

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

International Brotherhood of
Electrical Workers, Local Union No. 8

Appellant

Court of Appeals No. WM-11-006

Trial Court No. 09 CI 232

v.

Kingfish Electric, LLC

Appellee

v.

The City of Bryan, Ohio

Third-Party Defendant

DECISION AND JUDGMENT

Decided: May 25, 2012

* * * * *

Joseph M. D-Angelo and Thomas P. Timmers, for appellant.

Ryan S. Thompson, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Plaintiff-appellant International Brotherhood of Electrical Workers, Local Union No. 8 (“Local 8”) appeals from the judgment of the Williams County Court of Common Pleas granting summary judgment in favor of defendant-appellee Kingfish Electric, LLC (“Kingfish”). The trial court granted summary judgment on the grounds that Kingfish’s members are not “employees” subject to Ohio’s prevailing wage law, R.C. 4115.03 et seq.¹ For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} The material facts are not in dispute. Kingfish is an Ohio limited liability company with only two members, Michael Queen and Scott Fisher. Queen and Fisher do not take a salary or otherwise pay themselves wages. Rather, they split equally the net profits of Kingfish, and they are not required under either federal or state law to withhold social security or income tax from the distributions they receive. In addition, Queen and Fisher do not receive employee W-2 forms, but instead recognize and report their receipt of net profits on IRS Form K-1, the pass-through form for partnerships.

{¶ 3} In 2008, the city of Bryan (“the City”) awarded Kingfish the electrical contract for the 2008 Don North Municipal Building Second Floor Renovation Project (“the Project”). The Project qualifies as a public improvement project for the purposes of Ohio’s prevailing wage law. Queen and Fisher worked on the Project from August 2008

¹ Ohio’s prevailing wage law was amended by Am.Sub.H.B. No. 153, 2011 Ohio Laws File 28. Any citation to those statutes in this opinion will be to the pre-amended version.

through December 2008. They were the only two individuals who performed any work under the electrical contract awarded to Kingfish.

{¶ 4} On July 28, 2009, Local 8 initiated this prevailing wage action against Kingfish. The parties do not dispute that Local 8 has standing to bring this claim as an “interested party” under R.C. 4115.03(F)(3).² The complaint, filed in accordance with R.C. 4115.16,³ alleges that Kingfish violated Ohio’s prevailing wage law by compensating Queen and Fisher at a rate less than the prevailing wage, and by failing to exhibit all of the required information on the certified payroll reports it submitted for work performed on the Project. Kingfish filed an answer denying these allegations. Kingfish also included with its answer a third-party complaint, seeking indemnity and/or contribution from the City for its failure to notify Kingfish of an October 23, 2008 change in the prevailing wage rates.

² R.C. 4115.03(F) provides:

“Interested party,” with respect to a particular public improvement, means: (1) Any person who submits a bid for the purpose of securing the award of a contract; (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.

³ R.C. 4115.16 allows an interested party to “file a complaint with the director of commerce alleging a violation of [Ohio’s prevailing wage law.]” If the director has not ruled on the merits of the complaint within 60 days, “the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred.” R.C. 4115.16(B).

{¶ 5} After all initial pleadings were filed, Kingfish moved for summary judgment. In its motion, Kingfish argued that “the lone members of an Ohio limited liability company who personally perform work as a laborer, workman, or mechanic in the construction of a public improvement are [not] subject to [Ohio’s] prevailing wage law.” Kingfish’s argument was based on the analysis in *Internatl. Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.*, 36 Ohio St.3d 74, 521 N.E.2d 809 (1988), which held that a sole proprietor was not an “employee” subject to the prevailing wage law. On December 23, 2009, the trial court denied this motion, finding that the *Wannemacher* decision was expressly limited to sole proprietorships. The court also found that Queen and Fisher were “employees” as defined in Ohio Adm.Code 4101:9-4-02(K), and thus subject to the prevailing wage law.

{¶ 6} Following this denial, the parties spent the next year pursuing discovery. Thereafter, in February 2011, Kingfish and the City moved for, and were granted, leave to file amended pleadings. In its amended answer, Kingfish admitted that Queen and Fisher were “employees” for the purposes of Ohio’s prevailing wage law, as that term is defined in Ohio Adm.Code 4101:9-4-02(K). Kingfish also admitted that Queen and Fisher were paid less than the prevailing wage, but stated that the underpayment was due to the City’s inadvertent failure to notify Kingfish of an increase in the prevailing wage rate that occurred midway through the Project. Kingfish attached a letter from the City, dated August 5, 2009, which explained that the prevailing wage rate had been increased from \$47.51/hour to \$49.08/hour on October 23, 2008. As a result, the City calculated

that Queen and Fisher were each underpaid in the amount of \$323.42. The City later sent checks, dated August 11, 2009, rectifying the underpayment. The City's amended third-party answer admitted these same facts.

{¶ 7} Two weeks after Kingfish filed its amended answer admitting the allegations in the complaint, Local 8 filed notices of depositions for Queen and Fisher. The next day, Kingfish moved to quash the notices of depositions, contending that in light of the amended answer, the only purpose of the depositions would be the accumulation of statutorily mandated attorney fees. On February 25, 2011, the trial court granted Kingfish's motion and quashed the notices because the depositions were scheduled to take place after the March 1, 2011 deadline for discovery.⁴ In response, on March 4, 2011, Local 8 moved for leave to conduct the depositions of Queen and Fisher.

{¶ 8} The parties then engaged in a flurry of filing activity. On March 10, 2011, Kingfish and the City filed a joint motion for judgment on the pleadings in which they sought judgment in favor of Local 8 based on Kingfish's admitted failure to pay the prevailing wage from October 23, 2008, through the end of the Project. On March 14, 2011, Local 8 opposed this motion, arguing that Kingfish and the City were factually mistaken in that the prevailing wage did not increase on October 23, 2008, but rather had increased on June 9, 2008. Therefore, Local 8 concluded that the underpayments were in fact occurring throughout the entire project. Furthermore, Local 8 concluded that because of this, the City's failure to provide Kingfish with the October 23, 2008 wage

⁴ The depositions were scheduled to take place on March 2, 2011. Earlier, the trial court had denied the parties' joint motion to extend the discovery deadline.

rate schedule could not have caused the underpayments. Notably, on the same day that it filed its opposition, Local 8 separately moved for summary judgment against Kingfish.

{¶ 9} Also on March 14, 2011, Kingfish filed an amended third-party complaint pursuant to the written consent of the City. The amended third-party complaint alleges that the City failed to include the current prevailing wage schedule in its bid package, and thus Kingfish is entitled to full indemnity and/or contribution from the City. The City answered at the same time, admitting all of the allegations in the amended third-party complaint.

{¶ 10} Still on March 14, 2011, Kingfish filed a motion for leave to file a second amended answer *instanter* pursuant to Civ.R. 15. In the second amended answer filed simultaneously, Kingfish admitted that Queen and Fisher, “as owners of Kingfish Electric, LLC, *have been determined by this Court to be included* within the definition of ‘Employee’ for the purposes of Ohio’s Prevailing Wage Law as said term is defined in [Ohio Adm.Code] 4101:9-4-02(K).” (Emphasis added.) This is in contrast to its first amended answer in which it admitted Queen and Fisher, “as owners of Kingfish Electric, LLC, *are included* within the definition of ‘Employee’ for the purposes of Ohio’s Prevailing Wage Law as said term is defined in [Ohio Adm.Code] 4101:9-4-02(K).” (Emphasis added.)

{¶ 11} Further still on March 14, 2011, Kingfish and the City moved again for judgment on the pleadings in light of Kingfish admitting it violated Ohio’s prevailing wage law by not paying Queen and Fisher the prevailing wage throughout the Project,

and the City admitting that its failure to include the current prevailing wage schedule in the bid package caused Kingfish's violation.

{¶ 12} Finally, Kingfish also moved for reconsideration of the trial court's December 23, 2009 denial of its motion for summary judgment, which turned on the issue of whether Queen and Fisher are "employees" of Kingfish.

{¶ 13} On March 31, 2011, the trial court granted Kingfish's motion for reconsideration, and reversed its earlier position by finding that Queen and Fisher are not "employees" for the purposes of Ohio's prevailing wage law. The trial court granted summary judgment in favor of Kingfish, and dismissed all other pending motions as moot. In contrast to its earlier position, the trial court reasoned that the analysis of *Wannemacher* does extend to the current fact pattern because it believed little difference, if any, exists between a sole-proprietor who performs the work on a public improvement project and an owner of a limited liability company who performs the work.

B. Assignments of Error

{¶ 14} Local 8 has timely appealed the March 31, 2011 judgment of the trial court and now raises the following two assignments of error:

- 1) The Trial Court Committed Reversible Error When it Granted Defendant Kingfish Electric's Motion for Summary Judgment.
- 2) The Trial Court Committed Reversible Error When it Expanded the Application of *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Company* to apply to members of an LLC.

{¶ 15} Because these two assignments concern the same issue, we will address them together.

II. Standard of Review

{¶ 16} We begin by noting that an appellate court reviews summary judgment rulings de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

III. Analysis

{¶ 17} The issue we must decide is whether Queen and Fisher are “employees” of Kingfish for the purposes of Ohio’s prevailing wage law.

A. The Admission of a Legal Conclusion is not Binding

{¶ 18} As an initial matter, Local 8 notes that Kingfish admitted in its amended answer that Queen and Fisher are included within the definition of “employees” under Ohio Adm.Code 4101:9-4-02(K). Kingfish, on the other hand, notes that its second amended answer does not contain the same admission, but rather admits only that *the trial court found* Queen and Fisher to be “employees.” However, because Kingfish’s

second amended complaint was filed without leave of court, it is a nullity and will not be considered. *See* Civ.R. 15(A). Thus, we must determine the effect of Kingfish's admission that Queen and Fisher are "employees" on its motion for summary judgment. Local 8 argues that summary judgment for Kingfish was inappropriate because, at the least, this admission is sufficient to create a genuine issue of material fact. We disagree for two reasons.

{¶ 19} First, the admission is not to any material fact. Rather, the admission is to the *legal conclusion* that Queen and Fisher are "employees" as that term is defined in Ohio Adm.Code 4101:9-4-02(K). *See Akron Centre Plaza, L.L.C. v. Summit Cty. Bd. of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054, ¶ 10 (construction of statutory language is a question of law for the court). Thus, Kingfish's admission to a legal conclusion does not create a genuine issue of material fact precluding summary judgment.

{¶ 20} Second, Kingfish's admission is not binding on Kingfish or the court because to be binding, the admission must be of a material and competent fact, not merely a legal conclusion or statutory definition. *Faxon Hills Constr. Co. v. United Bhd. of Carpenters and Joiners of Am.*, 168 Ohio St. 8, 10-11, 151 N.E.2d 12 (1958). *See also Waite v. Waite*, 6th Dist. No. L-84-089, 1984 WL 14373 (Sept. 14, 1984) (appellee's admission that the parties' relationship was a common law marriage is a legal conclusion, and is not binding on the party or the court). Therefore, since Kingfish's admission is to a legal conclusion, it does not determine Kingfish's motion for summary judgment.

B. Queen and Fisher are not “Employees” of Kingfish

{¶ 21} Ohio’s prevailing wage law provides in relevant part:

No person, firm, corporation, or public authority that constructs a public improvement with its own forces * * * *shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code.*

(Emphasis added.) R.C. 4115.10(A).

{¶ 22} “Employee” is not defined in this chapter of the Revised Code. However, the regulations promulgated by the Department of Commerce to clarify terms in Ohio’s prevailing wage law define “employee” as:

[A]ny person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and includes owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent. Employee does not include an individual who is a sole proprietor. Ohio Adm.Code 4101:9-4-02(K).

{¶ 23} These regulations went into effect in February 1990, less than two years after the Ohio Supreme Court announced its decision in *Wannemacher*. That case involved a sole proprietor who had been awarded a contract to do brick work on a public

improvement project. *Wannemacher*, 36 Ohio St.3d at 74-75, 521 N.E.2d 809. The sole proprietor, Dan Wannemacher, had employees who worked on the project, and he paid those employees in accordance with the prevailing wage law. Wannemacher also did some of the masonry work himself; however, he did not list his name, or the number of hours that he worked, on the certified payroll records. The International Union of Operating Engineers, Local 18 brought an action against Wannemacher, claiming that his failure to include himself in those records violated Ohio's prevailing wage law. On appeal to the Ohio Supreme Court, the issue presented was "whether a sole proprietor who personally performs physical work as a laborer, workman, or mechanic in the construction of a public improvement and who pays his employees prevailing wages, is himself subject to Ohio's prevailing wage law, R.C. 4115.03 through 4115.16." *Id.* at 75.

{¶ 24} In determining that Wannemacher was not subject to the prevailing wage law, the Supreme Court focused on the distinction between employers and employees in R.C. Chapter 4115. The court then proceeded to define "employer" and "employee" by looking to the common usage of those terms. The court concluded that "the use of 'employee' in R.C. Chapter 4115 does not encompass the term 'employer' when the employer is a sole proprietor who has not used his status as a sole proprietor to gain an unfair advantage in bidding on public improvement projects." *Id.* at 78.

{¶ 25} In this case, the trial court characterized its determination that Queen and Fisher are not employees as an extension of the exception created in *Wannemacher*. As a result, Local 8 contends that the trial court erred because the Ohio Supreme Court

expressly limited its holding in *Wannemacher* “to an employer who is a sole proprietor.” *Id.* at 75. We agree that the discreet holding of *Wannemacher* is of little precedential value in this case. Yet, we think that the trial court’s characterization distorts the issue here. In *Wannemacher*, the court based its holding on the common usage of “employer” and “employee” since neither the Revised Code, nor the regulations, defined those terms. However, the promulgation of definitions in the administrative code for “employer” and “employee” has rendered the specific holding of *Wannemacher* nugatory.⁵ Thus, the relevant issue is not whether the holding of *Wannemacher* should be extended, but rather whether Queen and Fisher fall under the current administrative code’s definition of “employee.”

{¶ 26} Local 8 argues that Queen and Fisher fall within this definition because it includes owners and partners who perform labor or work on a public improvement project. Kingfish, on the other hand, argues that such a broad reading of the definition ignores the functional prerequisite that the person must be “in the employment of an employer.” Kingfish contends that while it is an employer, Queen and Fisher, as members of the LLC, are not in its employment.

{¶ 27} Although we do not rely on *Wannemacher*’s holding in resolving this issue, we find its analytical framework and policy considerations to be instructive. In deciding that the prevailing wage law should not apply to a sole proprietor as a worker, the Ohio

⁵ Notably, *Wannemacher* remains good law on this point because its holding was incorporated into the regulatory definition of “employee,” which states, “Employee does not include an individual who is a sole proprietor.” Ohio Adm.Code 4101:9-4-02(K).

Supreme Court eschewed the opportunity to set the relevant criteria for determining application of the law as whether a person is performing work as a “laborer, workman, or mechanic.” Instead, the Court focused on the relationship between the worker and the employer, determining that the prevailing wage law only applies if the worker is an *employee*. See *Wannemacher*, 36 Ohio St.3d at 79, 521 N.E.2d 809 (Locher, J., dissenting). This emphasis on the importance of an employer-employee relationship was continued in the administrative code’s definition of “employee” in the requirement that a person be “in the employment of an employer.” Had the drafters intended any person who performs work as a laborer, workman, or mechanic on a public improvement project to be considered an “employee,” they simply could have eliminated the phrase “in the employment of an employer,” but because that phrase was included, we are bound to give it effect. R.C. 1.47(B); *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-Ohio-622, 925 N.E.2d 116, ¶ 9 (“A court’s paramount concern in construing a statute is the intent of the legislature. In this regard, ‘it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used’ and to read those words and phrases in context according to the rules of grammar and common usage.” (Citations omitted.)) We note that neither the Revised Code nor the applicable administrative regulations define “in the employment of.” Thus, we must determine whether Queen and Fisher are “in the employment of” Kingfish as that phrase is commonly used. See R.C. 1.42 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or

particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”)

{¶ 28} Under the circumstances of this case, we find that Queen and Fisher are not “in the employment of” Kingfish. Queen and Fisher are not under contract to Kingfish to provide a service, and they are not subject to termination. They are not under the control and direction of Kingfish with regard to the material details of how the work is to be performed. They do not receive a salary or wages from Kingfish for their work. They are not required to withhold social security or income tax from the distributions they receive. Finally, they report their income on IRS Form K-1, the pass-through form for partnerships. Therefore, because we conclude that Queen and Fisher are not “in the employment of” Kingfish, we hold that they are not “employees” for the purposes of Ohio’s prevailing wage law.⁶

{¶ 29} In so holding, we do not say that every member of a limited liability company is excluded from the definition of “employee,” thus rendering meaningless that

⁶ In addition, our determination in this case is consistent with the use of the phrase “in the employment of” in the regulations regarding unemployment compensation. *See* Ohio Adm.Code 4141-1-04(C)(3) (members in a member-managed limited liability company that is composed of two or more members and is classified as a partnership for federal income and unemployment tax purposes will be treated as general partners for the purposes of R.C. Chapter 4141); Ohio Adm.Code 4141-1-03 (general partners “*are not in the employment of the partnership*.” Such general partners shall not be considered in determining the total number of individuals in the employment of a firm.” (Emphasis added.)) Similarly, this determination is consistent with the application of Ohio’s workers’ compensation law. *See* Ohio Adm.Code 4123-17-07(B)(1) (where a limited liability company is treated as a partnership for tax purposes, the remuneration of its members shall not be reported as part of the payroll of the employer unless the limited liability company elects to include such person as an employee as provided in R.C. 4123.01(A)(2)).

portion of the definition that includes “owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent.” Ohio Adm.Code 4101:9-4-02(K). Instead, our holding that Queen and Fisher are not employees is based on the specific facts of this case. Other circumstances could exist where a member of a limited liability company is considered an employee, for example, when the member is contractually entitled to specific compensation for his or her work on the project, irrespective of the company’s profit.

{¶ 30} Local 8 argues that finding Queen and Fisher not to be employees ignores the corporate form of Kingfish. This is incorrect. In the present situation, Kingfish—the employer—is a separate entity from Queen and Fisher—the workers. This situation is dissimilar from *Wannemacher*, wherein Dan Wannemacher was both the employer *and* the worker. Thus, Local 8 contends that *Wannemacher*’s holding that a sole proprietor could not be an employee under the statute because he was also the employer is inapposite. Local 8 reaches the conclusion that Queen and Fisher are not employers, and therefore they must be employees. However, this conclusion presupposes that only two classifications are possible, employers and employees. As is evident from the definition of “employee,” this is not the case. For example, under Ohio Adm.Code 4101:9-4-02(K), a foreman on a public improvement project who devotes less than twenty percent of his time to labor on the project is not an “employee,” even though he performs some work on the project. This indicates a third class exists, which is comprised of persons who

perform work on the project but are not employees. Queen and Fisher fall within this class.

{¶ 31} Local 8 next contends that by applying the exception for sole proprietors carved out by the Ohio Supreme Court in *Wannemacher*, and retained in the administrative code’s definition of “employee,” we are treating Kingfish in a manner similar to sole proprietorships. Local 8 contends this is contrary to the general principle that “an LLC should be governed by the same rules that apply to [corporations and partnerships].” *Dexxon Digital Storage, Inc. v. Haenszel*, 161 Ohio App.3d 747, 2005-Ohio-3187, 832 N.E.2d 62, ¶ 64. However, this argument confuses the issue. The exception referred to by Local 8 is an exception from the definition of “employee,” it does not make an “employer” exempt. Indeed, *Wannemacher* noted that the sole proprietor had other employees to whom he paid the prevailing wage. *Wannemacher*, 36 Ohio St.3d at 78, 521 N.E.2d 809. Here, because Kingfish falls within the regulatory definition of “employer,” it is required to pay its employees the prevailing wage, just as any other limited liability company, partnership, corporation, or sole proprietorship. The real issue is whether Queen and Fisher are “employees,” and we have held they are not.

C. Public Policy

{¶ 32} Finally, Local 8 argues that policy considerations militate against holding that Queen and Fisher are not employees under Ohio’s prevailing wage law. As stated by the Ohio Supreme Court in *State ex rel. Evans v. Moore*, 69 Ohio St.2d 88, 91, 431 N.E.2d 311 (1982),

The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, inter alia, worker rights and remedies vis-à-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state. * * *

Above all else, 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.

{¶ 33} Citing to the dissent in *Wannemacher*, Local 8 sets forth two ways in which our holding would foil this policy. First, because any contractor organized as a limited liability company would not have to pay its members the prevailing wage rate, the company could lower or delete its members' labor costs from the bid, thereby winning a contract by being the lowest bidder. Local 8 argues "[t]he award of work would be based solely on advantages gained through a legal loophole, instead of efficiency, productivity, and quality of work." This result would "[destroy] parity and mak[e] a mockery of the bidding process." Second, Local 8 asserts that any contractor organized as a limited liability company would not have to maintain records for its members. It argues this would result in an incomplete picture of a contractor's work on a project, and would make it difficult to determine whether a contractor listed the correct hourly rate for each job classification and whether it reported hours accurately. Thus, "the inspection and verification of payrolls would be rendered ineffective, damaging enforcement of the

Prevailing Wage Law and contributing to the undercutting of employee wages.” We do not find either policy argument convincing.

{¶ 34} Initially, we reiterate our previous statement that our holding applies only to the facts of this case; we are not creating a blanket rule excluding all members of limited liability companies from the definition of “employee.” Thus, the scope of the impact of our decision is not as broad as Local 8 envisions. In addition, we note these concerns were raised by the dissent in *Wannemacher*. In this case, we see no fundamental difference between a sole proprietor and these two members sufficient to warrant a different result where a majority of the Ohio Supreme Court considered these same arguments and found them unpersuasive.

{¶ 35} Accordingly, Local 8’s first and second assignments of error are not well-taken.

IV. Conclusion

For the foregoing reasons, the judgment of the Williams County Court of Common Pleas is affirmed. Local 8 is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

Mark L. Pietrykowski, J., dissents

PIETRYKOWSKI, J.

{¶ 36} I respectfully dissent.

{¶ 37} A court construes an ambiguous statute in a manner that gives effect to the legislative intent behind its enactment. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 20-21. “[T]he 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*, 69 Ohio St.2d 88, 91, 431 N.E.2d 311 (1982); *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-Ohio-622, 925 N.E.2d 116, ¶ 10.

{¶ 38} The Ohio prevailing wage law, R.C. 4115.03 through 4115.16, is to be read in pari materia with administrative regulations adopted by the Department of Commerce

to facilitate administration of the law. *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, ¶ 38.

{¶ 39} At issue here is whether members of a limited liability company are to be treated as employees under the Ohio prevailing wage law when they perform work or labor in constructing public improvements in this state. The statutory scheme does not include a definition for the term “employee.” The regulations provide a definition in Ohio Adm.Code 4101:9-4-02(K):

(K) “Employee” means any person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and *includes owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent. Employee does not include an individual who is a sole proprietor. * * *.*

{¶ 40} The definition of employee provided in Ohio Adm.Code 4101:9-4-02(K) clearly and unambiguously includes principals of business entities within the term employees for purposes of the prevailing wage law. Under the regulation, a person performing work as a laborer, workman, or mechanic on a public improvement does not lose the status as an employee under the Prevailing Wage Law simply because he or she holds an ownership or managerial interest or position with the employer. Ohio

Adm.Code 4101:9-4-02(K) specifically recognizes that owners, partners, supervisors and working foremen can be employees where they meet a 20 percent time threshold under the regulation. One exception recognized by *Wannemacher* and included in the regulation is where the person performing the work is a sole proprietor.

{¶ 41} In *Wannemacher*, the Ohio Supreme Court ruled that an employer who is a sole proprietor and personally performs the work of a laborer, workman, or mechanic on a public improvement is not to be treated as an employee for purposes of the Prevailing Wage Law with respect to his own individual labor. *Wannemacher*, 36 Ohio St.3d at 75. The court expressly limited its decision to employers who are a sole proprietors. *Id.*

{¶ 42} Kingfish Electric, LLC is a limited liability company. Under Ohio law a limited liability company is a distinct business entity separate and apart from its members. *Disciplinary Counsel v. Kafele*, 108 Ohio St.3d 283, 2006-Ohio-904, 843 N.E.2d 169, ¶ 18; *Damas v. Damas*, 6th Dist. No. L-10-1125, 2011-Ohio-6311, ¶ 50; R.C. 1705.01(D)(2)(e). Accordingly, the fact that Michael Queen and Scott Fisher as members of the LLC were the owners of the company, does not prevent them from also being employees within the definition afforded under Ohio Adm.Code 4101:9-4-02(K). It is not insignificant that the contract for this project was between Kingfish Electric, LLC and the city of Bryan and not between Queen or Fisher, personally, and the city.

{¶ 43} The *Wannemacher* decision was a 4-3 decision. The majority opinion expressly limited its holding in the case to sole proprietors. The dissent, authored by Justice Locher and joined by Justices Douglas and Sweeney, provides insight as to the

harm that may be caused by creating exceptions under the Prevailing Wage Law as to who are to be treated as employees and subject to wage requirements under the statute:

The prevailing wage law achieves its purpose by creating parity in the bidding process. By requiring all contractors and subcontractors bidding on public works to pay their workers the same rate of wages, the law removes the differential of labor costs from the bidding process. Thus, union and non-union contractors have an equal opportunity to bid on, and win, public-works contracts. When an individual contractor, such as *Wannemacher*, can reduce its labor costs through judicially created loopholes, the regulatory scheme is defeated and parity destroyed. *Wannemacher*, 36 Ohio St.3d at 79 (Locher, J., dissenting).

{¶ 44} The decision in *Wannemacher* was by a sharply divided court. The court's decision to expressly limit its holding to employers who are sole proprietors is to be understood in context with the concerns expressed in the *Wannemacher* dissent that exceptions for employers from being treated as employees under the statute can undermine the Prevailing Wage Law from achieving its statutory purpose.

{¶ 45} The course proposed here by the majority opinion is not supported by either the majority opinion in *Wannemacher* or the dissent. Exempting members of limited liability companies from prevailing wage requirements will create an unfair advantage to limited liability companies in bidding on public improvements that was not intended by the statutory scheme and will serve to prevent any parity in wages on public

improvement contracts in this state. The opinion creates an easy means for groups of workers to game the system by forming limited liability companies and thereby undercut bids by others who are required to pay the prevailing wage.

{¶ 46} I would reverse the judgment of the trial court and remand this case with instructions directing the trial court to apply the twenty percent time threshold test set forth in Ohio Adm.Code 4101:9-4-02(K) to determine whether Michael Queen and Scott Fisher were employees and subject to the requirements of the Prevailing Wage Law.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.