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 RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent Utility Service Company, Inc. ("Utility Service") adopts the jurisdictional statement submitted by the Appellant Department of Labor and Industrial Relations (the "Department").

STATEMENT OF FACTS

Pursuant to Rule 84.04(f), Utility Service does not believe the Department's statement of facts is complete or accurate because it omits the most critical undisputed material facts that were in the summary judgment record below.[1]

For the purposes of summary judgment, the Department did not dispute that "the existing facility under this Contract is the 250,000 gallon elevated water storage tower which includes the water tank." (L.F. 94.) The Department similarly did not dispute that the Contract at issue between Utility Service and Monroe City provides for the "care and maintenance" of the water storage tank. (L.F. 95.) These facts were not disputed by the

[1] The Department's statement of facts also contains an inaccurate statement regarding the cost of the facility at issue. The Department asserts that "the work performed during the first three years of the Contract" will be "about 24% of the value of a *similar* new tank." (Appellants' Sub. Br. at 8.) The parties entered a joint stipulation that someone "officially reported" that "a project of the Andrew County Public Water Supply District No. 1 for the construction of a 250,000 gallon elevated water storage tank in 2003 cost $470,000." (L.F. 142.) This stipulation was not part of the statement of facts of either party and no factual finding was made by the trial court. In addition, the stipulation simply admits through hearsay that the Department was so informed; it does not establish the truth of the matter asserted.

Department before the trial court, so they are deemed admitted and true for purposes of this appeal. *Rycraw v. White Castle Systems, Inc*., 28 S.W.3d 495, 498 (Mo. App. 2000).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT UTILITY SERVICE SUMMARY JUDGMENT BECAUSE THE WORK UNDER THE CONTRACT IS "MAINTENANCE WORK" WHICH IS NOT SUBJECT TO THE PREVAILING WAGE LAW, IN THAT IT IS AN UNDISPUTED FACT THAT THE WORK AT ISSUE DID NOT CHANGE THE SIZE, TYPE, OR EXTENT OF AN EXISTING FACILITY. (RESPONDS TO APPELLANTS' POINT I)

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

Hadel v. Board of Education, 990 S.W.2d 107 (Mo. App. 1999)

State ex. rel. Ashcroft v. City of Sedalia, 629 S.W.2d 103 (Mo. Banc 1982)

ITT Commercial Finance Corp v. Mid-America Marines Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

§§290.210-290.240, RSMo

II. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT UTILITY SERVICE SUMMARY JUDGMENT BECAUSE THE COURT PROPERLY CONCLUDED THAT THE EXISTING FACILITY UNDER THE CONTRACT WAS THE WATER TOWER WHICH INCLUDES THE WATER TANK IN THAT THE ORDINARY MEANING OF "FACILITY" INCLUDES

THE WATER TOWER AND THERE ARE NO "COMPONENT PARTS" (RESPONDS TO APPELLANTS' POINT II)

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

Chester Bross Construction Co. v. Missouri Dept. of Labor and Indstrial Relations, 111 S.W.3d 425 (Mo. App. 2003)

Smart v. Chrysler Corporation, 991 S.W.2d 737 (Mo. App. 1999)

§§290.210(1) and (4), RSMo

STANDARD OF REVIEW

Utility Service agrees with the Department's articulation of the proper role for an appellate court in reviewing a trial court's issuance of a summary judgment, but the Department fails to include two standards important to this case. First, it is a well-settled rule that when considering appeals, the appellate court will "take as true the facts set forth by affidavit or otherwise in support of a party's motion unless contradicted by the other party's response to the summary judgment motion." *Eldridge v. Columbia Mutual Ins. Co.*, 270 S.W.3d 423, 424 (Mo. App. 2008). As to the law, an appellate court should affirm the ruling of the trial court if any theory of law supports that ruling regardless of whether the theory was presented at trial. *Birdsong v. Christians*, 6 S.W.3d 218, 223 (Mo. App. 1999). In this case, the trial court's entry of summary judgment should be affirmed because it properly concluded that Missouri's Prevailing Wage Law does not require payment of prevailing wage for the work under this Contract because the work meets the Law's definition of "maintenance work."

INTRODUCTION

The Missouri Prevailing Wage Law ("Law") requires that prevailing wages be paid for all construction work on public works projects, exclusive of *maintenance* work. See §§ 290.220 & 290.230, RSMo[2] (emphasis added). The fundamental question in this case is whether the Contract between Utility Service and Monroe City (the "Contract") is construction work, which is included within the scope of the prevailing wage law, or maintenance work, which is specifically excluded. The facts of this case, the language of the statute, existing Missouri case law, and common sense all compel a conclusion that this Contract is maintenance work and the trial court's judgment must be affirmed.

The statute defines maintenance work 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." § 290.210(4), RSMo. The undisputed factual record establishes that the "existing facility" in this case is the water tower and elevated water tank. By its terms, the Contract is a "Water Tank Maintenance Contract." (L.F. at 12.) The trial court properly concluded that the work under the Contract is not subject to the Law because it meets the statutory definition of maintenance work. It is repair work that does not change or increase the size, type, or extent of the 250,000 gallon elevated water storage tank. § 290.210(4), RSMo; *Dep't of Labor & Indus. Relations, Division of Labor Standards v. Bd. Of Public Utilities of the City of Springfield*, 910 S.W.2d 737, 740 (Mo. App. 1995) (hereinafter "*City*

[2] All statutory citations are to the 2000 edition of the Revised Statutes of Missouri unless otherwise indicated.

Utilities").[3] As such, this Contract has been specifically excluded from prevailing wage requirements.

The Department, in urging that the statute requires prevailing wage to be paid for this work, tortures the law and the facts to support its desired conclusion. In Point I of its brief, the Department argues that the trial court misconstrued the statute when it concluded that the work this Contract requires is within the statutory definition of maintenance. Rather than focus on whether the work meets the statutory definition of maintenance, which is the dispositive issue, the Department argues instead that prevailing wage is required because the work contemplated by the Contract can be characterized within the broad categories of work included within the statutory description or explanation of construction. The resulting interpretation, whereby any work that falls within the categories enumerated among construction requires prevailing wage, would read "maintenance work" out of the statute entirely. For example, the Department's proposed test would lead this Court to conclude that painting of any magnitude requires payment of prevailing wage. All work on public works projects would require payment of prevailing wage rates regardless of the impact on the size,

[3] Indeed, the conclusion that this is maintenance work struck the court of appeals as so uncontroversial that it only issued a per curiam opinion, despite being apprised that this Court expressed interest in these issues and had accepted transfer in a prevailing wage case from another district of the Court of Appeals, *see Dodson v. Pemiscot County Mem. Hosp.*, SC 90660. As the court of appeals doubtless recognized, the facts of *Dodson* are radically different than this water tower maintenance case.

nature, or extent of the existing facility. This result is not supported by the plain and ordinary language of the Law and undermines the intent of the legislature to exclude maintenance work from the scope of the Law.

In Point II, the Department goes still further and urges the Court to reinvent the factual record below so that it will not be bound by its factual concession that the "existing facility" in this case is the water tower and tank. The Department contends that the identity of the "existing facility" is a question of *law*, and the trial court committed an error of law when it accepted the parties' factual agreement as to the nature of the existing facility in this case. This Court should reject the Department's legal and factual acrobatics and affirm the reasonable judgment of the trial court.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT UTILITY SERVICE SUMMARY JUDGMENT BECAUSE THE WORK UNDER THE CONTRACT IS "MAINTENANCE WORK" WHICH IS NOT SUBJECT TO THE PREVAILING WAGE LAW, IN THAT IT IS AN UNDISPUTED FACT THAT THE WORK AT ISSUE DID NOT CHANGE THE SIZE, TYPE, OR EXTENT OF AN EXISTING FACILITY. (RESPONDS TO APPELLANTS' POINT I)

The policy of the state of Missouri is that prevailing wage shall be paid to all workers employed by "any public body engaged in public works *exclusive* of maintenance work." § 290.220, RSMo (emphasis added). The Law is intended to be corrective and interpreted broadly to achieve "the greatest public good." *Long v. Interstate Ready-Mix, L.L.C.*, 83

S.W.3d 571, 574 (Mo. App. 2002). But, its remedial nature does not give license to the Department's suggested interpretations that are inconsistent with or in contravention of the language of the statute. *State ex rel. LeFevre v. Stubbs,* 642 S.W.2d 103,106 (Mo. banc 1982); *State ex rel. Ashcroft v. City of Sedalia,* 629 S.W.2d 578, 583 (Mo. App. 1982). The plain language of the Law is clear that it does not apply when the work is "maintenance work." *City Utilities,* 910 S.W.2d at 740 (discussing §§ 290.220 and 290.230, RSMo).

In concluding that this Contract did not require prevailing wage because it is maintenance work, the trial court interpreted the statute correctly and applied it to the undisputed factual record in this case. When the issue is whether work is maintenance, "it is essential to identify what is the 'existing facility.'" *City Utilities,* 910 S.W.2d at 745. The parties simplified that inquiry for the trial court below and admitted for the purposes of summary judgment that "the existing facility" is "the 250,000 gallon elevated water storage tower which includes the water tank." (L.F. 94.) After identifying the water tower and tank as the "existing facility," the trial court correctly determined that all of the work is repair to an existing facility which does not change or increase the size, type, or extent of the water tower or tank. These determinations are factual not legal conclusions. (Appellants' App. at A18,n.3.) S*ee also City Utilities,* 910 S.W.2d at 745. Based on these factual determinations, the trial court reached the correct legal conclusion: this contract calls for maintenance work, and the Law does not apply. (L.F. 159-163.)

Utility Service will first describe how the trial court was correct in its interpretation of the Law. As the trial court correctly held, the critical question is whether the repair work would change the size, type, or extent of the existing facility, here the water storage tower

and tank. Next, Utility Service will highlight the fatal flaws in the Department's interpretation of the Law. Third, Utility Service will demonstrate that the trial court was correct to conclude that the undisputed facts in the record compelled a conclusion that the work at issue in this case is maintenance work which the legislature excluded from the requirements of the Law. Finally, Utility Service will show how the factual record presented to the trial court all but precludes any other conclusion.

A. The Statute Excludes Maintenance Work that Does Not Change the Size, Type, or Extent of the Existing Facility from its Scope.

The statutory interpretation issue in this case requires this Court to give meaning to the legislature's twin directives in the Law: (1) construction work should be compensated at the prevailing wage; and (2) maintenance work performed on existing facilities is excluded from this requirement. When interpreting legislative acts, this Court's primary responsibility is to ascertain the intent of the legislature and to presume that each and every word, clause, sentence and provision was intended to have some effect. *Chester Bross Construction Co. v. Missouri Dept. of Labor and Industrial Relations*, 111 S.W.3d 425, 426 (Mo. App. 2003). Portions of statutes should not be read in isolation but in context of the entire statute, harmonizing all provisions. *Neske v. City of St. Louis*, 218 S.W.3d 417, 424, 426 (Mo. banc 2007).

The legislature defined maintenance work by the effect it has on an existing facility: "Maintenance work means 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." § 290.210(4), RSMo. Of course, if there is no existing facility, none of the work can be

classified as maintenance work regardless of the type of work performed. *Chester Bross Construction*, 111 S.W.3d at 427-428. If there is an existing facility, the focus is on identifying the existing facility and determining whether it has been increased or changed in its size, type, or extent by the repairs. As noted above, the parties agreed that the existing facility in this case is the water storage tower and tank.

Construction on the other hand is not specifically defined by the statute. Rather it is described broadly so that all work performed in the process of constructing a new building or structure will be subject to the Law and cannot be discriminated against based on its type. § 290.210(1), RSMo ("Construction includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair.") (emphasis added). In drafting the statute, the legislature *described* construction work by reference to the types of work it includes, but it *defined* maintenance work, not by the type of work performed, but by the effect it has on the facility. § 290.210(1) & (4), RSMo. In other words, when building something from the ground up, everything that must be done to complete the project is subject to the Law because it is part of the construction of the facility. The legislative intent for this description is obvious. When constructing a building, public bodies are not allowed to exclude the painting or the decoration of the new building from prevailing wage. But when a facility already exists, the Law directs us to the effect of work on the facility to determine whether prevailing wage is required.

The statutory scheme is very simple. It may be best articulated in § 290.230.1, RSMo.: prevailing wages are to be paid to all workers engaged in "construction of public works, exclusive of maintenance work." The statute requires a determination that

construction occurs and that a public work is involved. Then it requires the exclusion of any work that is "maintenance." Although maintenance work is likely to fall into one or more of the broad categories enumerated within construction such as painting, the Law excludes that work from its reach if it involves the repair of an existing facility that does not change or increase the size, type, or extent of the existing facility. As the court of appeals has held, the test to be applied in making this determination is not the type of work required (i.e. is it painting or carpentry or steel replacement) or "the magnitude of the repair; rather, it is whether a change or increase in the size, type, or extent of the existing facility is wrought by the repair." *City Utilities*, 910 S.W.2d at 744. This is plainly what the statute commands and the trial court was correct in its interpretation.

B. The Department Misreads the Law.

The Department ignores the plain language of the statute and precedent, implicitly urges this Court to reject it outright in favor of the Department's own novel interpretation. The Department urges a new interpretation of the Law, reading "construction" as broadly as possible, by relying on the fact that the prevailing wage law is a remedial statute. (Appellants' Sub. Br. at 15). The statute should certainly be construed to give effect to its legislative intent, but the phrase "construction" cannot be construed in any way that reads out the legislature's specific exception for maintenance work. *State ex rel. Ashcroft v. City of Sedalia*, 629 S.W.2d at 583.

In *City of Sedalia*, the court of appeals properly rejected similar arguments when the Department attempted an expansive reading of the phrase "public benefit" within the definition of "public works." The court rejected the Department's interpretation of the Law -

- that any benefit to the public required payment of prevailing wage -- because that interpretation would render other language in the Law requiring workers to be employed by or on behalf of a public body meaningless. *Id.*

According to the Department, if the work in this case fits into one of seven categories included in construction by the statute ("construction, reconstruction, improvement, enlargement, alteration, painting and decorating,") the analysis is over and prevailing wages must be paid. (Appellants' Sub. Br. at 25.) The Department asserts that maintenance work, under the statute, "is a subset of construction" (Appellants' Sub. Br. at 23), but it still argues that if the work can be characterized as construction it can never be maintenance of an existing facility. This approach is not supported by any existing case law, the tenets of statutory construction or common sense.

If this Court were to accept the Department's reading of the interplay between "construction" and "maintenance," it would render the "maintenance work" exclusion meaningless and subject all work performed on public works projects to the prevailing wage. This interpretation would violate an important rule of statutory construction. It cannot be presumed that the legislature inserted "idle verbiage or superfluous language in a statute." *Hyde Park v. Dir. of Revenue,* 850 S.W.2d 82, 84 (Mo. 1993). Indeed, the Department's brief argues that all painting is construction work because "painting is included within the scope of 'construction.'" (Appellants' Sub. Br. at 26-27); *See also (*Appellants' Sub. Br. at 19) ("if the public works include painting, then the parties' Contract is subject to prevailing wages.") Statutes should not be construed "so as to work unreasonable, oppressive or absurd results." *Kincade v. Treasurer of State of Mo.*, 92 S.W.3d 310, 311 (Mo. App. 2002).

The Department's own regulations reinforce the distinction between construction and maintenance. In 8 CSR 30-3.020(1), the Department defined "construction" as "all work done in the *construction or development* of a public works project" which includes but is not limited to altering, remodeling, painting, decorating, and transportation of materials and supplies. (emphasis added) Although the Department has rulemaking authority to interpret and implement the Law under § 290.240, RSMo, it has promulgated no additional rules or regulations that would provide further guidance regarding the distinction between maintenance and construction.

The Department also argues that the maintenance exception under the Law applies only to the major repair category of construction and not other categories of construction. (Appellants' Sub. Br. at 25-26.) Utility Service agrees that the Law defines maintenance partially as “repair but not the replacement” of an existing facility. A harmonious reading of the two statutory definitions leads to the conclusion that a "repair" as referenced in the definition of "maintenance," does not change or increase the size, type, or extent of the existing facility. Any repair that does render such a change to the existing facility would not constitute maintenance under the statute and would require payment of prevailing wage.

In addition to misreading the Law, both the Department and Amicus Curiae, the Missouri State Building and Construction Trades Council, also misconstrue the judgment of the trial court. (Appellants' Sub. Br. at 23; Amicus Sub. Br. at 15-16.) The trial court stated that "[A]ll work under a contract for public works must be either construction or maintenance work." (Appellants' App. at A8). They (the Department and Amicus) argue that this statement shows that the trial court misinterpreted the Law by treating

"construction" and "maintenance" work as "mutually exclusive, binary categories" going so far as to call it a "novel interpretation of the Act." (Appellants' Sub. Br. at 23.) There is nothing novel about the trial court's correct and logical approach. Because construction is included under the Law but maintenance is not, work performed on a public works project must be categorized either as covered construction or excluded maintenance to determine whether it is subject to the Law.

On the undisputed factual record before the trial court, all of the work was maintenance because it did not change the size, type, or extent of the water storage tower and tank. Whether the work contemplated by the Contract can be described as construction, which is the primary focus of the Department's argument here, is wholly insufficient to determine whether it is maintenance work. Maintenance work may be an improvement, it may be an alteration, and it may be painting, but it will be exempt from the Law so long as it does not change the size, type, or extent of the existing facility.

C. The Trial Court Correctly Concluded that the Work Under This Contract is Maintenance Work.

The trial court relied on a three-part test evident from a plain reading of the statute and articulated in *City Utilities* to determine whether the work performed on this public works project is maintenance work. *City Utilities,* 910 S.W.2d at 737. As the *City Utilities* court held, in order for work to be excluded from the Law as maintenance work: 1) the work must be repair, not replacement of the existing facility; 2) the work must be in or to an existing facility; and 3) the work must not result in any change or increase in the size, type, or extent of the existing facility. *Id.* (*citing* § 290.210(4), RSMo); S*ee also Hadel,* 990

S.W.2d at 113;[4] *Chester Bross Construction,* 111 S.W.3d at 427 (both employing the three-part test to determine whether work is maintenance or construction).

1. Repainting of the Water Tank is Maintenance Work.

Under the Contract, Utility Service must repaint the interior and/or exterior of the water tank at such time as repainting is necessary. (L.F. 41, 47.) Interior painting is to be determined by the thickness of the existing liner and its protective condition, and exterior painting is done when the appearance and protective condition of the existing paint shows that it is necessary. *Id.*

The trial court was correct in finding that repainting of the interior and/or exterior of the water tank meets the definition of maintenance work. (L.F. 156-157.) Repainting, whether it be in the interior or exterior of the tank, is simply work done to *repair* the existing coat of paint and restore the water tank and tower to its original condition. Painting is only construction where the work is done in the process of constructing a new facility, when painting a facility for the first time or where the work changes the size, type, or extent of the existing facility. Conversely, where painting or repainting is done as a part of routine maintenance or repair to an existing facility, it is maintenance and not subject to the Law.

[4]Although *Hadel* involved a school district authorizing work on a school building under Chapter 177, it is relevant here because the court of appeals looked to how the terms "construction" and "maintenance" were defined in the Prevailing Wage Law to assist in resolving the factual question of whether the work was "maintenance" or "construction." *Hadel*, 990 S.W.2d at 112-114.

(L.F. 86-87.) In this case, "[B]ecause the repainting is done only for maintenance purposes and is not done in conjunction with new construction . . . repainting constitutes repair work under the Prevailing Wage Act." (Appellants' App. at A20.)

Before the trial court, the Department contended that "painting" is always "construction." (L.F. 42, 100.) In its brief before this Court, the Department again claims painting requires payment of prevailing wage but has modified its position and now concedes that "minor touch up paint may be insufficient to satisfy" the definition of construction. (Appellants' Sub. Br. at 19-20.) The Department's distinction between minor touch up painting (which is also a form of repainting) is wholly unworkable. Would a party or a court look to the amount of paint used, the number of brush strokes taken, or the sizes of brushes used to determine whether painting was maintenance or construction? There is no support for this approach in the statutes, Department regulations or any other law.

Amicus Curiae, the Missouri State Building and Construction Trades Council, on the other hand argues that all painting without exception is construction, every brush stroke. (Amicus Sub. Br. at 9.) The exclusive basis of Amicus' argument is that the description of construction in the statute includes painting. *See* § 290.210(1), RSMo. But the term "painting" is specifically enumerated in the description of construction to ensure that painting done in the course of a construction project is subject to the Law, and not to guarantee every brush stroke is compensated with the prevailing wage. When building a new facility, if painting is done, the workers engaged in painting must be paid the prevailing

wage.[5] (Appellants' App. at A20.) Similarly, when an existing facility is improved in any way that changes the size of the existing facility, the workers on that project, including the painters, must be paid the prevailing wage. The issue is not whether *painting* occurs, it is whether it occurs to an existing facility and, if so, what effect it has on the existing facility. In this case, the Contract provides for repainting when necessary. (L.F. 47.) This is plainly a repair to the existing, already painted and constructed, water storage tower and tank.

Persuasive on this issue is the court of appeals decision in *Chester Bross Construction*. In *Chester Bross Construction*, the court did not look at the specific type of work being performed but instead at the nature of the overall project. *Chester Bross Constr.*, 111 S.W.3d at 427-248. Since the overall project in *Chester Bross Construction* was to construct a new facility (specifically a new highway), all of the types of work being performed on the project site had to be paid prevailing wage. The same analysis should be applied in this case, but it dictates the opposite result. Regardless of the category of work being performed, all of it is in furtherance of maintaining the existing facility of the water storage tower and tank and not in constructing a new facility. (L.F. 32-33.)

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[5] The Department's regulations state this concept precisely, defining construction to include "all work done in the construction or development of a public works project, including . . . painting and decorating [and] the transporting of materials to or from the city." 8 CSR 30-3.020. Transporting of materials might be done for maintenance as well, of course, but when done as part of creating a new building or changing the size, type, or extent of the building it is non-excluded construction and prevailing wage must be paid.

Both *City Utilities* and *Hadel* are also instructive on how repainting should be treated under the Law. *City Utilities* involved the removal of asbestos insulation from the existing heater and piping. The court found that because the work was a repair to the existing facility that did not change the size, type, or extent of the existing facility it was maintenance work. *City Utilities*, 910 S.W.2d at 739. Similarly in *Hadel*, the court found that removal and replacement of the worn roof materials constituted a repair of the existing facility that did not change the size, type, or extent of the existing facility and was maintenance work. *Hadel*, 990 S.W.2d at 113. Repainting under the Contract in this case is done to repair the existing exterior and interior paint of the existing water tank and tower. It is maintenance of the existing facility and not subject to the Law.

2. Specialized Services to Maintain and Repair the Existing Facility are Maintenance Work.

Utility Service also provides specialized services under the Contract, including engineering and inspection services needed to maintain and repair the tank, such repairs to include steel replacement, steel parts, expansion joints, water level indicators, sway rod adjustments, manhole covers/gaskets, and other parts for the tank. (L.F. 38.) Utility Service also installed an anti-climb device on the access ladder to prevent unauthorized persons from climbing the tower and accessing the water tank. *Id.* The anti-climb device is approximately six to eight feet long and includes a mesh cage that encloses the access ladder. It is not a permanent part of the existing facility and is used only for public safety purposes. (L.F. 42-43.)

The trial court was correct to conclude that these specialized services also meet the definition of maintenance work. They are performed on the water tower. They include repair, not replacement, of the water tank and tower, and they do not change or increase the size, nature or extent of the water tower. (L.F. 156.) Steel replacement, for example, is only done when necessary to shore up or repair existing steel parts. *Id.* Welding is only done when necessary to maintain and repair the existing facility. *Id.* Installation of the anti-climb device does not change or increase the size, type, or extent of the elevated water tower or tank. (L.F. 157.) It simply makes the facility secure.

a. This Work Is Excluded Maintenance, Not Reconstruction, Alteration, or Improvement Covered by the Law.

The Department argues that these specialized repair services amount to "reconstruction" because the work "involves restoring the water tower to its previous condition" and "remodeling of the water tower and tank." (Appellants' Sub. Br. at 17-18.)[6] The Department also argues that even if this work did not amount to reconstruction, prevailing wage must be paid because it is "alteration" or "improvement" as the work makes "different in detail[s] but not in substance and "raises to a better quality or condition." (Appellants' Sub. Br. at 18-19.) The Department offers no factual citation for the idea that the

[6] The Department is quoting from dictionary entries from WEBSTER'S NEW WORLD DICTIONARY 1187 (2d ed. 1978) for the term "to reconstruct." (Appellants' Sub. Br. at 17-18.)

facility is improved from its orginal state by the work because there is no such factual support in the record.

Under the statutory framework, construction is indeed a broad concept that covers everything including, as the Department points out, maintenance work. The subset of construction known as maintenance work, however, is defined by the legislature as repair work which does not change the size, type, or extent of an existing facility and is excluded from the prevailing wage law. It does not matter whether one describes the work as reconstruction, alteration, improvement or construction; under the statute it is still excluded maintenance work if it does not change the size, type, or extent of the existing facility. By taking the description of construction and the terms contained within it out of the statutory context, the Department would render the exclusion for maintenance meaningless and basically non-existent under the law. *Kincade*, 92 S.W.3d at 311 (holding that courts should avoid absurd results).

Based on the Department's analysis, it is difficult to conceive of any work that would be excluded from the Law because it is maintenance. A repair of nearly any sort would be "reconstruction" as it would be a restoration to its "previous condition" or at a minimum, it would be an "improvement" as it would "raise the quality or condition." (Appellants' Sub. Br. at 17-18.) The Department seems to suggest that the only way repairs could be maintenance is if the repairs were made with material that would not restore the existing facility to its previous condition. In other words, repair work can only be maintenance if the workers use material that is in the same condition as the material needing repair. The Department basically concedes that this is its position by saying that new replacement parts

of a better quality than the parts being replaced render the work outside the definition of maintenance. (Appellants' Sub. Br. at 19.) But again, the Department made no factual record below concerning the quality of any replacement parts.

The unreasonableness of the Department's position becomes even more apparent when reviewing cases which have found that repair work is maintenance work. In *Hadel*, for instance, the work at issue involved removal and replacement of faulty and worn roof materials. *Hadel*, 990 S.W.2d at 113. The court found that the work constituted "maintenance work," not "construction" as it did not change the size, type, or extent of the existing facility wrought by the repair. *Id.* Under the Department's interpretation seemingly the only way that the work on the roof in *Hadel* could have been considered maintenance is if the faulty and worn roof materials were replaced with equally faulty and worn roof materials. But *Hadel* was correctly decided. Maintenance means repair. To repair something, one must restore it to its original condition.

Similarly, the contract in *City Utilities* was for asbestos removal. It involved the removal of insulation containing asbestos from heater and piping. *City Utilities*, 910 S.W.2d at 743. Like in *Hadel*, the court found that the removal of the asbestos from around the heater and piping and replacement with another type of insulation did not change the size, type, or extent of the existing facility and was maintenance. *Id.* Under the Department's analysis, however, the asbestos insulation would have to be replaced with asbestos insulation or equally faulty material or else it would be considered construction under the Law.

The distinction between "repair" and "replacement" or "reconstruction" and thus "maintenance" and "construction" within the context of the Law was the subject of a well-

reasoned 1970 Attorney General Opinion. [7] The Attorney General opined that "[R]eplacement of worn or deteriorated elements of a structure with similar or identical elements in order to restore the structure to its original condition is generally considered synonymous with repairing; however, substitute of all the elements or units of a structure with new or different units is commonly construed as a replacement or reconstruction, not repair." Mo. Att'y Gen. Op. No. 32-70 (October 20, 1970). In drawing this distinction, the Attorney General relied on the United States Supreme Court decision in *Aro Mfg. Co. v. Convertible Top Replacement Co.,* 365 U.S. 336, 339 (1961). *Aro* involved patent infringement; specifically, whether it is infringement on a combination patent when a component of the combination is replaced without the patentee's consent. *Id.* In deciding against patent infringement, the United States Supreme Court looked to see if replacement of the component part was "infringing reconstruction" or "permissible repair." *Id.* at 342. While *Aro* was not specific to prevailing wage, its framework is instructive in determining whether or not something is maintenance or construction. Rebuilding or reconstructing an existing structure is not permissible repair, but replacement of a worn out part is a permissible repair.

The work under the Contract in this case is permissible repair. It is a restoration to give duration to the water tower and tank by repairing and replacing worn-out, damaged and

[7] Attorney General Opinions are not binding but may be persuasive. *Mesher Bros. Indus., Inc. v. Leachman*, 529 S.W.2d 153, 158 (Mo. 1975).

destroyed parts. It is not reconstruction or rebuilding of the water tower and tank. *Aro Mfg. Co.*, 365 U.S. at 342-43.

The trial court was correct in concluding that these specialized services are maintenance work not construction. Such work is analogous to the repair work at issue in *Hadel* and the removal work in *City Utilities* both of which were found to be maintenance work and not subject to the Law. The specialized services are repairs to the existing facility, the water tower and tank. (L.F. 96-100.) Specialized services such as engineering services, steel replacement and welding are done to maintain the existing water tower and tank and not in the construction process. Installation of the anti-climb device is done to ensure the security of the existing water tower and tank and does not change the size, type, or extent of the existing facility.

b. This Work is Excluded Maintenance, Not a Major Repair Covered by the Law.

The Department also argues that "[G]iven the magnitude of the work to be performed under the Contract, it certainly amounts to extensive remodeling, which is synonymous with reconstruction" and falls within the definition of major repair. (Appellants' Sub. Br. at 20-21.) The Department's basis for this argument is that the repairs under the Contract "are large and important." (Appellants' Sub. Br. at 20.) Again, the Department offers no evidence for this proposition. Regardless, the magnitude test to determine whether or not repair work is maintenance work has heretofore been clearly rejected in Missouri. *See City*

Utilities, 910 S.W.2d at 744.[8] *City Utilities* dealt with a regulation promulgated by the Department which declared repairs to an existing facility that applied to 20% or more of the existing facility to be "major repairs" and thus construction work regardless of whether or not such work changed or increased the size, type, or extent of the existing facility. *Id.* The court in *City Utilities* rejected this test finding that it contradicted the statutory scheme and was an attempt to impermissibly broaden the coverage of the Law. *Id.* As such, the Department's argument as to magnitude has been specifically rejected.

Regardless, the Department's assertion that the repairs, which it argues are large and important and as such are major repairs, is based on a flawed legal analysis. The description of "construction" and definition of "maintenance" distinguish between the terms "major repair" and "repair." *See* §§ 290.210.(1) and (4), RSMo. In reading the two provisions contextually, it becomes clear that the distinction hinges upon whether the work changes the size, type, or extent of the existing facility, not whether or not such repairs are large or important. A "major repair," which is a part of the description of "construction," is one that changes or increases the size, type, or extent of the existing facility. A "repair" as referenced in the definition of "maintenance," does not change or increase the size, type, or extent of the existing facility. Therefore, whether a repair is "major" depends on a factual determination about the effect of the repair on the existing facility.

[8] The magnitude test was also rejected in *Hadel* wherein the Plaintiffs unsuccessfully argued that the "legislature intended repairs of the magnitude referred to in § 177.086, RSMo. to be major." *Hadel,* 990 S.W.2d at 113.

In this case, the trial court was correct in its finding that the work does not change or increase the size, type, or extent of the water storage tower and tank. Regardless of the magnitude of the repair rendered to the existing facility under the Contract, unless the existing facility itself is modified so as to deem it construction work, it is not subject to the Law. *See City Utilities*, 910 S.W.2d at 740.

3. Other Work under the Contract Including Inspection and Cleaning of the Water Tank and Furnishing of the Relief Valves during Servicing is also Maintenance Work.

Utility Service also performs annual inspections of the water tank to assure that the structure is in sound, water-tight condition. (L.F. 38.) In addition, the tank is to be drained and cleaned. (L.F. 38.) Inspection and cleaning of the water tank certainly meets the statutory elements of "maintenance" work. It is at most repair work to an existing facility, the water tower, that does not result in any change or increase in the size, type, or extent of the water tower. (L.F. 156.) The Department at the trial court level agreed that this work is maintenance and not construction so long as such work is not preparatory to construction. (L.F. 40, 96-97.) Here, the Department argues that the work is covered by the prevailing wage requirement.

Utility Service also agreed to furnish relief valves, if necessary, to install in the water system so the Owner can pump and maintain water pressure while the tank is being serviced. (L.F. 38.) The relief valves are only installed if needed to maintain water pressure during servicing of the tank. (L.F. 43.) They are not a permanent part of the existing facility and are removed after servicing of the tank is completed. (L.F. 44.) Furnishing of the relief

valves does not change the size, type, or extent of the water tower. (L.F. 44.) As with cleaning and inspection, the Department agreed at the trial court level that installation of the relief valves is not construction work so long as it is done in the context of inspection and cleaning of the water tank. (L.F. 114.)

The Department now argues, relying on *Chester Bross Construction*, that it considers this work to be preparatory to construction and subject to the Law. (Appellants' Sub. Br. at 22.) Of course, this position begs the question of whether the work discussed above is construction. The issue in *Chester Bross Construction* was whether or not the work performed by a mechanic on machinery used in the course of constructing the **new** highway was maintenance work or construction. *Chester Bross construction*, 111 S.W.3d at 427-428. Unlike in this case, there was no existing facility, so the court found that by definition the work could not be maintenance as there was nothing to maintain. *Id.* Here there is an existing facility and the work is maintenance and not preparatory to construction work because nothing is being constructed.

In this case, none of the professional services outlined in the Contract involve the construction of a new facility. (L.F. 44.) None of the professional services outlined in the Contract change or increase the dimensions of the existing facility, the water tower. (L.F. 44.) None of the professional services change the function of the water tower. (L.F. 44.) As such, the trial court was correct in concluding that the work under the Contract is maintenance work and is excluded from prevailing wage requirements.

D. The Summary Judgment Record Here is Insufficient to Generate a Fact Dispute on the Nature and Impact of the Work.

The Department's brief has curiously little discussion of the facts or the record before the trial court in this case. Examination of the record demonstrates that it provides no support to the Department's position.[9] At the trial court, Utility Service submitted a statement of uncontroverted facts accompanied by an appropriate affidavit and record evidence that the existing facility under the Maintenance Contract is the water tower which includes the water tank; the Department did not dispute this fact. (L.F. 94.) Utility Service similarly provided an affidavit and record evidence that none of the work under the Contract changes or increases the size, type, or extent of the existing facility, the water tank and tower. (L.F. 96-100.) Utility Service made its prima faciae showing for summary judgment. *See Hanson v. Union Electric Company*, 963 S.W. 2d 2, 4 (Mo. App. 1998). Although the Department contended (despite clear precedent to the contrary) that this was a legal conclusion to which no response was required, the Department did not provide any supporting materials that would contradict the affidavit offered by Utility Service which contained sworn testimony as to what the existing facility is under the Contract and the effect

[9] While the Department spends little time discussing the record in this case, it does refer to building projects outside the record including work on the Broadway Building and the Paseo Bridge. (Appellants' Sub. Br. at 12.) Utility Service does not know whether the work on these projects is subject to the Law, as the facts underlying those projects are not before this Court in this water tower maintenance case.

the work under the Contract had on the existing facility.[10] (L.F. 60-65.) Under this Court's summary judgment rules, the Department waived its right to argue otherwise. *ITT Commercial Finance Corp. v. Mid-America Marine Supple Corp.,* 854 S.W. 2d 371, 374 (Mo. Banc 1993). Yet the Department is now asking this Court to disregard these undisputed facts and uncontroverted affidavit properly relied on by the trial court and reverse based on arguments and evidence that were not properly presented below. This Court should not permit the Department to reinvent the record below, which plainly compelled the trial court to enter summary judgment.

The Department's approach here is precisely the same approach that was attempted and rejected in *City Utilities*. In *City Utilities*, the defendant offered an uncontroverted affidavit that work under the contract for asbestos removal from the heater and piping within the electrical power station did not change the size, type, or extent of the heater and piping. *Id.* at 744. Just as here, the Department refused to respond to this factual statement about whether work changed the size, type, or extent of the facility and then argued on appeal that the statement was conclusory and must be disregarded. The *City Utilities* court properly rejected that argument, holding that whether work changes the size, type, or extent of a facility is a question of fact. *Id.* at 746 ("Here the statement that "[t]he [Western] contract

[10] The Department did offer an affidavit with its reply to Utility Service's opposition to the Departmen's motion for summary judgment but not as part of its response to Utility Service's motion for summary judgment. The affidavit was not submitted in accordance with Rule 74.04(c)(2) and must be ignored. (Appellants' App. at A18 n.3)

did not change the size, type, or extent of the heater or piping" is one of fact."); *See also Smart v. Chrysler Corp.*, 991 S.W.2d 737,742 (Mo. App. 1999) (statements made by employees of a safety company as to who was responsible for safety under a contract were not legal conclusions but assertions of fact).

The court in *City Utilities*, relying on the record before it, held that the removal of asbestos from around the heater and piping did not change the size, type, or extent of the existing facility as to remove the contract from the category of maintenance work. *Id.* at 746. The court of appeals also examined the summary judgment record before it reached the same conclusion as the court in *City Utilities* holding the work under the Contract does not change the size, type, or extent of the existing water tower and tank. (Appellants' App. at A23-A24.) Although the Department does not cite the *City Utilities* case until page 27 of its brief, that case is directly on point, and it is dispositive of the issues here. But more important, the *City Utilities* court was correct. Just as it did in *City Utilities*, the Department in this case chose to sit on its hands and not respond to Utility Service's statement of uncontroverted facts below nor its uncontradicted affidavit. It cannot now ask this court to do its work and refute those very same facts. At worst, the issue presents a mixed question of fact and law, yet the Department offered no facts at all.

There is no dispute of material fact precluding summary judgment for Utility Service in the record below. The identity of the existing facility is undisputed: the water tower and tank. The only evidence in the record regarding the impact of the work on the existing facility establishes that the work does not change the size, type, or extent of the facility. In order to defeat summary judgment, the Department was required by the rules to provide

countervailing evidence. *ITT*, 854 S.W.2d at 376. Having failed to do so, the uncontroverted evidence provided to the trial court was accepted below, and remains binding on appeal.

II. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT UTILITY SERVICE SUMMARY JUDGMENT BECAUSE THE COURT PROPERLY CONCLUDED THAT THE EXISTING FACILITY UNDER THE CONTRACT WAS THE WATER TOWER WHICH INCLUDES THE WATER TANK IN THAT THE ORDINARY MEANING OF "FACILITY" INCLUDES THE WATER TOWER AND THERE ARE NO "COMPONENT PARTS" (RESPONDS TO APPELLANTS' POINT II).

The Department argues, apparently in the alternative, that the trial court was not correct in finding that the existing facility in this case is the water tower which includes the water tank. (L.F. 160.) In making this argument, the Department appears to abandon the analysis it urged in Point I. Rather than focusing on whether the work could be considered construction, the Department's Point II acknowledges that whether or not there is an existing facility should be the primary consideration in determining if the work under the Contract is subject to the Law. *City Utilities*, 910 S.W.2d at 745. Where there is no existing facility, all of the work regardless of its type is construction and subject to Law. *Chester Bross Construction*, 111 S.W.3d at 427-428. In those cases, workers "by definition, cannot be involved in maintenance work when there is no 'existing facility.'" *Id.* (citing § 290.210(4), RSMo).

In cases where there is an existing facility, "it is essential to identify *what* is the 'existing facility.'" *City Utilities*, 910 S.W.2d at 745. The existing facility in this case is the water tower which includes the water tank. (L.F. 94.) While the Department flatly conceded

this fact before the trial court, it now contends that the existing facility is not the water tank and tower but instead "other component parts of the water tank or tower, including portions of the steel shell of the tank" and "the steel parts, expansion joints, water level indicators, manhole covers or gaskets." (Appellants' Sub. Br. at 34.) The justification offered by the Department for failing to dispute this fact is that "what constitutes a 'facility' within the meaning of 290.210(4), RSMo . . . [is] a question of law." (Appellants' Sub. Br. at 30.)

The trial court and the court of appeals agree: the Department is wrong. (Appellants' App. at A18 n.3.) What constitutes the "existing facility" is a factual determination. *See Smart*, 991 S.W.2d at 742. However, even if this Court were to consider it a matter of law, the ordinary meaning of the term "facility," the rules of statutory construction, and the case law on this point, fail to support the Department's interpretation.

A. The Department Agreed that the Existing Facility was the Water Tower and Tank and is Too Late to Dispute this Fact.

Utility Service submitted an uncontested affidavit that the existing facility under the Contract is the water tower which includes the water tank. (L.F. 61.) This is an appropriate statement and observation summarizing the conditions under the Contract. *See City Utilities*, 910 S.W.2d at 746 (accepting as appropriate evidence submitted affidavits characterizing impact of work on an existing facility which if not contradicted would be accepted as true). The Department presented no evidence to contradict the affidavit, and in fact, admitted for the purposes of summary judgment that the existing facility was the water tower which includes the water tank. (L.F. 94) The trial court, therefore, acted appropriately in taking the

facts as set forth in the affidavit as true. *City Utilities*, 910 S.W.2d at 746 (*citing ITT Commercial Finance Corp*, 854 S.W.2d at 376). The trial court was also justified in finding that the tower was the existing facility based on the language of the Contract itself. The Contract between the parties recites that the facility is a "250,000 gallon elevated water storage tower located at the corner of Court and Vine Streets in the City of Monroe." (L.F. 12-13.)

There is ample support in the record for the trial court's finding. But even more important to this appeal, the Department presented no evidence of its own and conducted no discovery on the issue. The Department made three arguments to justify its failure to dispute Utility Service's identification of the existing facility as the water tower and water tank, all of which were dismissed as unfounded by the court of appeals below. First, the Department argued that this is not a factual statement but legal conclusion. The court of appeals, relying on *City Utilities*, dismissed this contention (Appellants' App. at A18 n.3.) *Smart*, 991 S.W.2d at 742. Second, the Department argued that it did contest this statement by offering its own affidavit. However, this affidavit was not offered as part of its response to the motion for summary judgment but was presented for the first time in a reply brief regarding the motion. As such, it was not submitted in accordance with Rule 74.04(c)(2) and both the trial court and the court of appeals properly disregarded the affidavit. *Id.* Finally, the Department argued that it only agreed that the water tower and tank were the existing facilities "under the contract." The court of appeals found "no support to show how the stipulation to this fact should not result in the Trial Court finding the existing facilities to be the water tower and tank." *Id.* The trial court, faced with an undisputed definition of the

existing facility in the summary judgment record, had no basis to find that any other "facility" existed. It cannot be said to have erred.

Even if the Department had not abandoned this argument, there is no factual basis to find any other "major component part" to this structure and the Department has not identified such. The record is clear from the affidavits submitted and from the Contract itself that the existing facility is simply a large elevated storage tower and tank that holds water. All of the repairs discussed in the Contract are to "the tank or tower" and there is no indication that there is any major component part that is part of the Contract. There is no reason to disturb the trial court's factual finding. Under any of the theories of what the term "facility" may mean, the trial court got this one right.

B. As a Matter of Law, the Trial Court Did Not Err by Using a Definition of "Facility" that Covered the Water Tower, which Includes the Water Tank.

If the issue is one solely of law, the trial court still properly concluded that the water tower was the facility. The Department offers dictionary definitions of the word "facility." The dictionary definitions "may refer to an entire building (such as a hospital) or its major component parts (such as machinery or plumbing)." (Appellants' Sub. Br. at 32.)

The definition of facility as an entire building would certainly cover the water tower and tank, and this is the context in which the Missouri legislature normally uses the term. While "facility" is not defined in the Law, in interpreting statutes, “it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in

different chapters and were enacted at different times." *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. banc 2005). Under the doctrine of *pari material*, such a construction is acceptable and appropriate. *Hadel*, 990 S.W.2d at 110-11.

A review of other statutes defining facilities reveals a consistent approach from the legislature wherein facility refers to a building or entire structure. "Business facility" is a "building including all the land . . . machinery and equipment. § 135.100(3), RSMo; "Assisted Living Facilities" and "Residential Care Facilities" are "premises." § 198.006, RSMo; "Child Care Facility" is a "house or other place." § 210.201, RSMo. "Dry cleaning facility" is defined as "real property premises or leasehold space in which a dry cleaning facility operates." § 260.900(2) RSMo. Utility Service can locate no statute that uses the term "facility" to refer to or mean component parts of a larger structure. Furthermore, such a statute was not referred to or mentioned by the Department.

1. The Term "Facilities" Does Not Mean "Component Parts."

The Department does not contend that the trial court erred in finding that there was an existing facility but that it erred in finding that the existing facility was the tower and tank. Instead, the Department argues that the existing facilities in this case are the component parts of the tower and tank. When referring to a component part, the Department means one which "perform[s] some particular function or serve[s] or facilitate[s] some particular end." (Appellants' Sub. Br. at 32, 34.) According to the Department, the component parts in this case are the steel parts, expansion joints, water level indicators, sway rod adjustments, manhole cover/gaskets and other component parts of the tower and tank. (Appellants' Sub. Br. at 34.) Because these parts were either changed by the work under the Contract or the

work under the Contract involved the replacement of these parts, the Department asserts the work is not maintenance but construction and subject to the Law. (Appellants' Sub. Br. at 34-35.)

Under this formulation, a wide range of parts commonly replaced, such as gaskets in the water tank, water level indicators and even outlet covers, would be construction requiring payment of prevailing wage. Even a light bulb "perform[s] a particular function" and has independent utility. (Appellants' Sub. Br. at 34.) Under the definition of facility advocated by the Department, anytime a light bulb is replaced, its replacement is of the existing facility and therefore outside the definition of maintenance and subject to the Law. The Department's position breaks down component parts into such minutiae that no work would be excluded from the Law. This was certainly not the intention of the legislature in enacting the Law.

Furthermore, this argument is even inconsistent with the dictionary definition upon which the Department purports to rely. That definition includes "major component parts (such as machinery or plumbing)." (Appellants' Sub. Br. at 32.) It does not include every single part of a building or every single gasket on a water tank. The Department's analysis fails to distinguish between a part such as a piece of steel or a manhole cover and a "major component" such as plumbing or the piping and heating system that was implicitly considered the facility by the trial court in *City Utilities*.

The Department has the authority to promulgate rules including one which would address what constitutes a facility. § 290.240.2, RSMo. The Department has no such rule, and in fact, its own regulations appear to agree that existing facilities under the Law refers to

"buildings" not "major component parts." Those regulations state that all public works for which the Law applies shall be classified as either "building construction" or "highway and heavy construction." *See* 8 CSR 30-3.040. The regulations go on to further define "building construction" by using the term "building" repeatedly. Even when the regulations appear to apply to a public works for something smaller than a building, such as a driveway, parking lot or landscaping, it is put in the context of a building. So the trial court did not err in finding that the water tower was similar to a building and therefore fell within acceptable definitions of the term "facility." Quite to the contrary, as a matter of law its finding is correct.

2. Case Law Does Not Support the Department's Position.

While the Department primarily relies upon cases from Pennsylvania to support its argument, it also asserts that *City Utilities* and *Hadel* are consistent with its interpretation of existing facilities as the component parts of the tank and tower. (Appellants' Sub. Br. at 32.) However, the Missouri cases provide no support for the Department's argument. In *City Utilities*, the trial court found implicitly that the "existing facility" was the heater and piping of Unit 3 and that the asbestos removal from the existing facility did not change the size, type, or extent of the heater or piping and thus was maintenance work not construction. *City Utilities*, 910 S.W.2d at 745. The Department argues that because the heater and piping were only a portion of one unit of the electric generating facility, *City Utilities* supports its position that component parts are the existing facilities. However, in *City Utilities* the asbestos removal which was at issue only involved the heater and piping of Unit 3. *Id.* at 743. What constituted the existing facility beyond that was not at issue in *City Utilities*.

Furthermore, the court in *City Utilities* found that the work did not change or increase the size, type, or extent of the heater and piping even though it changed its insulation from asbestos to some other less hazardous material. *Id.* at 746.

The Department also cannot take refuge in the *Hadel* case. In *Hadel*, the court held that the repair and replacement of faulty and worn roof tiles did not change the existing facility. *Hadel*, 990 S.W.2d at 113. The case is not clear as to whether the existing facility was the school buildings upon which the roofs sat or the roofs themselves; however, what is clear is that the court did not consider the individual tiles of the roof, which were faulty and replaced, to be the existing facility.

To bolster its argument that existing facilities are component parts, the Department looks to prevailing wage cases from Pennsylvania. *See Borough of Youngwood v. Pa. Prevailing Wage Appeals Board*, 947 A.2d 724 (Pa. 2006) and *Kulzer Roofing, Inc. v. Commonwealth, Dep't of Labor & Industry*, 450 A.2d 259 (Pa. Commw. Ct. 1982). These cases are not binding on this Court nor do they support a reversal of the trial court's judgment in this case. Utility Service does not dispute that these cases found that existing facilities could be component parts (such as machinery or plumbing) as well as entire structures. *See Kulzer Roofing*, 450 A.2d at 261. However, the Department's reliance upon these cases to support its broad interpretation of "facilities" to include steel parts, expansion joints, water level indicators, manhole covers or gaskets, and other component parts of the water tank or tower is misplaced and unfounded. (Appellants' Sub. Br. at 34.) Furthermore, the definitions under the law in Pennsylvania are not identical to those in Missouri specifically in

that maintenance work in Pennsylvania is considered a subset of repair work, not a subset of construction, as it is in Missouri. *Id.*

While the Pennsylvania cases cited by the Department are not binding on this Court, Utility Service will briefly discuss them for purposes of factually and legally distinguishing them from the case at hand. In *Kulzer Roofing*, the court reversed course from a line of earlier decisions that had defined the word "facility" as meaning an entire building (a cell block in the main case). *Kulzer Roofing* departed from that reasoning by finding that a roofing project which involved reroofing of eight buildings was covered by the prevailing wage law. The basis for the court's reversal was the determination that the existing facility was the "major component" roof itself, not the buildings upon which the roof sat and the reroofing project changed the size, type, or extent of the existing roof. *Id.*

Building upon the *Kulzer Roofing* decision, the court in *Borough* held that a street resurfacing and improvement project which involved milling and repaving of several city streets was a public works project subject to the prevailing wage law and not maintenance. *Borough*, 947 A.2d at 727. Analogizing *Borough* to *Kulzer Roofing*, the court found that like the replacement of the old roof with a new roof, replacement of an old road top with a new road top constituted a change in type, and therefore was repair work not maintenance work. *Id.* at 728. The court in *Borough* focused less on what constituted the existing facility and more on the magnitude of the repair work involved, a test which has been clearly rejected in Missouri. *Id.* at 733 (describing the street resurfacing project "as the physical removal of several inches of road surface . . . complete resurfacing with several inches of new material"

as beyond "minor repairs" which would qualify as "'maintenance work.'") Essentially, the court seemed to be discussing whether the work changed the "type" of the road.

The decisions in *Kulzer Roofing* and *Borough* do not support the Department's position that existing facilities should be broken down to such minutiae as steel parts, gaskets, manhole covers or an anti-climb device to be installed on a ladder but instead suggest approval for the breaking down of an existing facility to large component systems such as the roof, the plumbing, the machinery, the sidewalks, the curbing, and the phone system. The analysis in these cases is not truly distinct from the analysis used by the court in *City Utilities* where the existing facility was assumed to be the piping and heater not the asbestos insulation which was being removed from the piping and heater and in *Hadel* where the existing facility was either the roof or the buildings upon which the roof sat but not the individual roof tiles themselves which were being replaced.

3. The Department's "Component Parts" Analysis Renders "Maintenance Work" Meaningless.

Finally, the Department's interpretation of the term "existing facility" in this case is not supported by tenets of statutory construction in that it would work "unreasonable, oppressive or absurd results" rendering the definition of maintenance in the statute superfluous. *See Kincade,* 92 S.W.3d at 311. If as the Department asserts the steel parts, expansion joints, water level indicators, manhole covers or gaskets, and other portions of the steel shell of the tank are the existing facilities what parts of the water tower and tank would not be considered an existing facility. It would be close to impossible to perform a repair on any portion of the water tower and tank that would not be deemed construction under the

Department's analysis. As to repair of a roof in *Hadel*, it appears that under the Department's analysis each individual roof tile would be an existing facility, and as such, any repair of a tile would be deemed construction. While the legislature in enacting the Law acted with the public interest in mind, their intent certainly was not to enact a law so broad that it rendered all work on public projects construction and relegated other definitions and terms contained in the Law meaningless.

The Department's analysis of "existing facility" is of no help to this Court because it completely negates the possibility that any work is maintenance work. If the Department's analysis were accepted, prevailing wage would be required to replace a single shingle. This is nonsensical, and certainly an absurd result which should be avoided. Like in *Hadel*, where the court found that repairing the roof, which included replacement of portions of the roof, was not synonymous with constructing a facility, maintaining and repairing portions of the water tower is not synonymous with construction.

CONCLUSION

There are many different bases upon which this Court could affirm the trial court. This Court could follow *City Utilities* and recognize, as the Department admitted below, that nothing contemplated by the Contract changes the size, type, or extent of the elevated water tower and tank. If this Court does not wish to adopt the exact reasoning of *City Utilities*, simple statutory analysis requires affirmance. Finally, as to what constitutes the facility at issue here affirmance could be based on 1) the factual record on what constituted the facility; 2) the trial court's use of an acceptable dictionary definition of facility; or 3) the fact that there is no facility other than the water tower in this case.

For the reasons set forth above, Utility Service urges this Court to affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, via first class mail, U. S. postage prepaid, on October 12, 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 11,796 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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