

SC 90963

IN THE SUPREME COURT OF MISSOURI

UTILITY SERVICES 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

BRIEF OF AMICUS CURAIE

THE MISSOURI ASSOCIATION OF SCHOOL ADMINISTRATORS

Penney R. Rector

Director of Legal Services

Missouri Bar No. 41938

3550 Amazonas Drive

Jefferson City, MO 65109

(573) 638-4825

(573) 556-6270 (Facsimile)

Attorney for Amicus Curaie

Missouri Association of School Administrators

TABLE OF CONTENTS

Table of Authorities.....	ii
Interest of Amicus Curaie.....	1
Statement of Jurisdiction.....	2
Statement of Facts.....	2
Points Relied Upon.....	3
Introduction.....	4
Argument.....	5
Conclusion.....	10
Certificate of Services.....	11
Certificate of Compliance.....	12

TABLE OF AUTHORITIES

CASES

Chester Bros Const. Co. v. Mo. Dep't of Labor, 111 S.W. 3d 425 (Mo. App. E.D. 2003)..... 6-7

State Dep't of Labor & Indus. Relations, Division of Labor Standards v. Board of Public Utilities of the City of Springfield, 910 S.W.2d 737 (Mo. App. S.D. 1995) 4-5

STATUTORY AUTHORITY

§163.161, RSMo..... 9

§177.086, RSMo..... 7

§§290.210-290.230, RSMo 4, 5, 7

OTHER AUTHORITIES

2010 Mo. Laws 2..... 9

FY 2011 Budget Expenditure Restriction/Line Item Vetoes 9

INTEREST OF AMICUS CURIAE

The Missouri Association of School Administrators (MASA) represents approximately 600 school superintendents who are responsible for the day-to-day operations of Missouri's public schools. MASA has a long history as the professional representative of public school superintendents, with MASA being organized prior to 1900.

MASA members serve as school district leaders with primary responsibility for the management and supervision of our public schools, including oversight and implementation of school district budgets and maintenance of school district facilities. School administrators have a direct interest in, and responsibility for, both the financial condition of their school districts and the maintenance and repair of school district facilities. MASA is the voice of these administrators and should be heard by this Court.

STATEMENT OF JURISDICTION

Amicus Curiae, the Missouri Association of School Administrators, adopts the Respondent Utility Services Co., Inc.'s Jurisdictional Statement. Further, Amicus Curiae states that consent has been obtained from counsel for both the Appellant and Respondent authorizing the filing of this amicus brief.

STATEMENT OF FACTS

Amicus Curiae adopts the Statement of Facts presented by the Respondent Utility Services Co., Inc.

POINTS RELIED ON

- I. The Trial Court Did Not Err In Granting Respondent’s Request For Summary Judgment In That The Work Performed Under The Contract Constituted Maintenance Work Which Is Not Subject To Payment Of Prevailing Wage Rates Pursuant To Missouri’s Prevailing Wage Law.**

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

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

§§290.210-290.230, RSMo

§177.086, RSMo

- II. School Administrators Throughout The State Seek The Court’s Clarification Of The Terms “Construction” And “Maintenance” In The Context Of Public Works And Prevailing Wage Requirements, In That School Districts Are Directly Impacted By The Appellants’ Broad Sweeping Interpretation Of The Term “Construction”.**

2010 Mo. Laws 2

§290.230, RSMo

INTRODUCTION

Missouri's prevailing wage law requires that prevailing wage rates be paid for construction on public works projects, exclusive of maintenance work. See §§290.210 and 290.230, RSMo. "Maintenance work" is specifically defined as "the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facility is not thereby changed or increased." See §290.210(4), RSMo. The trial court correctly determined that the work necessitated by the contract between Monroe City, Missouri and Utility Service Company, Inc. constituted maintenance work which was exempt from the payment of prevailing wage rates. See §290.210(4), RSMo; *State Dep't of Labor & Indus. Relations, Division of Labor Standards v. Board of Public Utilities of the City of Springfield*, 910 S.W.2d 737, 740 (Mo. App. S.D. 1995).

School administrators throughout the state of Missouri seek the Court's assistance in clarifying the broad sweeping interpretation of the term "construction" utilized by the Missouri Department of Labor and Industrial Relations and requiring the Department to focus on the statutory framework for the terms "construction" and "maintenance" which are clear and unambiguous.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S REQUEST FOR SUMMARY JUDGMENT IN THAT THE WORK PERFORMED UNDER THE CONTRACT CONSTITUTED MAINTENANCE WORK WHICH IS NOT SUBJECT TO PAYMENT OF PREVAILING WAGE RATES PURSUANT TO MISSOURI'S PREVAILING WAGE LAW.

In arguing that maintenance work is a very narrow subset of construction work, Appellants ignore the plain meaning of §290.230, RSMo which requires the payment of prevailing wages on construction work, exclusive of maintenance work. In determining whether work constitutes construction or maintenance, “the magnitude” of the repair is irrelevant. *State Dep’t of Labor & Indus. Relations v. Board of Public Utilities of the City of Springfield*, 901 S.W.2d 737, 744 (Mo. App. S.D. 1995). Rather, the inquiry must focus on “whether a change or increase in the size, type, or extent of the existing facility is wrought by the repair.” *Id.* Appellants’ summation of Missouri’s public policy on p. 15 of their Substitute Brief is missing one critical word, in that it states: “[t]he act thus declares that Missouri’s public policy is to ensure that works on public projects be paid prevailing wage.” *See* Appellants’ Substitute Brief at p. 15. An accurate summation of this public policy statement should read: “[t]he act thus declares that Missouri’s public policy is to ensure that works on public *construction* projects be paid prevailing wage.”

The exclusion of this one vital word is telling. Appellants' purport that all work performed on public works projects constitutes construction or must be presumed to constitute construction, thus necessitating the payment of prevailing wage rate, unless a very narrow and ill-defined exception can be met. This interpretation ignores the precise language of the statute.

The Appellants' strained interpretation of the statute leads to untenable results. School districts regularly find it necessary to contact the Department of Labor and Industrial Relations (the "Department") for project-by-project determinations of whether particular work constitutes construction or maintenance work in the opinion of the Department. School administrators make every effort to comply with the statute but are unable to rely upon the plain, common sense reading of the statute due to the Department's expansive reading of the law. Restriping an existing parking lot may be considered construction in some instances and not others. Patching a leaky roof may be deemed construction, even though the size, type or extent of the existing facility is not altered. Routine and necessary upkeep is often categorized as construction work requiring the payment of prevailing wage rates which is in contravention with the statute. School districts seek the Court's clarification and assistance in restoring the true meaning of the terms "construction" and "maintenance".

The expansive interpretations of the Department have left school districts without clear guidance on what the law actually requires. The trial court correctly and concisely held that work performed on public projects must be either construction or maintenance

work. This determination is exemplified by the trial Court's analysis which denotes that work performed on an existing facility constitutes maintenance work so long as the work does not change or increase the size, type or extent of the existing facility. Judgment p. 8; *Citing, Chester Bross Const. v. Mo. Dep't of Labor*, 111 S.W.3d 425, 427 (Mo. App. E.D. 2003).

Pursuant to §290.230, RSMo, school districts pay prevailing wage rates on public works projects when such work constitutes construction. In addition, school districts must bid construction projects when costs exceed \$15,000.00. *See* §177.086, RSMo. However, no statutory bid requirements are in place for construction with a cost less than \$15,000.00; and as noted hereinabove, school districts need not pay prevailing wage rates on maintenance projects. These exceptions afford cost savings for school districts during the difficult financial times that school districts are facing.

In harmonizing the definitions of construction and maintenance, the trial court correctly determined that the two definitions co-exist equally and that work must either be classified as construction or maintenance. When classified as maintenance work, the payment of prevailing wage rates is not required. Therefore, the judgment of the trial court should be affirmed.

II. SCHOOL ADMINISTRATORS THROUGHOUT THE STATE SEEK THE COURT’S CLARIFICATION OF THE TERMS “CONSTRUCTION” AND “MAINTENANCE” IN THE CONTEXT OF PUBLIC WORKS AND PREVAILING WAGE REQUIREMENTS IN THAT SCHOOL DISTRICTS ARE DIRECTLY IMPACTED BY THE APPELLANTS’ BROAD SWEEPING INTERPRETATION OF THE TERM “CONSTRUCTION”.

The expansive definition of “construction” utilized by the Appellants can have a detrimental effect on the ability of school districts to quickly, efficiently and cost effectively complete routine maintenance work. Oftentimes local laborers are available and willing to perform maintenance work at less than prevailing wage rates, but the Appellants’ interpretation of the statute prohibits the work from being performed in the most cost effective and efficient manner by local patrons of the school districts. School districts may opt to pay prevailing wage rates in order to avoid adverse findings by the Department. Such expenditures, while intentional and precautionary, are unnecessary as the law does not require the payment of prevailing wage rates for maintenance work when the size, type or extent of an existing facility is not changed or increased. *See* §290.230, RSMo.

The State of Missouri is one of only twelve states that provide no financial support for the construction and maintenance of school facilities. It is untenable that the State, which refuses to provide financial support for the construction, repair and maintenance of

school facilities, is pushing to require school districts to spend more money than is required by law by expanding the scope of the term “construction” to encompass work that should be reasonably classified as maintenance work and exempt from prevailing wage requirements. Should the State seek to force increased costs upon school districts through an expansive definition of the term “construction”, so should the state provide the funding required to comply with such an expansive interpretation of the law.

It is likely that school districts will defer routine maintenance work due, in part, to the costs which are inflated as a result of the Department’s expansive interpretation of the law, which delay can result in the need for significant repairs in the future. This is particularly true during difficult financial times such as those school districts are currently facing. The foundation formula which provides the basis for funding Missouri’s public schools is underfunded by approximately One Hundred and Twenty Million Dollars (\$120,000,000.00), and transportation reimbursement for expenses incurred by school districts to get students to school have been reduced by Seventy Million Dollars (\$70,000,000.00), woefully below the seventy-five percent (75%) reimbursement rate provided for by state statute. *See* 2010 Mo. Laws 2 (Appendix A); Appendix B, Office of Administration’s FY 2011 Budget Expenditure Restriction/Line Item Vetoes at <http://oa.mo.gov/bp/FY2011ExpenditureRestrictionLineItemVetoes.pdf>; *See also* §163.161, RSMo. These and numerous other cuts and reductions to the public education budget have left school districts struggling to find the necessary resources to meet the needs of students and reduce the funds available for classroom instruction.

Couple the lack of sufficient funding for public education with the expectation that school districts will pay prevailing wage rates on projects that should be classified as maintenance projects, and the result is either deferral of maintenance work or a reduction in the funds available in the classroom.

School administrators seek clarity and a plain reading of the statute, as provided by the trial court, to ensure ongoing compliance and ease of application of the law. School administrators should not be forced to engage in guess work or be required to contact the Department each and every time a leaky faucet needs repaired or a hole in the asphalt needs to be patched. School administrators are not seeking abolition of prevailing wage requirements; they are merely seeking the Court's assurance that maintenance work is excluded from prevailing wage requirements and, further, that so long as the work is performed on an existing facility and the work does not change or increase the size, type or extent of an existing facility, the work is considered maintenance work. Although straightforward, the trial court's analysis of the terms "construction" and "maintenance" is correct and provides the clarity that school administrators need as they consider future work to be completed on school facilities. Wherefore, the trial court's judgment should be affirmed.

CONCLUSION

Wherefore, the Missouri Association of School Administrators respectfully requests that the Court affirm the judgment of the trial court and, thereby, provide clarity and direction on the application and breadth of the State's prevailing wage laws.

Respectfully submitted,
MISSOURI ASSOCIATION OF SCHOOL
ADMINISTRATORS

Penney R. Rector
Missouri Bar No. 41938
3550 Amazonas Drive
Jefferson City, Missouri 65109-5716
Telephone: (573) 638-4825
Facsimile: (573) 556-6270

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage pre-paid, on this _____ day of October 2010 to the following:

Jeremiah J. Morgan
Deputy Solicitor General
Office of the Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65101

Charles Hatfield
Stinson Morrison Hecker
230 W. McCarty Street
Jefferson City, MO 65101

Rodney Gladney
4399 Laclede Avenue
St. Louis, MO 63108

Penney R. Rector, MO Bar No. 41938

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in S. Ct. Rule 84.06(b) and S. Ct. Rule 55.03. The undersigned further certifies that the brief contains 2,271 words.

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

Penney R. Rector, MO Bar No. 41938

APPENDIX

INDEX TO APPENDIX

2010 Mo. Laws 2 (H.B. 2002)..... A-1

FY 2011 Budget Expenditure Restriction/Line Item Vetoes A-11