or with additional certainty.[23] The critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those that do not are void for vagueness.[24]

In the instant matter, no court, administrative agency, labor union or contractor has ever conjured up this offsite interpretation of R.C. 4115.05 until this lawsuit was decided by the Ninth District wherein it held that PW Law applied to manufacturing, fabrication, supply, or delivery work done in connection with a public works project. The Code was enacted in 1990, and this offsite issue was not raised or addressed by any labor union, contractor association or the Department itself, as is evidenced by the resulting interpretations of the PW Law which were codified in the then newly drafted administrative regulations. Even after several public hearings, with an array of testimony from diverse stakeholders, no one thought to include offsite manufacturing or delivery work in the regulations. If some were to argue to the contrary, a review of O.A.C. 4101:9-4-01 *et seq.*, reveals that there is not a single reference to "materials" manufactured offsite. While the void for vagueness doctrine utilizes a "reasonable person of ordinary intelligence" standard, here the thousands of judges, agency officials, State of Ohio agency attorneys, labor and management attorneys, union officials and contractors, who have interpreted and worked under this PW Law for over seven decades, without doubt collectively embody a vast group of "experts" with superior intelligence of this Law. Yet, somehow all of these "experts"

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[23] *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals* (1992), 63 Ohio St.3d 354, 358, 588 N.E.2d 116, citing *Roth v. United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

[24] *Grayned,* 408 U.S. at 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222; *Papachristou v. Jacksonville* (1972), 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110.

missed this novel interpretation of R.C. 4115.05 asserted by the Ninth District and Local 33. Perforce, the proposition that the one contentious sentence contained in R.C. 4115.05 be deemed void for vagueness based upon a "reasonable person of ordinary intelligence" is met and exceeded.

If the Ninth District's decision stands, Gene's will be the first business entity in Ohio that must pay its employees prevailing wages for offsite work. Clearly, Gene's and the other Amici filing briefs in support of Proposition of Law No. 1 had no notice of R.C. 4115.05 prescriptions to facilitate compliance with the PW Law regarding offsite work, as this practice was never mandated or enforced by any administrative agency or court in the past. These contractor and business associations represent contractors and businesses that perform work on public improvement projects daily.

If "experts" did not realize the intended meaning of this sentence, it goes without saying that a "no reasonable person or ordinary intelligence" could interpret the statute as written to apply to offsite work, absent the judicial exceptions and limitations imposed by the Ninth District, coupled with the fact that in 73 years, R.C. 4115.05 has never been interpreted to apply to offsite work by any court or administrative agency. ABC and other Amici respectfully request that this Court declare the one continuous sentence contained in R.C. 4115.05 be constitutionally void for vagueness.

B. Proposition of Law No. 2

Local 33 readily admits that it is their position that the true purpose of interested party standing is <u>not</u> to ensure employees working on public improvement projects are properly paid prevailing wages, but instead the true purpose of the law is to serve the union's institutional interests in acquiring and preserving work for its members. (Local 33 Merit Brief at 14). Local 33 and its Amici then ask the Court to expand the scope of interested party standing, and the "attorney-

in-fact" relationship created thereby, so that any labor union can sue any contractor or represent the interests of any employee who performed any work in any craft of trade on any project regardless of whether this improperly forced relationship creates a clear conflict of interest, and regardless of whether any individual employee selects to have their claims represented by the union.

If it was the Legislature's intent to allow a labor union to represent any employee on any public project simply because they are a "labor union," R.C. 4115.03(F) would have been drafted to reflect this, and their standing would not be purposefully restricted to acquiring "authorizations from employees," nor would their standing be limited to representing members of a contractor who "submitted a bid" on the public project. See R.C. 4115.03 (F). To protect the interests of all employees working on public improvement projects, the Legislature acted to purposefully limit a labor unions standing to file a complaint when: (1) directly authorized by an individual employee who performed work on the project, and then only with regard to that particular employee; and/or (2) the union represents the interests of its own members who work for a contractor who submitted a bid on a contract for the Project and then, only against the contractor who competed on the project for the same contract. The latter interested party standing must be limited to the same trade or contract to preserve the intent of the Legislature and to prevent frivolous or harassing lawsuits filed by uninterested labor unions.

Local 33 and its Amici argue for expansion of interested party standing to allow them to file complaints against any contractor, regardless of their trade or craft, and for standing to represent every employee working on a public project if just one employee authorizes union representation. They irrationally argue that they "step into the shoes" of the Department and have unlimited authority to represent all employees who worked on the project pursuant to R.C. 4115.16 and R.C. 4115.03 (F). They also claim that Gene's interpretation of the scope of interested party standing is

absurd and will lead to some employees receiving relief while other unrepresented employees are denied relief. A Review of R.C. 4115.16 reveals that Local 33's interpretation of the PW Law is incorrect.

R.C. 4115.16 allows the interested party standing to file an administrative prevailing wage complaint with the Director and then with the trial court if the Director fails to rule on the merits of the administrative complaint within 60 days of its filing. The fact that the R.C. 4115.03 (F)(3) mandates express authorization from employees who are not members of the union prevents the union from representing employees on the Project who choose not to be represented by the union. Also, the fact that the R.C. 4115.03 (F)(3) mandates that the union's standing is contingent upon their members working for a contractor who submitted a bid on a specific contract for the project demonstrates that the standing is limited to filing a complaint only against a contractor who submitted a bid on the same contract for the project, i.e. filing a complaint against a contractor engaged in the same craft or trade.

Once interested party standing is achieved through one of these two processes, the union may file a civil complaint either on behalf of its members or on behalf of the employees who specifically authorized the representation and who worked on the Project. Limiting the union's standing to these situations ensures that the "attorney-in-fact" fiduciary relationship created and is not circumvented by the union preserving "its own interests" in the action as the Amici admit is their driving force in filing complaints. This limitation of standing is the only protection employees have who work on a project from labor unions such as Local 33, whose avowed purpose is to protect and advance "its own interests on public improvement project" and not those of Gene's non-union employees.

Local 33 incorrectly suggests that an employee who worked on the project may file their own administrative complaint under the statute after the union has filed its prevailing wage complaint into the trial court. This proposition is belied by the express language of the statute which commands the Director to cease its entire investigation when the interested party files its complaint with the trial court.[25]

Thus, R.C. 4115.16 completely stops the Department's investigation into any aspect of the complaint filed by the Union regarding a contractor's prevailing wage compliance on a project. Hence, pursuant to the Union's argument, if the union has attained standing to represent all employees on the project, regardless of whether they authorized the representation, then the Director is left powerless to investigate any other prevailing wage violation against the same contractor or with regard to the same employees forced into union representation after the union's civil complaint is filed. This interpretation is clearly not the Legislature's intent regarding interested party standing. Employees who do not request union representation in a civil action who are forced into accepting the union as their "attorney-in-fact" are now at the mercy of the union to properly and competently represent their claims. Since the PW Law cannot require a union to act as if it were or could fairly and adequately protect the interests of non-union employees, it is simply common sense that the Legislature intended to require the union to obtain individual authorizations from employees.

If the union decides not to collect back pay for the employees affected, assuming a violation is found, and decides instead to settle the employees' claims for a payment of excessive attorneys'

[25]See R.C. 4115.16 (B) states in part, [T]he director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director...

fees or in return for the employer signing a collective bargaining agreement, these employees have absolutely no recourse under the law against the union, nor can they file their own complaint with the Department as the claims originally represented by the union would be deemed to be *res judicata.* Limiting the union's standing to representing only those employees who specifically authorize the representation would allow the Director to continue investigating complaints unrelated to a union's complaint filed on behalf of the employees it was specifically authorized to represent, because the union's complaint filed into the trial court excludes the representation of those specific individuals. R.C. 4115.10 allows the Director then to continue his/her investigation and/or would allow the affected employee to select his/her own representation. To allow an "interested party" to pursue and enforce claims on behalf of other employees who did not authorize the lawsuit violates this Court's holding in *Mohawk Mechanical,* the Legislature's intent, and the right of every employee to select his/her own "attorney-in-fact."[26]

Local 33 and its Amici cite to this Court's decision in *Harris v. Van Hoose* (1990), 48 Ohio St.3d 24, 27 for the proposition that a union, as an interested party, has the power to represent all employees on a project regardless of whether they authorized the representation. This assertion is clearly erroneous as the *Van Hoose* Court addressed the Director's statutory duty to investigate all claims and represent all employees on a public project regardless of whether the Director obtained authorization from employees. This case in clearly distinguishable as it dealt exclusively with the

[26] R.C. 4115.16 (B) provides, "the court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director." It is important to note this fact because the investigative and representational authority afforded to the Court and the Department of Commerce with regard to the enforcement of prevailing wage laws do not fall upon the union to regulate, enforce or decide, but at all times remain with the Court or the Director.

authority of the "Director" under the statute and not the authority of an "interested party." As this Court found, R.C. 4115.10 mandates the Director to take action on behalf of employees who fail to do so regarding their prevailing wage claims. This same type of enforcement mandate is not imposed anywhere in the statute on interested parties. As stated before, the interested party does not "step into the shoes" of the Director, the trial court does, hence, the interested party has the same rights under the statute as are granted to the affected employee.[27] Because the rights of interested parties are the same as the rights of the employee, a clear fiduciary "attorney-in-fact" relationship is created between the union and employee. The Amici cannot dispute that the Director acts at all times solely in the best interests of the employees working on a public project. This is why the Legislature empowered the Director with superior representational rights over employees who work on public projects and are allegedly not paid prevailing wages. No interested party can assert it has the same representational rights concerning employees this Court has held are the unique domain of the Director.

The Amici also cite to the Eight District Court of Appeals' interpretation of interested party standing in *Ohio State Ass'n of United Ass'n of Journeyman & Apprentices v. Johnson Controls, Inc.* (1998), 123 Ohio App.3d 190, for the proposition that any union can file a prevailing wage complaint on behalf of any non-union employee regardless of whether any non-union employee had "authorized" the action. It is submitted that the Eighth District's decision is contrary to the statute and of this Court's subsequent decision in *Mohawk Mechanical*, where this Court explicitly held that written authorizations were required to achieve interested party standing. As such, the Eight

[27] See *IBEW, Local Union No. 8 v. Stollsteimer Elec., Inc.*, 168 Ohio App. 3d 238, 243-244 (Ohio Ct. App., Fulton County 2006) where the Court held the prevailing wage statute when read *in pari materia* to determine the meaning of R.C. 4115.13 (C), affords certain powers to the Director of the Department of Commerce when Director is named in the statute and affords separate powers to the trial court when the trial court is mentioned in the statute. None of the enumerated prescriptions of the PW Law which mention the trial court or the Director are accorded to the interested party.

District's decision in *Johnson Controls* is erroneous and has been overruled by this Court's decision a year later in *Mohawk Mechanical.*

A balance between protecting employees' rights who work on public projects and the union's right to file a complaint as an interested party to protect its own members' interests must be reached. The union and non-union employees alike must be afforded the protections contemplated by the Legislature to file and control their own complaints, direct their own settlements, select their own attorneys, or to elect to have the Department pursue their claims. The unregulated class action approach argued by Local 33 and its Amici creates a slippery slope that eviscerates the purposeful limiting language included in R.C. 4115.03 (F). The position of Local 33 effectively strips every employee of their right to choose their own representatives and provides the union with the unregulated ability to pursue lawsuits that are in the union's own self interests without fear of recourse.

ABC and other Amici submit that if Local 33's interpretation of R.C. 4115.03 (F) were correct, the Legislature would have simply drafted R.C. 4115.03 (F) to simply state "any labor union may file a prevailing wage complaint as an interested party against any contractor or on behalf of any employee on any public project." The addition of the restrictions added to R.C. 4115.03(F)(3) completely belie this interpretation. The Ninth District's decision and the Sixth District's decision in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc.* 2007-Ohio-3958, 2007 Ohio App. LEXIS 3602 expansion of R.C. 4115.03 (F) to allow <u>any</u> labor organization of <u>any</u> trade jurisdiction interested party standing to file a complaint (or lawsuit) against <u>any</u> contractor who worked on the project, regardless of that contractor's trade/craft jurisdiction is simply an incorrect interpretation of the scope of interested party standing.

It is submitted that a single union could never fairly and adequately represent such a broad and diverse class of individuals without impugning the ethical obligations inherent in every attorney/client relationship. More so, these recent decisions conflict with the Third District's longstanding decision in *International Asso. of Bridge, etc. Local Union 290 v. Ohio Bridge Corp.* (1987), 32 Ohio App. 3d 18, 20, 513 N.E.2d 358, where the Third District not only held that in the absence of an unsuccessful union bidder, the employees must specifically authorize the union's representation, but also held that interested party standing applied only where contractors had competed for the same contract for the project. In other words, the contractor and/or a union could file a prevailing wage complaint against only those contractors who were engaged in the same trade or craft submitting bids for the same contract on the project.

It is important to note that Local 33's claims for interested standing would fail altogether and be disposed of if this Court holds that PW Law does not apply to offsite manufacturing or delivery work. Mr. Cherfan never worked on the jobsite of the public project at issue and his authorization would be no different than a clerical employee who works for Gene's signing an authorization with Local 33 claiming that he/she was entitled to construction industry prevailing wages. Hence, adopting Gene's Proposition of Law No. 1 would completely dispose of Proposition of Law No. 2.

CONCLUSION

The decision of the Ninth District Court of Appeals in fundamentally wrong and has turned 73 years of prevailing wage law interpretation and application on its head. The Ninth District's decision has introduced confusion and absurdity into what was otherwise well established principles of law that are reflective of union and non-union industry practices. A reversal of the Ninth

District's decision will not create new law, but will return the law to the status quo. As such, the Ninth District opinion should be reversed in total and Gene's two Propositions of Law adopted.[28]

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Dated: October 14, 2008

[28] Certain legal arguments and factual assertions made in the Amicus Brief filed by SMACNA and SMRCA need to be independently addressed. First, it must be noted that SMACNA of Cleveland has taken a position regarding Proposition of Law No. 1 that is the opposite of the one taken by SMACNA of North Central Ohio, Inc., that filed a brief in conjunction with the Construction Employer's Association. SMACNA of Cleveland asserts that Ohio's prevailing wage law applies to offsite work, while SMACNA of North Central Ohio takes the position that it does not. Second, SMACNA of Cleveland makes unfounded claims that Gene's, because it does not pay prevailing wages for offsite work, somehow gains a competitive advantage over other union bidders. As can be seen from the contrary positions two SMACNA signatory union contractor associations have taken in this case, these signatory contractors do not currently pay union scale/prevailing wages for the offsite fabrication of sheet metal. Moreover, if Gene's or other contractor's bids are lower because this sheet metal was purchased from another fabricator or made in the contractors own fabricating shop, the savings in the bid would be certainly transferred to the public authority and to the taxpayers through the competitive bidding process; contrary to SMACNA's unfounded claims, these contractors would not "pocket the funds." Furthermore, SMACNA misstates the facts and law in this case. First, Gene's never admitted that Local 33 had standing as an interested party; Gene's has only admitted that Local 33 was authorized to represent Mr. Cherfan. Second, also contrary to the assertions by SMACNA and as evidenced by all of the other briefs filed in this case, prevailing wages have not applied to offsite work "since its inception," and this case is one of first impression.

CERTIFICATE OF SERVICE

This is to certify that one copy of the foregoing Reply Brief Of Amicus Curiae, Associated Builders & Contractors Of Ohio, Inc. In Support Of Appellant Gene's Refrigeration, Heating And Air Conditioning, Inc. was served this 14th day of October 2008 via U.S. Mail, postage prepaid, upon the following:

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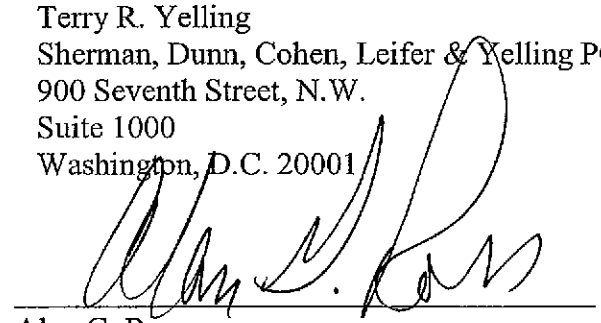

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