

[Cite as *Zurz v. Reese Elec., Inc.*, 2009-Ohio-5298.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

KIMBERLY ZURZ, DIRECTOR
OHIO DEPT. OF COMMERCE

:

Plaintiff-Appellee

:

C.A. CASE NO. 23027

vs.

:

T.C. CASE NO. 07CVF1721

REESE ELECTRIC, INC.

:

(Civil Appeal from
Municipal Court)

Defendant-Appellant

:

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O P I N I O N

Rendered on the 2nd day of October, 2009.

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WOLFF, J. (BY ASSIGNMENT):

{¶ 1} This appeal involves an action commenced by the Ohio
Department of Commerce alleging prevailing wage law violations
pursuant to R.C. 4115.10, by Defendant, Reese Electric, Inc.
("Reese").

{¶ 2} The Ohio Department of Commerce is responsible for enforcing the prevailing wage laws set forth in R.C. Chapter 4115. The prevailing wage laws require that all construction workers on public improvement projects be paid the mandatory prevailing wage rate when the fair estimate of the cost of a construction project exceeds certain monetary thresholds. R.C. 4115.03(B).

{¶ 3} The City of Englewood hired Reese to install four cluster lights on the existing baseball field in Centennial Park, a public park that includes eight baseball fields and dugouts. Centennial Park is owned by the City of Englewood.

This project, known as the Centennial Park Lighting Project, was part of a continuing effort to develop the park and was paid for by the City of Englewood. Prior to beginning the project, Englewood's City Manager estimated the overall project cost to be less than the threshold amount for "new construction," as defined in R.C. 4115.03(B)(1). Two of Reese's employees installed the lights for the Centennial Park Lighting Project.

They were paid less than the prevailing wage for their work on the Project, because the fair estimate of the cost of the Project did not exceed the threshold amount for new construction.

{¶ 4} On October 9, 2007, the Ohio Department of Commerce commenced an action against Reese pursuant to R.C. 4115.10,

alleging that Reese paid its employees below the prevailing wage rate. Reese denied the allegations and both parties moved for summary judgment. On August 15, 2008, the magistrate granted summary judgment in favor of the Ohio Department of Commerce. Reese filed objections to the magistrate's decision.

The trial court overruled the objections and granted summary judgment to the Ohio Department of Commerce, finding that the addition of lights to the existing ballfield was an "alteration" of those premises, R.C. 4115.03(B)(2), which, considering the estimated cost of the Project, required Reese to pay its employees the prevailing wage.

{¶ 5} Reese filed a timely notice of appeal and raises two assignments of error. We will address those assignments in reverse order.

SECOND ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ERRED IN OVERRULING REESE ELECTRIC INC.'S OBJECTIONS AND ADOPTING THE MAGISTRATE'S DECISION THAT THE CENTENNIAL PARK LIGHTING PROJECT WAS A PUBLIC IMPROVEMENT."

{¶ 7} When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.*

(1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶ 8} "The prevailing wage statutes, R.C. 4115.03 through R.C. 4115.16, require contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the project is to be performed." *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, 349, 1998-Ohio-621. R.C. 4115.10(A) provides that no public authority that constructs a public improvement shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code.

{¶ 9} The prevailing wage law applies to "construction projects that are 'public improvements' as defined in R.C. 4115.03 (C): 'Public improvement' includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or political subdivision thereof." *Episcopal Retirement Homes, Inc. v. Ohio Dept. Of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, quoting R.C. 4115.03 (C).

{¶ 10} OAC 4109:9-4-02 provides definitions for the purpose of clarifying the meaning of certain terms in R.C. 4115.03. OAC 4101:9-4-02 (FF) states:

{¶ 11} “Structures and works’ means, to the extent not specifically stated in the definition of public improvement, all construction activity, including, but not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, streetscapes, subways, tunnels, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals.”

{¶ 12} Reese argues that the trial court erred in finding that the work performed by Reese’s employees was on a public improvement project. According to Reese, the addition of lights to an existing baseball field does not qualify as a public improvement because a baseball field is a patch of dirt rather than a physical structure contemplated by R.C. 4115.03 (C). We do not agree. The definition of “public improvement” in R.C. 4115.03 (C) is broad, and includes “all other structures or works.” Moreover, “structures and works” is given a very broad definition in OAC 4109:9-4-02 (FF). Given these broad definitions, we do not agree with Reese’s argument that “public improvement” is limited to a physical structure. Consequently, the installation of lights at an existing baseball field fits

within the broad definition of a "public improvement."

{¶ 13} The second assignment of error is overruled.

FIRST ASSIGNMENT OF ERROR

{¶ 14} "THE TRIAL COURT ERRED IN OVERRULING REESE ELECTRIC, INC.'S OBJECTIONS AND ADOPTING THE MAGISTRATE'S DECISION THAT THE CENTENNIAL PARK LIGHTING PROJECT WAS SUBJECT TO THE LOWER STATUTORY PREVAILING WAGE THRESHOLD SET FORTH IN R.C. _ 4115.03 (B) (2) ."

{¶ 15} It is undisputed that the estimate for the cost of the Centennial Lighting Project was under the threshold level for new construction in R.C. 4115.03 (B) (1), but above the threshold level for the type of construction described in R.C. 4115.03 (B) (2). Therefore, the dispositive issue is whether installation of lights at an existing ballfield constitutes new construction. If it does not constitute new construction, then the lower threshold in R.C. 4115.03 (B) (2) applies and the prevailing wage laws apply to the work performed by Reese's employees.

{¶ 16} R.C. 4115.03 provides, in pertinent part:

{¶ 17} "(B) 'Construction' means either of the following:

{¶ 18} "(1) Any new construction of any public improvement

. . . ;

{¶ 19} "(2) Any reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of any public

improvement,”

{¶ 20} OAC 4101:9-4-02 (G) states:

{¶ 21} “(G) ‘Construction’ means:

{¶ 22} “(1) Any new construction of any public improvement

. . . .

{¶ 23} “(2) 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.”

{¶ 24} The trial court found that the installation of the lights at the existing ballfield did not constitute “new construction.” Rather, the installation “was an ‘alteration’ of those premises which would improve its use.” (Dkt. 34, 38).

We agree with the trial court that the Centennial Park Lighting Project, which consisted of installing lights at an existing baseball field, falls more comfortably within the broad definition in R.C. 4115.03 (B) (2) than (B) (1).

{¶ 25} The first assignment of error is overruled.

{¶ 26} The judgment of the trial court will be affirmed.

DONOVAN, P.J. And BROGAN, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District,
sitting by assignment of the Chief Justice of the Supreme Court
of Ohio.)

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