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## **JURISDICTIONAL STATEMENT**

Amici Curiae, Mechanical Contractors Association of Missouri, Plumbing Industry Council, and Plumbers and Pipefitters Local Union No. 562, adopt and incorporate by reference as if fully set out herein the Jurisdictional Statements contained in the Briefs of the Appellees-Respondents, State of Missouri, Missouri Department of Labor and Industrial Relations and the City of St. Charles.

## INTEREST OF AMICI CURIAE

The Mechanical Contractors Association of Missouri, combined with the Plumbing Industry Council are Associations jointly comprised in St. Louis of over two hundred (200) separate companies that contract for and undertake public works projects involving outdoor pressurized pipe pursuant to state and federal law. Its members largely consist of mechanical engineers located in various counties, including St. Charles County and throughout the State of Missouri. The Associations=members are involved in the installation and repair of public works involving water and sewage connections subject to the Prevailing Wage Act requirements as enforced by the Missouri Department of Labor.

The Plumbers and Pipefitters Union, combined with its UA affiliate, is an unincorporated labor association composed of approximately five thousand (5,000) skilled workers in the State of Missouri, which maintains a federal and state apprenticeship program for workers engaged in public works projects on pressurized pipe for the provision of public utility services.

The Mechanical Contractors Association and the Plumbing Industry Council state that the purpose of the law is to protect and properly regulate the public bid process from contractors and other third parties. Contractors who fail to follow the law are otherwise free to charge exorbitant rates without providing the workmanship necessary to complete the public works jobs in a workmanlike fashion. This abuse of process creates environmental damage and corrupt business practices.

It is the position of the Contractor Association and the UA trade groups with whom it

contracts, that when water systems or extensions thereto are not properly constructed by public water supply districts, the Court can take notice that the increased costs of improper construction on water line construction can substantially reduce the effectiveness of water lines, ecological damage and that improper workmanship can cause damages to increase to the State by several hundred percentage points. The Department of Labor regulatory process has been judicially sanctioned and approved, without exception, uniformly by the Courts in the State of Missouri as more fully set out herein in this Brief.

These significant public interests are not fully represented by the parties in this case and that while the Mechanical and Plumbing Contractors and the UA fully support the Points Relied On as presented by the Appellees, these specific Amici respectfully submit this additional discussion and argument, since the State acts in a neutral, not representative capacity.

#### **CONSENT OF THE PARTIES FOR FILING OF AMICI CURIAE BRIEF**

Pursuant to Eastern District Court of Appeals Rule 375, the undersigned counsel for Amici has contacted counsel for the Appellees and Respondents, all of whom have expressed their consent on behalf of the parties to the filing of this Amici Brief, with the exception that counsel for the Appellants, Purler-Cannon-Schulte, Inc., and Karsten Equipment Company, Inc., have failed to provide any definitive response of neither objecting nor consenting on behalf of Purler-Cannon-Schulte, Inc., et al., or Karsten Equipment Company, Appellants herein, to the filing of Amici Curiae Brief.

## **STATEMENT OF FACTS**

Amici Curiae, Mechanical Contractors Association of Missouri, Plumbing Industry Council, and Plumbers and Pipefitters Local Union No. 562, adopt and incorporate by reference as if fully set out herein the Statement of Facts contained in the Briefs of the Appellees-Respondents, State of Missouri, Missouri Department of Labor and Industrial Relations and the City of St. Charles.

**POINT RELIED ON**

- I. THE CIRCUIT COURT WAS CORRECT IN UPHOLDING THE DEPARTMENT'S IMPOSITION OF PIPEFITTERS OCCUPATIONAL TITLE TO THE WORK THAT IS ACTUALLY PERFORMED IN THE LOCALITIES ON PRESSURIZED PIPING BECAUSE IT IDENTIFIES THE PREVAILING WAGE FOR THE PERFORMANCE OF THIS WORK IN THAT IT IS WITHIN ITS PROPER DISCRETION UNDER ALL STANDARDS OF REVIEW.**

Associated General Contractors v. Department of Labor and Industrial Relations, 898 S.W.2d 587, 590 (Mo. App. W.D. 1995)

Stine v. Kansas City, 458 S.W.2d 601, 607 (Mo.App. W.D. 1970)

Heavy Constructors Association v. Division of Labor Standards, 993 S.W.2d, 569, 573 (Mo. App. W.D. 1999)

United Brotherhood of Carpenters and Joiners of America, District Council Kansas City and Vicinity v. Industrial Commission, 363 S.W.2d 82 (Mo. App. 1962)

## ARGUMENT

- I. THE CIRCUIT COURT WAS CORRECT IN UPHOLDING THE DEPARTMENT'S IMPOSITION OF PIPEFITTERS OCCUPATIONAL TITLE TO THE WORK THAT IS ACTUALLY PERFORMED IN THE LOCALITIES ON PRESSURIZED PIPING BECAUSE IT IDENTIFIES THE PREVAILING WAGE FOR THE PERFORMANCE OF THIS WORK IN THAT IT IS WITHIN ITS PROPER DISCRETION UNDER ALL STANDARDS OF REVIEW.**

### Standard of Review:

This case, having been decided on a Motion for Summary Judgment, Rule 74.04 of the Missouri Rules of Civil Procedure applies. As the Supreme Court of Missouri succinctly stated in setting out the standard of review, in ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993), movant is entitled to judgment where there are no genuine issues of material fact and where the movant is entitled to judgment as a matter of law. 854 S.W.2d at 377. To be a genuine issue of fact, the issue, or dispute must be a real and substantial one B one consisting not merely of conjecture, theory and possibilities. Id. at 378. Respondent met its burden in this case as the trial court correctly held.

The Occupational Title Rule defines Occupational Titles covering work of a similar character so that the Department of Labor and Industrial Relations, Division of Labor Standards, and contractors can more easily determine the prevailing wage a worker must be paid when the worker performs certain types of work. See Associated General Contractors v. Department of Labor and Industrial Relations, 898 S.W.2d 587, 590 (Mo.App.W.D. 1995). The Court, in Associated General Contractors, discussed work of a similar character and noted

that *work of a similar character refers to the nature or type of public works project being performed and the character of the work actually done.* Id. at 591-92. Work of a similar character does not relate to the size or the scope of a public works project. Id.; City of Kennett v. Labor and Industrial Relations Commission, 610 S.W.2d 623 (Mo. banc 1981); City of Joplin v. Industrial Commission, 329 S.W.2d 687 (Mo. banc 1959).

The City of Joplin case referred to the concept of work of a similar character, as, in part, the Arady classification of the employees by resort to means of common knowledge and experience in this State.<sup>@</sup> Id. at 691. As such, the Occupational Title Rule is based upon objective criteria and does not attempt to establish what person or classification of person can or must perform the specific work defined in the Rule. The Adescription of work designated for a particular occupational title is not intended to be jurisdictional in scope or nature, and is not to be construed as limiting or prohibiting workers from engaging in construction work falling within several occupational titles.<sup>@</sup> 8 C.S.R. 30-3.060(1). The Missouri Prevailing Wage Law is tailored after the federal statute of the performance of work on public works contracts, Davis-Bacon Act, as revised, 40 U.S.C. ' 3141, *et seq.* Each Occupational Title of work description is based upon the nature of the work performed, with consideration given to those trades, occupations or work generally considered within the construction industry as constituting a distinct classification of work. 8 C.S.R. 30-3.060(2). When determining the occupational title rates, the Division considers the collective bargaining agreements, the Dictionary of Occupational Titles, and the opinions of experts from organized labor and contractor associations. Definitions of various Occupational Titles of workers who perform

services on public works projects exist in 8 C.S.R. 30-3.060. The occupational title of **APipefitter@** covers those who install and repair piping systems, including **Aall pressurized piping systems.@** 8 C.S.R. 30-3.060(8)(T). **APipefitter@**, along with **APlumber@** are the only occupational titles to include the term **Apressurized piping@**.

With respect to the occupational title of Laborer, the Occupational Title Rule describes the work as consisting of **Aproviding routine manual labor@** 8 C.S.R. 30-3.060(8)(K). The Rule states that the work of the laborer **Aencompasses** several sub-classifications within the title and work description considered in light of whether the public works project pertains to building construction or heavy highway construction.@ The work descriptions for general laborer and building construction, general laborer and heavy/ highway construction and skilled labor and heavy/highway construction include work with **Anon-pressurized pipe@** 8 C.S.R. 30-3.060(8)(K).

In Essex Contracting, Inc. v. City of DeSoto, 815 S.W.2d 135, 139 (Mo.App. E.D. 1991), the Department of Natural Resources and the Department of Labor, after an on-site inspection of a waste-water treatment plant revealed shoddy workmanship and environmental damage, attempted, along with the City of DeSoto, to withhold payment because the work was done by workers outside of standard occupational titles. Essex paid its Pipefitters the Laborers=rate of pay and worked them in the wrong classification. It also allowed its Laborers to work in the Pipefitter classification while receiving Laborers=rates of pay. In any event, this afforded Essex the ability to low-bid the project. The Court ruled that without Occupational Titles, under the State regulatory process, the Department of Labor was without authority to

correct this egregious situation. In short, huge profits went to the offending contractors while the public received substandard performance. This issue was shortly thereafter remedied through the regulatory and legislative process. It has since been uniformly upheld by every Appellate Court in this State. The Industrial Commission confirmed earlier rulings under date of June 11, 1997, that work pertaining to the occupational title of Laborers and Pipefitters in Franklin, Gasconade, Jefferson, Lincoln, Montgomery, St. Charles, St. Louis, Warren, and Washington Counties and the City of St. Louis, is accurately and properly described in 8 C.S.R. 30-3.060(6). The Occupational Titles of work descriptions for each type or class of work contained therein have been held presumptively valid throughout the entire State of Missouri. Heavy Constructors Association v. Division of Labor Standards, 993 S.W.2d, 569, 573 (Mo. App. W.D. 1999).

In short, in the case at bar, Appellants and their Amici are attempting to re-write the statute and the regulations, and ignore the *res adjudicata*, collateral estoppel nature of the previous decisions in this area. Their arguments ignore the substantial evidence rule and express guidelines on administrative discretion. They have also failed to exhaust administrative remedies in this area on decisions previously rendered to their detriment. See Objection 13, unanimously decided June 11, 1997, by the Labor and Industrial Relations Commission, attached hereto for the convenience of the Court and the parties. (See Appendix, A-2).

In Associated General Contractors of Missouri v. the Department of Labor and Industrial Commission, 898 S.W.2d 587 (Mo.App. W.D. 1995), Motion for Rehearing and/or Transfer denied May 2, 1995, an association of general contractors and others brought suit

against the Department of Labor and Industrial Relations, challenging the Administrative Rule listing the occupational titles for purposes of the Prevailing Wage Act. In an appeal of the Cole County Circuit Court's denial of a request for declaratory or permanent injunctive relief, the Court of Appeals held that the Rule is not unreasonable and is consistent with the Prevailing Wage Act and that the Rule is not invalid on the ground that the Occupational Titles give the statutory phrase "work of a similar character" a meaning which is inconsistent with its adjudicated meaning. Further, the Court held that the Rule **does not violate the Hancock Amendment and that the Rule is not pre-empted by Federal law on the ground that it represents an unauthorized intrusion into the collective bargaining process and regulation of union jurisdictional disputes.** In 1997, the Supreme Court of Missouri applied criminal enforcement to wilful violations of the prevailing wage requirements on public works when it upheld a St. Louis County prosecution of a mechanical contractor who failed to pay the correct rate of pay for workers in the incorrect Occupational Title doing "work of a similar character" at a high school located in the Rockwood School District within this judicial district. State v. Lee Mechanical Contractors, Inc., 938 S.W.2d 269 (Mo.App. E.D. 1997). The Supreme Court, in interpreting Section 290.340, determined that a contractor who "willfully" violates the law as that term is used, knowingly does so, and therefore sufficiently proves the "scienter element" to cure any uncertainty or ambiguity as to the meaning of the terms of the "prevailing hourly rate of wages" or work of a similar character in Sections 290.250, 290.210(5), and Section 290.340. Id. at 272. The offending contractor in question was, as a result, debarred from the public bid process for a time certain.

In Eastern Missouri Laborers District Council, et al., v. the City of St. Louis, et al., 5 S.W.3d 600 (Mo. 1999), a declaratory judgment action was brought to challenge the City of St. Louis' interpretation of its plumbing code as requiring private plumbing contractors to secure a plumbing permit before installing public water mains. The permit in question required that only licensed plumbers under the National Standard Plumbing Code could work on public water or sewer mains that involved pressurized piping. The Circuit Court had declared that the National Standard Plumbing Code had allowed the City to require private contractors to secure plumbing permits before installing public water mains and held that the City's interpretation did not violate either the Equal Protection or Due Process Clauses of the federal or State Constitutions. See U.S. Const. amends. V, XIV; Mo. Const. art. 1, Sections 2 and 10. The Court also held by way of *dicta* that ordinances and regulations regulating the business of plumbing and the licensing of plumbers are exercises of the ... police power in the area of public health and safety. @ Id. at 604. See Stine v. Kansas City, 458 S.W.2d 601, 607 (Mo.App. W.D. 1970). In a Circuit Court decision, attached hereto for the convenience of the Court and the parties (Appendix, A-5), Case Number CV97-16193, Division 8, Judge Wells correctly ruled on another issue involving the standards for enforcement of the pressurized piping rules that the proper standard for the Court's review was to determine if the Agency's decision is supported by competent and substantial evidence based upon the record as a whole. The Circuit Court ruled that as a reviewing court, it may only reverse an Agency's decision if it is not supported by competent and substantial evidence or where the Agency has abused its discretion or where the Agency has acted arbitrarily, capriciously or unreasonably, or in a manner

unauthorized by law. Id. at 369. See also Central Missouri Plumbing v. Plumbers Local 35, 908 S.W.2d, 366, 369 (Mo.App. W.D. 1995).

The Court must examine the record as a whole, mindful of the requirements of the Standard of Review requiring deference to Agency action. See also, Heavy Constructors Association v. Division of Labor Standards, 993 S.W.2d, 569, 573 (Mo. App. W.D. 1999), which held that the Occupational Title Rule applying the propriety of work descriptions on a state-wide basis was reasonable and consistent with the requirements of the Missouri Prevailing Wage Law, Section 290.210 to Section 290.340 RSMo., in that prevailing wages be determined on a local basis, 8 C.S.R. 30-3.060, for the description of the types of work, without altering the Department of Labor and Industrial Relations' method for determining local prevailing wage rates based upon wages actually paid in particular localities. As such, the Circuit Court in St. Charles, in the case at bar, is entirely correct when it states that the Occupational Title Rule simply standardizes the descriptions of the types of work typically performed on public works projects throughout the state. See Heavy Constructors Association at 573. As such, the Prevailing Wage Law, through its regulatory process, is a proper exercise of administrative authority. See Associated General Contractors v. Department of Labor and Industrial Relations, 898 S.W.2d 587 at 591 (Mo. App. W.D. 1995).

Section 292.270 RSMo., expressly states that a determination shall be final for the locality, unless reviewed under the provisions of 290.210 to Section 290.340, and as such, by legislative definition, the previous decisions of the Commission and the courts enunciated herein are what led the Department to take its action against the offending contractors.

Pursuant to Section 292.262 RSMo., any previous Annual Wage Order Rate remains in effect until a new rate is determined for the work in question and until any new rate becomes final. In essence, Chapter 290.262 thereof provides a safe harbor so chaos does not result upon the application of the effect of an existing Prevailing Wage Rate Order. See, e.g., State ex. Rel. Director of Revenue State of Missouri v. Scott, 919 S.W.2d 296 (Mo.App. W.D. 1996), where the Court ruled in an original proceeding in prohibition that a trial judge does not have jurisdiction to issue a restraining order or a license revocation because there was a state legislative scheme in effect for judicial review.

The Court identifies two important points: first, that Chapter 536 RSMo., (the Administrative Procedure Act), is merely a supplemental act which contains provisions for the review of Agency decisions not otherwise provided for by statute. It further identifies that the law favors statutory construction that harmonizes with reason and gives effect to the legislature's intent and tends to avoid absurd results. See State ex. rel. Director of Revenue, State of Missouri v. Scott, 919 S.W.2d 296 (Mo.App. W.D. 1996), where the Court of Appeals denied a trial court's issuance of a Stay Order, in a review of an administrative decision to revoke a driver's license, because it was contrary to the statutory scheme.

In the present case, Chapter 290 provides a complete statutory and legislative scheme for the establishment of a prevailing wage rate and for the **determination of occupational titles upon review** of any Commission decision with regard to a new wage rate. This avoids any absurd result which will occur when the Department of Labor Relations, through its Division of Labor Standards, on a time-honored basis, seeks to enforce the orders of the

Commission for which normal appeal time has expired. The wage rate and occupational title for Plumbers and Pipefitters performing work on pressurized piping has previously been decided and is final, and the current review process is complete. That is the statutory scheme.

Section 290.262 provides expressly:

A final determination applicable to every locality to be contained in an Annual Wage Order ... shall remain in effect until superseded by a new Annual Wage Order, or **as otherwise provided in this Section.** (Emphasis supplied).

Section 536.140 RSMo., identifies the scope of review of administrative decisions and Paragraph 3 thereof identifies that there are two (2) situations which define the Court's scope of review. If a case only involves the application by the Agency of the law to the facts, the Court may weigh the evidence for itself and determine all the facts on the record before the Agency. In the second scenario, involving administrative discretion in light of the facts, the Court's scope of review is set out under Section 2, and it is not a matter of independent determination by the Court. That was exactly the correct holding of the Kansas City Court of Appeals on this very issue which was not appealed by the parties in 1998.

In United Brotherhood of Carpenters and Joiners of America, District Council Kansas City and Vicinity v. The Industrial Commission, 363 S.W.2d 82 (Mo. App. 1962), the Court stated that the labor union alleged that the action of the Commission did not involve the exercise of administrative discretion, but only the application of the law to the facts and that the Court could weigh the evidence for itself and determine the facts accordingly from its own review of the evidence under Section 537.140, RSMo. This is basically the same argument

made by Appellants in this case seeking some sort of super-judicial *de novo* review. The Court has already rejected this type of an approach and held that the determination of facts going into or upon which the prevailing wage and Occupational Title procedure is to be determined, clearly required the exercise of discretion. The Court ruled that the reviewing court **had no authority** to weigh the evidence and determine for itself the facts of the case. See also City of Kennett v. Labor and Industrial Relations Commission, 610 S.W.2d 623 (Mo. banc 1981). Section 536.130 RSMo., provides that whenever a court is not entitled to weigh the evidence pursuant to 536.140(4), and determine the facts for itself, as in the present case, and if it determines that any evidence was improper, the Court even then, can only remand the case to the Agency with direction to reconsider the case in light of such specific evidence. If the Court determines that evidence was improperly excluded, all it can do is remand. If the Court determines that the evidence was not improperly excluded (e.g., Section 536.140.2(6) (not arbitrary, capricious or unreasonable), (7) (not an abuse of discretion)), then the Court's review is limited to the record either before the Industrial Commission or the lower court, presumptively, as identified in United Brotherhood, *supra*, at page 89, **without substituting the Court's judgment for that vested in the Commission by law.**

**CONCLUSION**

Based upon the foregoing, it is respectfully submitted that the decision of the Circuit Court of St. Charles County hereby be affirmed in its entirety.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. Proc. 32(a)(7)(c) and 8th Cir. Rule 28a(c), the undersigned certifies that the foregoing brief was prepared using Corel Word Perfect 10. The font used to prepare the foregoing brief is Times New Roman, 13 point type, and according to the line number function on Corel Word Perfect 10, the foregoing brief contains 3,986 words.

The undersigned also certifies pursuant to 8th Cir. Rule 28(a)(d) that the computer diskette provided herewith has been scanned for viruses using McAfee Virus Scan Version 3.0.2, and is virus-free.

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**CERTIFICATE OF SERVICE**

THE UNDERSIGNED HEREBY CERTIFIES that two (2) copies of the foregoing ABrief of Amici Curiae@was served on the following parties, by placing same, postage prepaid in the U.S. mails, this \_\_\_\_\_ day of \_\_\_\_\_, 2003:

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**APPENDIX TO BRIEF OF APPELLANTS**

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