

SC90963

IN THE SUPREME COURT OF MISSOURI

UTILITY SERVICE CO., INC.,

Plaintiff - Respondent,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIAL
RELATIONS, and THE LABOR AND INDUSTRIAL
RELATIONS COMMISSION OF MISSOURI,

Defendants - Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Richard G. Callahan

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The Department of Labor and Industrial Relations and the Labor and Industrial Relations Commission of Missouri appeal from a February 2, 2009, judgment of the Circuit Court of Cole County finding that the work described in the contract between Utility Service Co., Inc. and Monroe City, Missouri, involving a water tower and tank, was not subject to the prevailing wage requirement under Missouri's Prevailing Wage Act, §§ 290.210-290.340, RSMo.^{1/} The case was originally appealed to the Missouri Court of Appeals, Western District, and was transferred after a per curiam opinion to this Court by order dated August 31, 2010.

^{1/} All statutory citations are to the 2000 edition of the Revised Statutes of Missouri except as otherwise indicated.

STATEMENT OF FACTS

A. Factual Background.

Utility Service Co., Inc. (“Utility Service”) entered into a “Water Tank Maintenance Contract” (“Contract”) with Monroe City, Missouri, which includes professional services needed to maintain and care for the City’s 250,000 gallon elevated water storage tower and tank. Legal File (“L.F.”) 47; 94. The Contract includes the following categories of work:

- a. an annual inspection and servicing of the tank, which includes draining and cleaning the tank utilizing high-pressure equipment with chemical injection and disinfecting it prior to returning it to service;
- b. specialized services, including engineering and inspection services needed to maintain and repair the tank and tower; repairs include steel replacement, steel parts, expansion joints, water level indicators, sway rod adjustments, manhole covers/gaskets, and other component parts of the water tank;
- c. cleaning and repainting of the interior and/or exterior of the tank at such time as complete repainting is needed;
- d. installation of an anti-climb devise on the access ladder to prevent unauthorized persons from climbing the tower;

- e. installation of a lock on the roof hatch of the tank to prevent unauthorized entry; and
- f. furnishing of relief valves, if needed to install in the water system so the owner can pump direct and maintain water pressure while the tank is being serviced.

L.F. 95.

The steel replacement described in the Contract is a necessary repair of the tank and tower when severe pitting or steel loss occurs. L.F. 98. The complete repainting of the interior and exterior of the water tank described in the Contract involves adding an entire layer of paint. L.F. 99. The installation of an anti-climb device described in the Contract involves affixing an anti-climb device to the access ladder of the tank. L.F. 101. The purpose of this anti-climb device is to prevent unauthorized persons from climbing the tower, and it is considered a standard safety mechanism. L.F. 101. The anti-climb device is approximately six to eight feet long and includes a mesh cage that encloses the access ladder. L.F. 101. The installation of a lock described in the Contract involves the installation of a standard padlock on the hatch roof of the tank. L.F. 102. The installation of relief valves described in the Contract involves temporarily installing relief valves as needed during servicing of the tank. L.F. 102.

The construction of a new water storage tank of a similar size to the one referenced in the Contract would cost \$470,000.00. L.F. 142. The work performed during the first three years of the Contract, when the major work can be expected to occur, will cost the City of Monroe \$115,719.00, or about 24% of the value of a similar new tank. L.F. 145.

B. Utility Service’s Lawsuit.

On August 7, 2007, Utility Service filed a Petition for Declaratory Judgment against the Department of Labor and Industrial Relations and the Labor and Industrial Relations Commission of Missouri in the Circuit Court of Cole County, Missouri. L.F. 8-11. Utility Service sought a declaration that the work under the Contract was not subject to the Missouri Prevailing Wage Act, §§ 290.210-290.340, RSMo (“Act”), because it fell within an exception to Missouri’s declared policy to pay prevailing wages on the basis that the work is purely “maintenance work.” L.F. 106. The parties submitted the case to the court on cross motions for summary judgment. L.F. 154.

On February 2, 2009, the trial court issued a final order and judgment. In its judgment, the trial court focused on the exception in the Act for “maintenance work” and concluded that none of the Contract work increased or changed the size, type, or extent of the existing facilities. L.F. 160. It did not matter to the trial court that the work included construction work, which is defined by the Act as “construction, reconstruction, improvement, enlargement,

alteration, painting and decorating, or major repair.” § 290.210(1), RSMo. According to the trial court, “[a]ll work under a contract for public works must be either construction or maintenance work. When something is being built or constructed, rather than being repaired, the work is construction work.” L.F. 161. On appeal, the Missouri Court of Appeals, Western District, held that the Act does not apply if the project does not “call for any new construction . . . and the work does not change the size, type or extent of the existing facilities.” Order at 12 (per curiam).

POINTS RELIED ON

- I. **The Trial Court Erred in Granting Respondent Summary Judgment Because the Court Erroneously Interpreted Missouri’s Prevailing Wage Act, In That the Plain Language of the Act Broadly Covers “Construction” Work in the Parties’ Contract and is Not Limited by the Narrow Exception for “Maintenance Work.”**

Chester Bros Const. Co. v. Mo. Dep’t of Labor, 111 S.W.3d 425 (Mo. App. E.D. 2003)

Long v. Interstate Ready-Mix, L.L.C., 83 S.W.3d 571 (Mo. App. W.D. 2002)

State Dep’t of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Public Utilities of the City of Springfield, 910 S.W.2d 737 (Mo. App. S.D. 1995)

§§ 290.210 – 290.230, RSMo

- II. **The Trial Court Erred in Granting Respondent Summary Judgment Because the Court Erroneously Interpreted the Term “Facilities” in Missouri’s Prevailing Wage Act, In That Major Component Parts of a Water Tower and Tank are “Facilities” Under the Act.**

Hadel v. Bd. of Educ. Of School Dist. of Springfield, R-12, 990 S.W.2d 107 (Mo. App. S.D. 1999)

*Kulzer Roofing, Inc. v. Commonwealth of Pennsylvania, Dep't of Labor
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*State Dep't of Labor and Indus. Relations, Div. of Labor Standards v.
Bd. of Public Utilities of the City of Springfield*, 910 S.W.2d 737
(Mo. App. S.D. 1995)

§ 290.210(4), RSMo

SUMMARY OF THE ARGUMENT

Under the court of appeals' interpretation of the Prevailing Wage Act (and the trial court's similar interpretation), many massive and expensive public works projects would *not* be considered "construction work" as broadly defined by the Act, but merely "maintenance work" not subject to prevailing wages. Public works projects costing millions of dollars, such as the Broadway Building or the Paseo Bridge renovations, would not be subject to prevailing wages. And why? Because, according to the court of appeals, the Act does not apply if the project does not "call for any new construction . . . and the work does not change the size, type or extent of the existing facilities." Order at 12 (per curiam). This interpretation of the Act, however, ignores the plain language of this remedial statute as well as basic principles of statutory construction.

The work described in the Contract between Utility Service and Monroe City, Missouri, and involving a water tower and tank, is subject to prevailing wages. The Act provides that prevailing wages be paid for workers "engaged in the construction of public works, exclusive of maintenance work." § 290.230, RSMo. "Construction," in turn is broadly defined by the Act as "construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair." § 290.210. The work under the Contract in this case includes the replacement of major parts, the addition of new parts, and painting. This work constitutes "reconstruction," "improvement," "alteration," "painting," and

“major repair,” which are activities that are expressly defined as “construction” by the Act. § 290.210(1), RSMo.

The work under the Contract is also not subject to the narrow “maintenance work” exception in the Act because that exception applies only to limited repair work that is not included in any other statutorily defined forms of construction. And even if the maintenance exception did apply to all forms of construction, the work in this case would not meet the definitional test for maintenance, because the work in fact changes the “size, type or extent of existing facilities” or involves the “replacement” of “existing facilities.” § 290.210(4), RSMo. Furthermore, the plain meaning of “facilities” includes the component parts of a structure such as a water tower and tank. Since the Contract unquestionably involves the replacement of component parts or the addition of component parts, it is not “maintenance work” within the meaning of the Act.

ARGUMENT

Standard of Review

A grant of summary judgment is reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The “propriety of a grant of summary judgment is purely an issue of law,” and the appellate court “need not defer to the trial court’s order granting summary judgment.” *Id.* In this case, the trial court’s summary judgment should be reversed as a matter of law because the court erroneously interpreted Missouri’s Prevailing Wage Act.

I. The Trial Court Erred in Granting Respondent Summary Judgment Because the Court Erroneously Interpreted Missouri’s Prevailing Wage Act, In That the Plain Language of the Act Broadly Covers “Construction” Work in the Parties’ Contract and is Not Limited by the Narrow Exception for “Maintenance Work.”

The Prevailing Wage Act (“Act”), §§ 290.210-290.340, RSMo, was enacted by the Missouri General Assembly in 1957. *See Long v. Interstate Ready-Mix, L.L.C.*, 83 S.W.3d 571, 574 (Mo. App. W.D. 2002). The Act includes a statement of Missouri’s policy expressly favoring the payment of prevailing wages:

Policy declared. – It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character ... shall be

paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work.

§ 290.220, RSMo.

The Act thus declares that Missouri's public policy is to ensure that workers on public projects be paid prevailing wages. *See Long*, 83 S.W.3d at 574. As such, the Act was enacted in the interest of the public welfare and is a remedial statute. *Id.* (citing *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998)). Remedial statutes "should be construed so as to meet the cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used ... resolving all reasonable doubts in favor of applicability of the statute to the particular case." *State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103 (Mo. banc 1982) (citing *State ex rel. Brown v. Bd. of Educ. of the City of St. Louis*, 242 S.W. 85, 87 (Mo. banc 1922)).

The purpose of the Act is to prevent workers engaged in public works from the evil of substandard wages. Therefore, any doubts about the applicability of the Act must be resolved in favor of ensuring that workers engaged in public works projects receive the prevailing wage.

A. Prevailing Wages Apply Because of “Construction” Work in the Contract, Including Reconstruction, Improvement, Alteration, Painting, and Major Repairs.

The Act mandates that the “prevailing hourly rate of wages” shall be paid to workers “engaged in the *construction* of public works, *exclusive of maintenance work.*” § 290.230, RSMo, (emphasis added). The Act defines “construction” and “maintenance work” as follows:

- (1) **“Construction”** includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair.

* * *

- (4) **“Maintenance work”** means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased.

§ 290.210, RSMo. Because the Act specifically includes “construction” work and then excludes “maintenance work,” it is necessary first to determine whether the work in the parties’ Contract fits within the definition of “construction.”

“Construction” is an expansive concept in the Act. Indeed, the General Assembly demonstrated its intent to ensure that “construction” is broadly construed by including even “construction” itself within its definition, along with

many other broad terms. § 290.210(1), RSMo. The General Assembly further declared that prevailing wages are the “policy of the state of Missouri,” thus ensuring that the definition of “construction” would be liberally construed with all doubts resolved in favor of its application. § 290.220, RSMo.

Because terms used to define “construction” in the Act – including reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair – are not themselves defined in the Act, the terms are used in their plain and ordinary meaning. *See Hyde Park Hous. P’ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). The trial court made virtually no effort to analyze the Contract work in this case under the definition for “construction,” including the terms used to define “construction.” Yet, the work detailed in the Contract fits the definition of several terms defined as “construction” within the meaning of the Act.

1. The parties’ Contract includes “reconstruction.”

To reconstruct is “to construct again; rebuild; make over.” WEBSTER’S NEW WORLD DICTIONARY 1187 (2d ed. 1978). To “rebuild” can also mean “to restore to a previous condition” or “to repair or remodel extensively, as by taking apart and reconstructing, often with new parts.” *Id.* at 1184. According to the terms of the Contract, “repairs include steel replacement, steel parts, expansion joints, water level indicators, sway rod adjustments, manhole covers/gaskets, and other component parts of the tank or tower.” L.F. 12. Utility Service will

provide “interior renovation” if needed and “will also install an anti-climb device on the access ladder.” L.F. 12. The work performed during the first three years of the Contract, when the major work can be expected to occur, will cost the City \$115,719.00, or about 24% of the value of a similar new tank. L.F. 145.

The work to be performed on the water tower and tank, as described in the Contract, amounts to reconstruction because it involves restoring the water tower to its previous condition. It is also reconstruction because it is a remodeling of the water tower and tank insofar as major parts will be taken apart and reconstructed using new parts. L.F. 145. Indeed, even the trial court acknowledged that the Contract involved “[s]teel replacement . . . when *severe* pitting or steel loss occurs.” L.F. 156 (emphasis added).

Given the magnitude of the work to be performed under the Contract, it certainly amounts to extensive remodeling, which is synonymous with reconstruction. This Contract work falls within the ordinary meaning of “reconstruction,” and falls within the broad public policy favoring application of the Act in the face of any doubts. *LeFevre*, 642 S.W.2d at 106. Therefore, the parties’ Contract is subject to prevailing wages as a matter of law.

2. The parties’ Contract includes “alteration” and “improvement.”

Even if the work to be performed on the water tower did not amount to “reconstruction,” it would still constitute “alteration” or “improvement.” Once

again, the trial court made no effort to analyze whether the work under the Contract satisfied the requirements of “alteration” or “improvement.” To “alter” is “to make different in details but not in substance; modify.” WEBSTER’S NEW WORLD DICTIONARY 40 (2d ed. 1978). To “improve” is “to raise to a better quality or condition; make better.” WEBSTER’S NEW WORLD DICTIONARY 707 (2d ed. 1978).

Replacement of major component parts and the addition of an anti-climb device are, at a minimum, “modifications” of the water tower or “differences in detail,” that would bring this work within the plain meaning of “alteration” or “improvement.” Furthermore, insofar as the new replacement parts are of a better quality than the parts replaced or are of a better design, the work on the tower results in its “improvement.” The “installation of an anti-climb device” – a device that is approximately six to eight feet long and includes a mesh cage that encloses the access ladder – is an “alteration” or “improvement.” Therefore, this construction work makes the parties’ Contract subject to prevailing wages as a matter of law.

3. The parties’ Contract includes “painting.”

Probably the simplest application of the Act in this case is the provision for painting. “Construction” is specially defined in the Act to include “painting.” Thus, if the public works include painting then the parties’ Contract is subject to prevailing wages. And while minor touch-up paint may be insufficient to satisfy

this provision, there is no dispute that this Contract does not involve minor touch-up painting. Instead, the Contract includes the complete repainting of the interior and/or exterior of the water tank. L.F. 12. The trial court specifically found that “repainting of the interior and/or exterior of the tank” was for “complete repainting.” L.F. 155.

Both parties agree that repainting involves adding a layer of paint. L.F. 99. Thus, repainting – particularly “complete repainting” – is a subset of painting, which is specifically included in the definition of “construction” in the Act. § 290.210(1), RSMo. For this reason alone, prevailing wages apply to the Contract.

4. The parties’ Contract includes “major repair.”

The Contract work in this case not only falls within the definition of construction insofar as it involves reconstruction, alteration, improvement or painting, but it also constitutes construction because it includes “major repair” within the meaning of the Act. To “repair” is to “put back in good condition after damage, decay, etc.; mend; fix.” WEBSTER’S NEW WORLD DICTIONARY 1204 (2d ed. 1978). Major repairs are large or important repairs. *See* WEBSTER’S NEW

WORLD DICTIONARY 854 (2d ed. 1978) (defining “major”).^{2/} The water tower and tank are to be put back into good condition after damage or decay by the work described in the Contract because the work involves the replacement of major component parts after “severe” damage. L.F. 156.

For example, the Contract involves the replacement of steel components of the shell after severe damage such as “severe pitting or steel loss” and the replacement of expansion joints and manhole covers or gaskets. L.F. 156. These are large or important repairs that bring the Contract within the meaning of “major repair.” Indeed, it can hardly be disputed that repairs totaling nearly 25% of the total cost of a replacement water tower and tank constitute “major repairs.”

^{2/}The term “major repair” also relates to the definition of “maintenance work” in the Act because that definition also uses the term “repair.” § 290.210(4), RSMo. As discussed below, the work under the Contract cannot be “maintenance work” because the Contract involves replacement of existing facilities (the major component parts), which is specifically excluded from the definition of “maintenance work.”

5. Work preparatory to “construction” is also subject to prevailing wages.

Finally, in addition to the work that is expressly defined as “construction,” courts have held that work on site that is preparatory to construction is itself construction. *See Chester Bros Constr. Co. v. Mo. Dep’t of Labor*, 111 S.W.3d 425, 427 (Mo. App. E.D. 2003) (holding that a mechanic who maintained and/or repaired vehicles utilized in the construction of a highway was directly employed in actual construction work). Thus, although cleaning the tank, inspecting the tank, or temporarily installing relief valves would not by themselves be construction, they are construction insofar as they are preparatory to the reconstruction, alteration, improvement, painting, or major repair discussed above.

B. The Narrow Exception for “Maintenance Work” Applies Only to Limited Repairs.

While the provision for “construction” work is to be liberally construed, the exclusion in the Act for “maintenance work” is not. As an exception to the remedial provisions of the Act, the definition of “maintenance work” must be narrowly construed. *See LeFevre*, 642 S.W.2d at 103. Yet, the trial court and the court of appeals did not interpret the Act in this way nor follow the declared policy of the state of Missouri. Instead, both courts took the exact opposite approach, letting the exception effectively swallow the rule. The trial court used

the exception for “maintenance work” as the basis for its entire analysis – analyzing all work according to whether it would “change or increase the size, type or extent of the existing facility.” *See* L.F. 156-59. Similarly, the court of appeals used the exception to control the analysis, holding that the Act does not apply if the project does not “call for any new construction . . . and the work does not change the size, type or extent of the existing facilities.” Order at 12 (*per curiam*).

Not only did the trial court and court of appeals take the opposite approach to interpreting the Act, but both courts also interpreted the Act to mean that “construction” work and “maintenance work” are mutually exclusive, binary categories that are distinguished by determining whether there is a change or increase in size, type or extent of the existing facilities. According to the trial court, “[a]ll work under a contract for public works must be either construction or maintenance work. When something is being built or constructed, rather than being repaired, the work is construction work.” L.F. 161.

This novel interpretation of the Act is unsupported by the plain language of the Act and the case law. Rather, according to the Act’s plain language and the cited cases, maintenance is a subset of construction, and the statutory exception to the prevailing wage requirement for maintenance applies narrowly only to construction work that involves repairs that are not “major repairs.”

In interpreting a statute, courts discern the intent of the legislature by “construing words used in the statute in their plain and ordinary meaning.” *Hyde Park*, 850 S.W.2d at 84. Courts assume that the “legislature intended that every word, clause, sentence, and provision of a statute have effect.” *Id.* Thus, courts presume that “the legislature did not insert idle verbiage or superfluous language in a statute.” *Id.* Where possible, courts construe all statutory provisions of the Act together and harmonize the various provisions. *Kincade v. Treasurer of the State of Mo.*, 92 S.W.3d 310, 311 (Mo. App. E.D. 2002).

The Act creates a broad requirement that workers must be paid the prevailing wage for “construction” work and delineates a narrow exception for work that is “maintenance work.” § 290.230, RSMo. Specifically, the maintenance exception applies to a “repair, but not replacement, when the size, type or extent of the existing facilities is not thereby changed or increased.” § 290.210(4), RSMo. The use of the term “repair” in the definition of “maintenance” is significant because “repair” is also a term that is used in one of the specific activities defined as construction by the statute: “major repair.”

The legislature could have defined maintenance as “*construction* ... when the size, type or extent of the existing facilities is not thereby changed or increased”; instead, it specifically chose the word “repair.” A harmonious reading of the definition of “construction” and the definition of “maintenance work” indicates that the legislature intended the maintenance exception to

apply only to construction that involves repairs that are not “major.” Thus, the purpose of the maintenance exception is to distinguish “major repair,” which is expressly included in the statute, from non-major repairs that can be considered maintenance.

A plain reading of the statute provides that at a minimum “maintenance work” *cannot* be any of the following:

- it cannot be a “major repair” because that is expressly included in the Act as a covered public work;
- it cannot be a repair that constitutes “replacement;” and
- it cannot be a repair that changes or increases the size, type or extent of the existing facility.

This leaves a very narrow category of repairs that are not subject to prevailing wages and suggests at least a two-part test for determining whether work is subject to the prevailing wage requirement. First, as discussed above, a court must determine whether the proposed work fits into one of the eight categories statutorily defined as construction (“construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair”). § 290.210(1), RSMo. If the work fits within one of the first seven categories then the analysis is over and prevailing wages must be paid.

Second, if the work involves repairs, the court must determine whether such repairs are “major repairs” or whether they are specifically excluded from

prevailing wage requirements because the repairs are “maintenance work” as defined by the Act. § 290.210(1), RSMo. Thus, contrary to the holdings of the trial court and court of appeals, it is only in the narrow context of the second test that a court should consider whether the work increases or changes the size, type or extent of existing facilities – and then only if it does not constitute replacement.

The conclusion that the maintenance exception applies only to a “major repair” and not other categories of construction is supported not only by the plain language of the Act but also by the fact that a contrary holding would produce absurd results that the legislature could not have intended. *See Kincade*, 92 S.W.3d at 311 (holding that “we will not construe the statute so as to work unreasonable, oppressive or absurd results”). For example, “painting” is one of the activities defined by the legislature as construction, but it would be nonsensical for a court to try to determine whether painting changes the size, type or extent of the existing facilities because painting always adds only a fraction of an inch to an existing structure.

It is difficult to imagine any scenario in which painting would significantly change or increase the size, type, or extent of existing facilities. Therefore, the trial court only stated the obvious when it held that complete repainting “involves adding a layer of paint that does not change or increase the size, type or extent of the existing facility.” L.F. 157. The court’s own conclusion

demonstrates that the application of the maintenance test to “painting” would render the General Assembly’s inclusion of painting in the definition of construction superfluous insofar as all painting would satisfy the test for the maintenance exception and no painting could be considered construction.

The trial court and court of appeals cited *State Dep’t of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Public Utilities of the City of Springfield* (“*City Utilities*”) to support the conclusion that the maintenance exception applies to all forms of construction. *State Dep’t of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Public Utilities of the City of Springfield*, 910 S.W.2d 737 (Mo. App. S.D. 1995); L.F. 159. However, *City Utilities* fails to support the courts’ interpretation of the Act for several reasons. First, *City Utilities* did not hold that “construction” and “maintenance work” are mutually exclusive categories that can be distinguished by the maintenance test, *i.e.*, by determining whether there is a change or increase in the size, type, or extent of the existing facilities. Rather, in construing the Act – which states that the prevailing wage applies to the “construction of public works, *exclusive of maintenance work*” (emphasis added) – the court in *City Utilities* correctly observed that maintenance work is a subset of construction work. *See City Utilities*, 910 S.W.2d at 740 (holding that “§ 290.230 does not require that the prevailing wage be paid for “construction” work that is “maintenance work”).

Secondly, the dispute in *City Utilities* involved a regulation defining the term “major repair” and not “construction” in general. *See Id.* at 744. In its analysis of the regulation, the court in *City Utilities* correctly recognized that “major repair” was properly defined with reference to the types of repairs specifically excluded by the statute under the definition of maintenance. *Id.* However, the court noted that the term “major repair” is only “part of the § 290.210(1) definition [of construction],” and the court did not suggest that the maintenance exception applies to other types of “construction” within the meaning of the Act. *Id.* at 744. Therefore, *City Utilities* does not stand for the proposition that the other categories included in the statutory definition of construction (“construction, reconstruction, improvement, enlargement, alteration, painting and decorating”) are limited by the requirement that they must “change or increase the size, type or extent of the existing facility” in order to be included within the remedial provisions of the Act.

The parties’ Contract in this case includes “construction work” subject to Missouri’s Prevailing Wage Act, including reconstruction, alterations, improvements, painting and major repairs. The trial court ignored this work, and instead broadly construed a limited exception for “maintenance work” that should have been narrowly construed in accordance with Missouri’s public policy favoring remedial statutes.

II. The Trial Court Erred in Granting Respondent Summary Judgment Because the Court Erroneously Interpreted the Term “Facilities” in Missouri’s Prevailing Wage Act, In That Major Component Parts of a Water Tower and Tank are “Facilities” Under the Act.

As set forth above, the work under the parties’ Contract is not subject to the narrow “maintenance work” exception in the Act because that exception applies only to limited repair work that is not included in any other statutorily defined forms of construction. Yet, even if the maintenance exception did apply to all forms of construction, the work in this case would not meet the definitional test for maintenance, because the work changes the “size, type or extent of existing facilities” or involves the “replacement” of “existing facilities.” § 290.210(4), RSMo. The plain meaning of “facilities,” in this statute, includes the component parts of a structure such as a water tower and tank.

A. The Term “Facilities” in the Missouri Prevailing Wage Act Includes Component Parts of a Structure.

The trial court erred in concluding that the work in the Contract is maintenance because it incorrectly defined “facilities” in terms of the entire structure and not its component parts. L.F. 160. In concluding that the “existing facility” under the Contract was the “water tower which includes the water tank,” the trial court improperly relied on the affidavit of Mr. Albritton. L.F. 160-61. Statutory interpretation is a matter of law and not of fact.

St. Louis County v. B.A.P., Inc., 25 S.W.3d 629, 631 (Mo. App. E.D. 2000).

Mr. Albritton’s statement that the water tower is the facility draws a legal conclusion about what constitutes a “facility” within the meaning of § 290.210(4), RSMo, which should have been a question of law for the trial court.^{3/}

^{3/} Citing *City Utilities*, the trial court stated that “while ‘conclusory allegations in an affidavit are insufficient to raise questions of fact ... when observations do not require expertise, conclusive answers by a lay witness are permissible when used to articulate a summery of conditions.’” L.F. 161 (*citing City Utilities*, 910 S.W. 2d at 747). This reliance on *City Utilities* is misplaced. The statement at issue in *City Utilities* was that “[t]he contract did not change the size, type or extent of the heater or piping.” *City Utilities*, 910 S.W.2d at 747. The witness statement was appropriate as a summary of conditions insofar as it was an observation about physical changes to a specific structure. In contrast, the witness statement at issue here was that “[t]he existing facility under this Contract is the 250,000 gallon elevated water storage tower which includes the water tank.” L.F. 61. This statement is not a factual statement about changes to a specific structure but rather a legal conclusion that the water tower was the “facility” within the meaning of the Act. As such, it was improper for the trial court to rely on this statement.

The term “facility” is not defined in the Act nor is it well-defined in Missouri case law. Therefore, the Court should construe the term in its “plain and ordinary meaning.” *See Hyde Park*, 850 S.W.2d at 84. In determining the meaning of “facilities” within the context of the Act, the Court should give effect to the public policy of the Act, which is to “insure that workers on public projects be paid reasonable wages.” *Long*, 83 S.W.3d at 574.

While Missouri courts have not yet defined “facility,” Pennsylvania courts have interpreted a similar provision. Pennsylvania’s Prevailing Wage Act, which is similar to Missouri’s Prevailing Wage Act, defines maintenance work, which is excluded from the prevailing wage requirement, as “the repair of existing facilities when the size, type or extent of such facilities is not changed or increased.” 43 Pa. Stat. Ann. § 165-2(5) (West 2008). In a case involving a reroofing project, a Pennsylvania court held that a “facility” within the meaning of the statute referred both to an entire structure and to its component parts. *Kulzer Roofing, Inc. v. Dep’t of Labor & Indus.*, 450 A.2d 259, 260 (Pa. Cmwlth. Ct. 1982).

In interpreting the term “facility,” the court in *Kulzer Roofing* consulted the dictionary definition of “facility” to determine its ordinary usage. WEBSTER’S THIRD INTERNATIONAL DICTIONARY defines “facility” as “something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve or facilitate some

particular end.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY 812-13 (1966), *cited in Kulzer Roofing*, 450 A.2d at 261. This definition indicates that “facility” may refer to an entire building (such as a hospital) or its major component parts (such as machinery or plumbing). *Kulzer Roofing*, 450 A.2d at 261. The critical test, according to this definition, is whether the structure performs a particular function or facilitates a particular end. Thus, the court in *Kulzer Roofing* concluded that in the context of a reroofing project, the “facility” was the roof and not the building. *Id.* After correctly recognizing that the roof was the facility, the court concluded that “a reroofing project which changes or increases the size, type or extent of the roof” is not maintenance work. *Id.*

In *Borough of Youngwood v. Pa. Prevailing Wage Appeals Bd.*, 947 A.2d 724 (Pa. 2008), the Supreme Court of Pennsylvania expanded on the ruling in *Kulzer Roofing*. *Youngwood* involved a street resurfacing project that removed several inches of material and replaced it with new material. *Id.* at 727. The Pennsylvania Supreme Court observed that “[s]ince *Kulzer Roofing*, the Commonwealth Court has consistently held that the replacement of worn public facilities constituted ‘public work’ subject to the prevailing wage requirements of the Act, despite the fact that the facilities were not thereby enlarged or altered by anything more than the ‘industry standard’ of replacement materials.” *Id.* at 732 n.9. Thus, according to the court, the replacement of a worn road surface with a new one is not maintenance and is subject to the prevailing wage

requirement, even if the resurfacing does not change the physical dimensions of the road. *Id.* at 733.

The Missouri cases cited by the trial court are not contrary to *Kulzer Roofing's* correct holding that “facilities” refers to the component parts of a structure. In *City Utilities*, the court expressly stated that it did not reach the question of the meaning of the term “existing facilities.” *See City Utilities*, 910 S.W.2d at 746 n.7 (finding that “we need not decide the broad question of whether ‘existing facility’ means entire building or component parts”). However, the court in *City Utilities* did not disturb the trial court’s apparent finding that the facility at issue was the “uninsulated piping and heater of unit 3,” *Id.* at 745, which was only a relatively small component part of an electric generating facility. *See Id.* at 743.

The trial court also cited *Hadel v. Board of Education*, which was a case involving the replacement of materials constituting not more than 20% of the surface area of the roof of a school building. 990 S.W.2d 107,109 (Mo. Ct. App. S.D. 1999); L.F. 162-63. *Hadel* is not directly on point because it involved a school district authorizing work under Chapter 77, RSMo and not Chapter 290, RSMo, although the court in *Hadel* did look to how “construction” and “maintenance” were defined under Chapter 290. *Hadel*, 990 S.W.2d at 112-13. *Hadel* sheds no light on the definition of “facilities” because the court there did not expressly state whether it considered the roof or the school building to be the

“facility” within the meaning of “maintenance.” While the court did refer to the school building as a “facility,” it also based its conclusion on an affidavit stating that “[t]he roofing work by [Respondent’s] employees does not result in any change in the size, type or extent of the *roofs* of the buildings on which such work is performed.” *Id.* at 113 (emphasis added). By the terms of the affidavit, the facility was the roof and not the school building. In this respect, *Hadel* accords with *Kulzer Roofing*, which also held that a roof was a facility.

B. Utility Service Must Pay the Prevailing Wage Because the Work is Not Maintenance Work.

Under the appropriately broad interpretation of “facilities” in *Kulzer Roofing*, the steel parts, expansion joints, water level indicators, manhole covers or gaskets, and other component parts of the water tank or tower, including portions of the steel shell of the tank, are existing facilities because, like a roof, they perform some particular function or serve or facilitate some particular end.

As in *Youngwood*, the replacement of these worn facilities with new facilities is not maintenance within the meaning of the Act, since the replacement of old facilities with new ones is a change in the “type” of the facility. Moreover, unlike Pennsylvania’s Prevailing Wage Act, Missouri’s Prevailing Wage Act explicitly excludes the *replacement* of facilities from the maintenance exception. Maintenance is “the repair, *but not the replacement*, of existing facilities when the size, type or extent of the existing facilities is not

thereby changed or increased.” § 290.210(4), RSMo, (emphasis added). Thus, any replacement of facilities is not maintenance according to the terms of the statute.

The installation of an anti-climb device cannot involve the repair of an “existing facility” within the meaning of § 290.210(4), RSMo, because there was no “existing facility.” The anti-climb device is a standard safety mechanism that is approximately six to eight feet long and includes a mesh cage that encloses the access ladder. L.F. 157. This device is a facility because it facilitates a particular end: safety. As there is currently no anti-climb device on the water tower, there is no existing facility that the anti-climb ladder could repair or replace.

The trial court and court of appeals’ efforts to narrowly define the rights of Missouri workers should be rejected as a matter of law because it is inconsistent both with the plain language of Missouri’s Prevailing Wage Act and its underlying public policy.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court and enter judgment in favor of the Department and Commission.

Respectfully submitted,

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The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, postage prepaid, via United States mail, on September 20, 2010, to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,755 words.

The undersigned further certifies that the labeled disk simultaneously filed and served with the hard copies of the brief has been scanned for viruses and is virus-free.

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