

SC90963

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IN THE SUPREME COURT OF MISSOURI

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UTILITY SERVICE CO., INC.,

*Plaintiffs/Respondents,*

v.

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

*Defendants/Appellants.*

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APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
HONORABLE RICHARD G. CALLAHAN  
WITH CONSENT OF PLAINTIFFS/RESPONDENTS AND DEFENDANTS/APPELLANTS

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AMICUS CURIAE BRIEF BY MISSOURI STATE BUILDING AND  
CONSTRUCTION TRADES COUNCIL, AFL-CIO

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## **STATEMENT OF JURISDICTION**

Amicus Curiae, the Missouri State Building and Construction Trades Council, AFL-CIO (Building Trades) adopts the Department of Labor and Industrial Relations of Missouri's Jurisdictional Statement. Further, Amicus Curiae Building Trades states this Amicus Brief is presented to the Court with the consent of counsel for Appellant and Respondent.

## **STATEMENT OF FACTS**

Amicus Curiae, the Missouri State Building and Construction Trades Council, AFL-CIO (Building Trades) adopts the Department of Labor and Industrial Relations of Missouri's Statement of Facts as laid out in its Substitute Brief of Appellants.

**POINT RELIED ON**

**I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS BECAUSE THE COURT ERRONEOUSLY INTERPRETED MISSOURI’S PREVAILING WAGE ACT, IN THAT THE PLAIN LANGUAGE OF THE ACT BROADLY INCLUDES “PAINTING” IN THE DEFINITION OF “CONSTRUCTION” MAKING, BY DEFINITION, ALL PAINTING AND PREPARATION TO PAINT “CONSTRUCTION” UNDER THE ACT REQUIRING THE PAYMENT OF PREVAILING WAGE.**

Chester Bross Construction Company v. Missouri Department of Labor and Industrial Relations, Division of Labor Standards, 111 S.W.3d 425 (Mo.App. E.D. 2003)

Department of Labor and Indus. Relations v. Board of Public Utilities of the City of Springfield, 910 S.W.2d 737 (Mo.App. S.D. 1995)

Long, et al. v. Interstate Ready-Mix, et al., 83 S.W.3d 571, 576 (Mo.App. W.D. 2002)

§ 290.210(1) RSMo.

8 CSR 30-3.020(1)

**II. 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 AND “MAINTENANCE” AND “REPAIR”  
WORK IS TO BE GIVEN ONLY THE NARROWEST OF READING.**

Hagan v. Dir. of Revenue, 968 S.W.2d 704, 706 (Mo. banc 1998)

LeFevre v. Stubbs, 642 S.W.2d 103 (Mo. banc 1982)

§ 290.210(4) RSMo

§ 290.230 RSMo

**III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT  
TO RESPONDENTS BECAUSE THE COURT ERRONEOUSLY  
INTERPRETED MISSOURI’S PREVAILING WAGE ACT, IN THAT  
BY RELYING ON THE PARTIES STIPULATED FACTS  
TRANSFORMED THE FINDINGS OF FACT INTO CONCLUSIONS OF  
LAW, AND IN SO DOING, TRANSFORMED A NARROW QUESTION  
BETWEEN TWO PARTIES INTO A BROAD, AND DISPARATE,  
APPLICATION OF THE ACT APPLICABLE TO ALL FUTURE  
PARTIES ACTING UNDER THE ACT.**

A.P. Green Fire Brick Co. v. Missouri State Tax Commission, 277 S.W.2d 544 (Mo. 1955)

In re Thomas L. Harris Trust, 204 S.W.3d 267 (Mo.Ct.App. S.D. 2006), reh’g and/or transfer denied, (Oct.2, 2006) transfer denied, (Nov. 21, 2006).

Berghorn v. Reorganized School Dist. No. 8, Franklin County, 260 S.W.2d 573 (1953).

Americare Systems, Inc. v. Missouri Department of Social Services, 808 S.W.2d 417, 420 (Mo.App.1991)

## ARGUMENT

### *Standard of Review:*

The standard of review in this case is that of the granting of a Summary Judgment. An appeal from 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 appellant court “need not defer to the trial court’s order granting summary judgment.” Id. In this case, as a matter of law, the trial court’s summary judgment should be reversed because it erroneously interprets Missouri’s Prevailing Wage Act.

**I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BECAUSE THE COURT ERRONEOUSLY INTERPRETED MISSOURI’S PREVAILING WAG ACT, IN THAT THE PLAIN LANGUAGE OF THE ACT BROADLY INCLUDES “PAINTING” IN THE DEFINITION OF “CONSTRUCTION” MAKING, BY DEFINITION, ALL PAINTING AND PREPARATION TO PAINT “CONSTRUCTION” UNDER THE ACT REQUIRING THE PAYMENT OF THE PREVAILING WAGE**

A. The Plain Language of the Prevailing Wage Law and the Regulation

Include “Painting” Within the Meaning of the Term “Construction,”  
Without Limitation

Amicus Curiae the Missouri State Building and Construction Trades Council, AFL-CIO respectfully urges the Court to avoid adopting the overly constricted interpretation of the Prevailing Wage Law suggested by Respondent in this case. Respondent essentially asks this Court to quantify what level of painting constitutes construction. While Respondent complains of the potential chilling effect upon municipalities if they should have to assure payment of the prevailing wage, certainly the position it advocates would result in increased litigation to determine exactly how much painting constitutes construction in the first instance. That is not a result the Court should endorse when it is clearly inconsistent with the unambiguous language of the statute. Simply put, painting is construction.

“Construction,” as that term is defined in the Prevailing Wage Law, includes “painting.” § 290.210(1) RSMo.<sup>1</sup> Although Amicus suggests that the statute is unambiguous, the regulation illuminates the precise scope of “painting” as construction work under the Law. 8 CSR 30-3.020(1) defines “construction” as “*without limitation,...*, painting[.]” *Id.* (emphasis added). Facially, then, the statute and regulation both include “painting,” without reservation, within the meaning of the

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<sup>1</sup> Notably, the Law does not again use the term “painting.”

term “construction.” As such, the prevailing wage must be paid when workers perform painting.

B. The City Utilities Test Should Not Be Applied to the Facts of This Case

Even if the Court adopts the “maintenance work” test from Department of Labor and Indus. Relations v. Board of Public Utilities of the City of Springfield, 910 S.W.2d 737 (Mo.App. S.D. 1995) (“City Utilities”), the Court still must conclude that painting is not “maintenance work” and is, therefore, construction. Amicus does not necessarily dispute the holding of City Utilities, noting that factually, the case involved asbestos abatement, not painting. Similarly, Chester Bross Construction Company v. Missouri Department of Labor and Industrial Relations, Division of Labor Standards, 111 S.W.3d 425 (Mo.App. E.D. 2003), involved the construction of a *new* road, and was correctly decided. Both cases are limited to their own specific facts, as should this case.

The City Utilities test excludes from “construction” “(1) work that is repair, not replacement; (2) in an existing facility; and (3) there is no change or increase in the size, type, or extent of the ‘existing facility.’” 111 S.W.3d at 427 (quoting City Utilities, 910 S.W.2d at 745). The water tower involved in this case certainly is an existing facility (whether its constituent parts are also “facilities” notwithstanding). Even assuming *arguendo* that painting is repair, not replacement, the City Utilities test

fails its third element when painting is involved. At this point, the regulation is again useful. *See, Long, et al. v. Interstate Ready-Mix, et al.*, 83 S.W.3d 571, 576 (Mo.App. W.D. 2002) (valid regulation may not modify or expand a statute). “Construction” includes painting, *without limitation*. 8 CSR 30-3.020(1). Respondent would suggest that, under Appellant’s formulation of the statute, a single brush stroke would be construction, for which the Prevailing Wage would be due. Amicus answers that question in the affirmative. There simply is no *de minimis* exception for painting on the face of the statute, or from a rational reading of the regulation. Applying City Utilities would require judicial inquiry into whether a particular contract called for a perceptible or an appreciable augmentation. That is simply not supported by the plain language of the statute. The language is clear, ALL painting work is construction work, including that work which must be done in preparation.

**II. 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 AND “MAINTENANCE” AND “REPAIR” WORK IS TO BE GIVEN ONLY THE NARROWEST OF READING.**

Both the Respondent and the trial court misread the Act’s exception relating to

“maintenance work.” § 290.210(4) RSMo. Nowhere in the entire history of the Missouri Prevailing Wage Law has a definition of “maintenance work” to which that law would not apply been as expansively asserted as Respondents claim in this case. To begin with, the term “construction” includes, in its very definition, the term “painting.” The project here involved much painting. Furthermore, the term “facilities” is not meant to define an entire building, but rather, specific portions of a project. For example, in City Utilities, the parties appeared to concede that the facility at issue was the “uninsulated piping and heater of unit #3, not even the unit itself.” While the Court did not necessarily agree with this limited definition, it nevertheless, accepted the definition for purposes of reaching its determination. Maintenance work may mean warranty work and repair on air conditioning units, for example, when major components are not replaced but it does not mean work of the broad extent involved here. Appellant is correct, however, in its assertion that the “maintenance work” definition is a narrow exception to the required broad “construction work” language.

The Respondent, applying the City Utilities test, argues the *only* test to be applied when determining whether work performed is ‘maintenance work’ under the Act is whether: 1) the work is repair work, not replacement of the existing facility, 2) the work is in or to an existing facility; and 3) the work does not result in any change

or increase in the size, type or extent of the existing facility where the work was performed. City Utilities 910 S.W.2d at 744 and § 290.210(4). This analysis makes no reference to the ‘major repair’ portion of the definition for ‘construction.’ Further, this test reads the maintenance exception too broadly, and is inconsistent with the statute.

In conformance with the public policy to ensure workers on public projects be paid prevailing wages, as well as the remedial nature and purpose of the Act when read as a whole, the Building Trades contend the proper formulation for the statute requires only the narrowest reading of the maintenance exception. *See, Long v. Interstate Ready-Mix*, 83 S.W.3d 571, 574 (Mo.App. W.D. 2002); Hagan v. Dir. of Revenue, 968 S.W.2d 704, 706 (Mo. banc 1998); LeFevre v. Stubbs, 642 S.W.2d 103 (Mo. banc 1982). Amicus contend the proper formulation of the Act is:

“Construction” = ALL construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair;

“Maintenance work” = repair, *unless* the repair is a reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair, in which case, it is construction;

“Major repair” ≠ refer to the size or degree of a repair, no matter how big *or how small*, but rather refers to the overall importance of the ‘major repair’ to the facility. *See, City Utilities*, 910 S.W.2d at 744 (“The clear inference is that the legislature did not intend that a test for magnitude be used to determine the Act’s applicability.”); § 290.230.

The Building Trades believes the question of what constitutes excluded

‘maintenance work’ as opposed to otherwise covered ‘construction’ is not, at present, one easily answered by a bright line test. However, the Building Trades do not believe this question can or should be answered by a bright line test, especially on the facts presented here.

Since at least Plutarch’s queries regarding Theseus’s ship, there has not been a bright line where maintenance ends and construction begins.<sup>2</sup> This Court’s advantage, however, is the legislature’s guidance that the purpose of the Prevailing Wage Act, as a whole is to “ensure workers on public projects be paid prevailing wages” in order to protect the Act’s policy to “protect the public welfare.” Long, 83 S.W.3d at 574. Additionally, unlike the question Plutarch poses, the question before this Court is not a factual or philosophical question, but a legal question. A question the Building Trades contend is correctly answered by finding the work in the instant case is construction because it does not fit within the narrow definition of ‘maintenance work.’

### **III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT**

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<sup>2</sup> The ship wherein Theseus and the youth of Athens returned [from Crete] had thirty oars, and was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for theological question of things that grow; one side holding that the ship remained the same, and the other contending that it was not the same. —Plutarch, Theseus[1] - See [<http://classics.mit.edu/Plutarch/theseus.html>].

**TO RESPONDENTS BECAUSE THE COURT ERRONEOUSLY INTERPRETED MISSOURI'S PREVAILING WAGE ACT, IN THAT BY RELYING ON THE PARTIES STIPULATED FACTS TRANSFORMED THE FINDINGS OF FACT INTO CONCLUSIONS OF LAW, AND IN SO DOING, TRANSFORMED A NARROW QUESTION BETWEEN TWO PARTIES INTO A BROAD, AND DISPARATE, APPLICATION OF THE ACT APPLICABLE TO ALL FUTURE PARTIES ACTING UNDER THE ACT.**

Because summary judgment was granted below on the parties presentation of stipulated facts, this case comes down to one of pure statutory interpretation. Even in a case of statutory interpretation, however, the underlying facts can confuse the issue for the parties and trial judge.

The underlying claim consisted of three component parts: 1) contract interpretation; 2) finding of what physical work was actually required to be performed where, pursuant to the contract; and, 3) statutory interpretation of Missouri's Prevailing Wage Law. (Judgment at 1, "This Court concludes that the Missouri Prevailing Wage Law does not apply to *work performed under this contract* because the work is maintenance not construction work." Finding of Fact 6. "The parties have a genuine dispute as to whether prevailing wage must be paid for services under this

contract.”) In analyzing the case in this fashion, the trial court’s judgment can stand for only two possible outcomes on appeal: 1) the trial court’s decision was an error in statutory interpretation; or, 2) the judgment applies to the facts of this case and this contract only, as stipulated to below, alone, without further application to the Prevailing Wage Law.

The Trial Court’s Judgment Was An Error In Statutory Interpretation  
And Should Be Reversed.

When a case is submitted to a trial court on stipulated facts, the appellate court is presented with a pure legal question. A.P. Green Fire Brick Co. v. Missouri State Tax Commission, 277 S.W.2d 544 (Mo. 1955). The appellate court’s job is to review, not only the trial court’s conclusion of law, but also the propriety of the trial court’s judgment on the agreed upon facts. In re Thomas L. Harris Trust, 204 S.W.3d 267 (Mo.Ct.App. S.D. 2006), reh’g and/or transfer denied, (Oct.2, 2006) transfer denied, (Nov. 21, 2006). The appellate court’s review is, therefore, *de novo* and the appellate court is not bound by the trial court’s application of the stipulated facts to the law. Berghorn v. Reorganized School Dist. No. 8, Franklin County, 260 S.W.2d 573 (1953).

As with any regulatory scheme, § 290.210.4 and § 290.230 must be read in a way to harmonize it with the Prevailing Wage Act. Americare Systems, Inc. v. Missouri Department of Social Services, 808 S.W.2d 417, 420 (Mo.App.1991). This

Court must look past the muddled language the legislature has laid down and interpret the language toward the Act's purpose. Long v. Interstate Ready-Mix, L.L.C., 83 S.W.3d 571, 577 (Mo.App. W.D. 2002); *citing*, Lonergan v. May, 53 S.W.3d 122, 126 (Mo.App. W.D. 2001). The Building Trades assert "maintenance work" is any repair of existing facilities *unless* that repair changes or increases the size, type or extent of those facilities or is "major repair." It is the second part of this definition that is at issue before this court and which, to conform with the Act's purpose, must mean, as a matter of law, that "maintenance work" is a narrow and confined category. *See*, LeFevre, 642 S.W.2d at 103 (discussing exceptions to remedial statutes).

There is no dispute that the legislature, in formulating the Prevailing Wage Law, wished to exclude maintenance work, from the power and policy of the Act. The City Utilities Court itself acknowledged 'maintenance work' is not its own category, but rather a narrow subset of 'construction' when it formulated its analysis. The City Utilities Court determined, "§ 290.230 does not require that the prevailing wage be paid for 'construction' work that is 'maintenance work.'" City Utilities, 910 S.W.2d at 740. The trial court erred therefore, in stating "All work under a contract for public work must be either construction or maintenance work.." (Judgement at 8).

Relying on the Act's plain language, as well as City Utilities' guidance, the proper analysis is: All contracts for public works are construction work; construction

work that fits the definition of “maintenance work”, however, does not require payment of prevailing wage. Unfortunately, that is where the validity of City Utilities’ stop.

The trial court found, and the Respondent obviously supports, a reading of § 290.230 that determines the “maintenance work” exception by framing the “size, type or extent . . . not thereby changed or increased” language as a factual determination. City Utilities, 910 at 744. It is not a factual determination. It is a legal determination.

The Trial court relied on Mr. Albritton’s affidavit to find Respondent’s work under the Contract with the Appellants did not change the size, type or extent of the existing facility, defined by Mr. Albritton to be the “water tower which includes the water tank.” (Judgment, p.7-8). Though the trial court freely admits Albritton’s affidavit is little more than observation by a layman, (Judgment, p.8) the trial court goes on to accept the statements as conclusions of law.

Surely, if the parties in a tort action stipulated (for some reason) to an affidavit stating the defendant acted negligently, it is still the court’s duty to find the defendant was negligent as a matter of law. The same is true in this case. As a layman Albritton is perfectly capable of stating his position that the work at issue in this case did not change the size, type or extent of the existing facility. The affiant’s factual assertion, however, does not make his statement true as a matter of law. It is the court, not the

affiant, who determines the law. In re Thomas L. Harris Trust, 204 S.W.3d 267 (Mo.Ct.App. S.D. 2006), reh'g and/or transfer denied, (Oct.2, 2006) transfer denied, (Nov. 21, 2006). On appeal, this Court is empowered to review the stipulated facts to assure the trial court properly applied the stipulated facts to the law. Berghorn v. Reorganized School Dist. No. 8, Franklin County, 260 S.W.2d 573 (1953).

The parties stipulated facts below are riddled with factual assertions that the trial court accepted as legal facts and this Court should properly reevaluate. A lay person is fully capable of truthfully telling the Court that various activities, in the affiant's mind (or even as a usual course of the affiant's business when not under the Prevailing Wage Act), are maintenance items that do not change the size, type or extent of an existing facility. It is the Court's duty, however, to state that, while assertions of fact may very well be truthful in other circumstance, when applied to the Prevailing Wage Act, those same activities may no longer be considered 'maintenance' but, are now, as a matter of law, 'construction.'

The Building Trades maintain, as does Appellant, that legally, activities such as replacing and welding steel replacements, steel parts, expansion joints, sway rods adjustments constitute 'construction' under the Act. However, as more fully developed in Point I of this Brief, the more direct example is the various painting and repainting activities in the Contract. The trial court's findings of fact that the painting

activities do not “change the dimensions, the function or use of the existing facility”, or “change or increase the size, type or extent of the existing facility” cannot overcome the legislature demand that as a matter of law, these activities are ‘construction’. *See* Judgment, p.3 ¶ 11; § 290.210. The same is true for nearly every other action Respondents engaged in to fulfill their obligations under the Contract. The law mandates that the men and women working pursuant to Respondent’s Contract received a prevailing wage.

### **CONCLUSION**

For the above stated reasons and law, it is respectfully submitted that the trial court erred in determining that the work performed by Respondents was not subject to the Prevailing Wage. It is respectfully requested that this erroneous judgment be reversed and remanded for such proceedings as are consistent with the Court’s opinion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of the foregoing “Amicus Curiae Brief by Missouri State Building and Construction Trades, AFL-CIO” was mailed first class, postage prepaid, this 20<sup>nd</sup> day of September, 2010, to:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.04, 84.06 the undersigned certifies that the foregoing Brief was prepared using Corel WordPerfect 12.0. The font used to prepare the foregoing Brief is Times New Roman with a 14-point type. According to the word and line count function of Corel WordPerfect 12.0, the foregoing Brief contains approximately 3,974 words and 528 lines which does not exceed the 7,089 words contained in Substitute Brief for Appellant.

The undersigned also certifies that the computer diskette provided herewith has been scanned for viruses and is virus-free.

Respectfully submitted,

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