

IN THE SUPREME COURT OF MISSOURI

No. SC90963

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
NINETEENTH JUDICIAL CIRCUIT
HONORABLE RICHARD G. CALLAHAN, JUDGE

ACCEPTED FOR TRANSFER AFTER OPINION BY THE COURT OF APPEALS,
WESTERN DISTRICT

BRIEF OF AMICUS CURIAE

MISSOURI SCHOOL BOARDS' ASSOCIATION

Respectfully submitted,

Missouri School Boards' Association

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INTEREST OF AMICUS CURIAE

I. Missouri School Boards' Association

The Missouri School Boards' Association (MSBA) is a nonprofit association of public school board members in the state of Missouri, created to provide assistance and support to Missouri public school boards. Almost seventy-five percent of the public school districts in this state are members of MSBA and support that mission. MSBA, as an educational leader, speaks for its member school districts to secure and protect the interests of public education for the benefit of Missouri school children.

This brief is filed with the consent of all parties.

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus Curiae adopt the statement of jurisdiction and statement of facts as set forth in Respondent's brief filed previously with the Court in this case.

POINTS RELIED ON

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE WORK IN THE CONTRACT WAS “MAINTENANCE WORK” WHICH IS NOT SUBJECT TO THE PREVAILING WAGE ACT, IN THAT THE WORK CONSTITUTED REPAIRS THAT DID NOT CHANGE THE SIZE, TYPE, OR EXTENT OF THE WATER TOWER AND TANK.

Carver v. Pemiscot County Memorial Hospital, SD29227, 2009 WL 5126644 (Mo. App. S.D. Dec. 30, 2009).

Dep’t of Labor & Indus. Relations v. Bd. Of Pub. Utils. of the City of Springfield, 910 S.W.2d 737 (Mo. App. S.D. 1995).

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

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PREVAILING WAGE ACT WAS NEVER INTENDED TO INCREASE THE COSTS OF MAINTAINING FACILITIES, IN THAT IT WOULD OFFEND PUBLIC POLICY IF THE COURT INTERPRETED NECESSARY AND REGULAR REPAIRS AS CONSTRUCTION WORK SUBJECT TO PREVAILING WAGE.

§ 290.230, RSMo.

Project Notification Reports. Missouri Department of Labor, Division of Labor

Standards. *Available at:* [http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/
project_report.asp](http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/project_report.asp).

Faith E. Crampton, *Spending on school infrastructure: does money matter?* 47 J. OF
EDUC. ADMIN. 305 (2009).

ARGUMENT

The Missouri Prevailing Wage Act (“the Act”) was enacted in 1957 to ensure that “all workmen employed by or on behalf of any public body engaged in the construction of public works, *exclusive of maintenance work*,” are paid no less than prevailing wage, as set by the Department of Labor and Industrial Relations. § 290.230, RSMo. (emphasis added); see *Chester Bros Const. Co. v. Missouri Dep’t of Labor & Indus. Relations, Div. of Labor Standards*, 111 S.W.3d 425, 427 (Mo. App. E.D. 2003). The lower court’s interpretation of the Act clearly upholds this legislative intent.

Missouri school districts undertake construction and maintenance projects every year using funds from public money and bonds. In September 2010 alone, Missouri schools submitted ten project notifications to the Department of Labor, ranging from a \$2800 light installation project in Dent County to a \$2.3 million building addition in Jefferson City. Project Notification Reports. Missouri Department of Labor, Division of Labor Standards. Available at: http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/project_report.asp. These renovations and repairs are not just trivial capital projects; they serve a vital role in supporting the education of Missouri’s children.² See Faith E. Crampton, *Spending on school infrastructure: does money matter?* 47 J. OF EDUC. ADMIN. 305, 318 (2009). The Court’s ultimate definition of the

² In her study comparing school district capital spending and student test scores nationwide, Crampton noted that “spending on school infrastructure *does* matter when it comes to student achievement.” 47 J. OF EDUC. ADMIN. at 318 (emphasis added).

Act's terms "construction" and "maintenance" in this case will significantly impact public school districts across the state.

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE WORK IN THE CONTRACT WAS "MAINTENANCE WORK" WHICH IS NOT SUBJECT TO THE PREVAILING WAGE ACT, IN THAT THE WORK CONSTITUTED REPAIRS THAT DID NOT CHANGE THE SIZE, TYPE, OR EXTENT OF THE WATER TOWER AND TANK.

This case is a definitional dispute with far-reaching implications. Utility Services Co., Inc. ("USCI") contracted with Monroe City, Missouri to perform maintenance, including annual inspection and service of the city's water tower and tank, as well as routine cleaning and repainting, as necessary. *Utility Serv. Co., Inc. v. Dep't of Labor & Indus. Relations*, WD70800, 2010 WL 1027457 at *2 (Mo. App. W.D. March 23, 2010) (mem.). This case turns on whether USCI's work constituted "maintenance" or "construction" and, as noted by USCI, the Missouri Court of Appeals has already provided a succinct test to answer that question by delineating between construction and maintenance work, the latter of which occurs only when "a change or increase in the size, type, or extent of the existing facility is wrought by the repair." *State Dept. of Labor & Indus. Relations, Div. of Labor Standards v. Bd. Of Pub. Utilities of City of Springfield*, 910 S.W.2d 737, 744 (Mo. App. E.D. 1995) (hereinafter "City Utilities").

In constructing definitions for "repair" and "maintenance work," the lower court is correct in applying the test articulated by the Court of Appeals in *City Utilities*. The Act

itself defines maintenance work as “(1) work that is repair, not replacement;³ (2) in an existing facility; . . . [that does not (3)] change or increase . . . the size, type, or extent of the ‘existing facility.’” *City Utilities*, 910 S.W.2d at 745; *see also* § 290.210(4), RSMo. The court in *City Utilities* thoroughly examined this characterization of “maintenance work,” stating that test to be applied is “whether a change or increase in the size, type, or extent of the existing facility is wrought by the repair.” 910 S.W.2d at 744.

Several Missouri cases have employed the *City Utilities* test, reading consistency into the Act. In 1999, for example, a construction union brought suit against the Springfield R-12 School District, arguing that the district had improperly hired its own employees to remove and replace parts of three school buildings’ roofs, violating a Missouri law that required schools to publicly advertise bids for construction work costing more than \$2,500, prior to 1996, and \$12,500 thereafter. *Hadel v. Board of Educ. of Sch. Dist. of Springfield R-12*, 990 S.W.2d 107, 109 (Mo. App. S.D. 1999); *see* § 177.086, RSMo (1994 & Supp. 1996). The court found that, because the employees’ work “d[id] not result in any change in the size, type or extent of the roofs of the buildings,” the work was properly characterized as “maintenance” and thus not subject to a law that governed only “construction.” *Id.* at 113.

³ Missouri courts engage in fact-specific analysis when defining “repair.” *See Hadel*, 990 S.W.2d at 113-14. In the interest of brevity, this brief will not address details of USCI’s contract and presumes this case involves only “repair” work, as held by the courts below.

This rationale has endured and, in 2009, the Missouri Court of Appeals again found that repair work on an existing facility constituted “maintenance” under the Act. *Carver v. Pemiscot County Memorial Hospital*, SD29227, 2009 WL 5126644, *1 (Mo. App. S.D., Dec. 30, 2009).⁴ In *Carver*, a hospital contracted with a group of workers to “restore [a nursing home] from its dilapidated condition” and repair parts of an emergency room. *Id.* Workers completed extensive renovations, including repainting the buildings’ interiors, replacing parts of the floors, ceilings, and bathrooms, and “enlarging the existing nurse station” to accommodate new equipment. *Id.* After workers completed the repairs, the Missouri Department of Labor and Industrial Relations – the same party to this case – determined that the work was subject to the Missouri Prevailing Wage Act and the workers sued the hospital for the extra wages. *Id.* at *2. Affirming the trial court’s determination that the work constituted “maintenance” under the Act, the Court of Appeals found that, because the “size, type, or extent” of the nursing home and emergency room were not changed or increased, the work was maintenance and not subject to prevailing wage. *Id.* at *5.

Like *Hadel*, *Carver* and *City Utilities*, this case addresses the same legal issues and commands the same result. The Court of Appeals correctly applied the *City Utilities* test, first, requiring a determination of whether work was done on an existing facility and,

⁴ Though unreported at this time, *Carver v. Pemiscot County Memorial Hospital* was transferred to the Supreme Court of Missouri, but Appellants voluntarily dismissed before the Court could address the merits.

second, whether the work constituted maintenance by repairing the facility, but leaving the size, type, and extent of the structure intact. The labor done in this case did not change the size or extent of the water tower or tank and thus the courts correctly characterized the work as “maintenance.” Drawing a line between expansion of an existing facility and mere upkeep and restoration of a facility is an important distinction that will help school districts better understand when their projects are subject to the prevailing wage.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PREVAILING WAGE ACT WAS NEVER INTENDED TO INCREASE THE COSTS OF MAINTAINING FACILITIES, IN THAT IT WOULD OFFEND PUBLIC POLICY IF THE COURT INTERPRETED NECESSARY AND REGULAR REPAIRS AS CONSTRUCTION WORK SUBJECT TO PREVAILING WAGE.

The plain language of Missouri’s Act states that the prevailing wage “shall be paid to all workmen employed by or on behalf of any public body engaged in the *construction* of public works, *exclusive of maintenance work.*” § 290.230.1, RSMo. (emphasis added). To stress the distinction, the legislature included the maintenance exception in the policy provision of the Act, as well. § 290.220, RSMo. A basic reading of the Act reveals the legislature’s intent to separate maintenance from construction and this Court should reflect that intent in its interpretation of the law. Broadly construing construction to force public entities to pay prevailing wage for regular maintenance, such as the painting of a

water tower or installation of safety mechanism, would undermine the purpose of the Act and eliminate the objective of the maintenance exception.

It is imperative that this Court establish a firm, yet fair distinction between maintenance and construction. School districts are heavily reliant on bonds and local levies to afford building renovations to accommodate their students. Projects cost significantly more because of prevailing wage requirements.⁵ For example, the Seneca R-7 School District estimated that it would have saved \$3 million on a recent project if prevailing wage had not applied. Joe Hadsall. April 1, 2007. Will bill prevail? THE JOPLIN GLOBE, *Available at:* <http://www.joplinglobe.com/local/x212054062/Will-bill-prevail/print>. Because of the ambiguity of the Prevailing Wage Act, it is difficult for districts to determine which projects will require prevailing wage expenditures and which the court will classify as “maintenance work.” The Act impacts how schools choose to use their funds and what kind of infrastructure they feel they can confidently afford, including the potential costs of prevailing wages.

Facilitation of better planning has the added benefit of saving public money, as well. According to the 157th Report of the Public Schools of Missouri, published in 2006 by the Missouri State Board of Education, Missouri districts spend over \$750 million annually on capital projects with no state grant assistance. This means that a

⁵ John Ford. March 20, 2010. Prevailing Wage Bill Clears Committee. NEOSHO DAILY NEWS, *Available at:* <http://www.neoshodailynews.com/highlight/x673430179/Prevailing-wage-bill-clears-committee>.

large proportion of district funding for public works comes from local tax revenues and bonds, voted on by the public. There are several pitfalls to this process, not the least of which is convincing voters to pass bonds when they feel the amount of money requested is exorbitant. If this Court affirms the lower court's interpretation of "maintenance work," schools will have more confidence in evaluating the total costs of their capital projects, better allocation of resources, and those savings will be passed on to the public.

Confusion in delineating maintenance work from construction work has also caused school districts to expect to pay prevailing wage for even the smallest of projects. Though it appears clear from the plain language of the statute that minor projects were not meant to fall within the meaning of "construction," schools, fearing inadvertent violation of the law, notify the Department of nearly every public works project, including those that simply repair cracks in pavement, waterproof a building, or fix a roof. *See Project Notification Reports. Missouri Department of Labor, Division of Labor Standards. Available at: http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/project_report.asp.*

Paying prevailing wage for projects that not only minimally impact existing facilities, but cost far less than new construction dilutes the maintenance exception. For example, Francis Howell School District spent \$4.3 million on school building additions while the City of St. Peters spent \$295 installing a Network outlet, but both entities had to report their projects to the Department for wage determination. St. Charles, Project Notifications for 2010. Missouri Department of Labor, Division of Labor Standards, *Available at: http://www.labor.mo.gov/publicworks/list_pn.asp?CountyCode=092.*

Because of the all-encompassing interpretation of “construction,” school districts are forced to assume that every project will require prevailing wage, regardless of the extent of the work.⁶ This means that districts not only need to budget for higher wages, but they also have to engage in a long and convoluted process of planning just for simple repair jobs.

The statutory process for even beginning a prevailing wage project involves the request of a wage order from the Division of Labor Standards, creation of a lengthy contract, and official notification to the Division of Labor Standards. *See* § 290.250, RSMo.; § 290.262.10, RSMo.; § 290.325, RSMo. During the actual project, it then falls to the school district to guarantee that contractors pay their employees the prevailing wage by reviewing wage records. § 290.290, RSMo. These procedures, though logically necessary when a school begins new construction, are absurd when applied to cases in which a district wants a worker to install a window, re-pour a sidewalk, or stripe a parking lot, all of which could be considered construction under a broad interpretation of the Act.

Affirming the lower court’s narrower interpretation of the law aids school districts

⁶ Even the Department’s official pamphlet on prevailing wage tells workers that if they worked on a public project as an employee of a contractor, they are eligible for the prevailing wage; there is no mention of maintenance versus construction work. Missouri Prevailing Wage Law. August 2007. Division of Labor Standards Information Series.

Available at: <http://www.labor.mo.gov/DLS/Forms/13-AI.pdf>.

in strategically planning capital projects, saving money for both schools and the public. School districts needing to improve or build upon their existing infrastructure often have limited budgets. See Faith E. Crampton, *Spending on school infrastructure: does money matter?* 47 J. OF EDUC. ADMIN. 305 (2009). This means that an accurate budgetary assessment of the work involved is vital. Schools know that prevailing wage requirements often increase project costs and, if districts can accurately determine which capital jobs will require compliance with the Act, they can allocate their money accordingly. For example, districts may choose to upgrade existing structures rather than create new ones in order to maximize their available funds and benefit students.⁷

⁷ This strategy is defined by schools as “deferred maintenance,” which “refers to maintenance necessary to bring a school facility up to good condition.” Faith E. Crampton, *Spending on school infrastructure: does money matter?* 47 J. OF EDUC. ADMIN. 305, 310 (2009). This is qualitatively different than “new construction,” the building of facilities to relieve overcrowding or accommodate increased enrollment. *Id.*

CONCLUSION

For the foregoing reasons, *Amicus Curiae* pray this Court uphold the appellate court's grant of summary judgment on behalf of Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing and a disk containing the same were mailed, postage pre-paid, on this 12th day of October, 2010 to the following:

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RULE 84.06 CERTIFICATION

The undersigned hereby certifies that the foregoing complies with the limitations contained in Rule 84.06 (b) and contains 3,219 words in 412 lines (including footnotes). The disk submitted herewith has been scanned and to the best of my knowledge is virus-free.

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