

No. SC88574

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. ROBERT EVANS, ET AL.,

Appellant,

v.

BROWN BUILDERS ELECTRICAL COMPANY, ET AL.,

Respondents.

Appeal from the Butler County Circuit Court
The Honorable Paul McGhee, Senior Judge

BRIEF OF *AMICUS CURIAE*
STATE OF MISSOURI

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INTEREST OF *AMICUS CURIAE*

The issue here is this: What is the pay rate due to apprentices employed on a public construction project covered by the Prevailing Wage Law, §§ 290.210 to 290.340, RSMo? The Prevailing Wage Law establishes a state policy that workers on state construction projects are to be paid the locally prevailing hourly rate of wages for their work. § 290.220. The State of Missouri has a strong and inherent interest in defending this policy. This policy is not fulfilled if covered workers are not paid as set out in the Prevailing Wage Law itself and in the regulations promulgated thereunder. The Attorney General, on behalf of the State, “may . . . appear . . . in any proceeding or tribunal in which the state’s interests are involved.” § 27.060, RSMo. Further, under Mo. R. Civ. P. 84.05(f)(4), the Attorney General may file an *amicus* brief without consent of the parties.

STATEMENT OF FACTS

The State accepts the Statement of Facts provided by the plaintiff-appellant workers.

STANDARD OF REVIEW

In a court-tried case, such as this one, the decision of the trial court will be affirmed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Roberts v. Progressive Northwestern Ins. Co.*, 151 S.W.3d 891, 893 (Mo. App. S.D. 2004). Judgments of trial courts are presumed correct and the appellant has the burden of proving the judgment at issue is erroneous. *Roberts*, 151 S.W.3d at 893.

The issue of concern to the State in this case is a legal question: What is the correct pay rate due to apprentices employed on a public construction project covered by the Prevailing Wage Law, §§ 290.210 to 290.340, RSMo. This legal question is one to be considered *de novo*. *Schubert v. Trailmobile Trailer, L.L.C.*, 111 S.W.3d 897, 899 (Mo. App. S.D. 2003).

ARGUMENT

Under the Prevailing Wage Law, §§ 290.210 to 290.340, RSMo, and 8 C.S.R. 30-3.030(2), apprentices are to be paid at least the percentage of the journeyman wage rate that is set out in their registered apprenticeship program for their particular skill level multiplied by the applicable prevailing wage for their occupation title as set out in the annual wage determination that applies to the project at issue.

The issue in this case is this: What is the pay rate due to apprentices employed on a public construction project covered by the Prevailing Wage Law, §§ 290.210 to 290.340, RSMo? The applicable regulation is 8 C.S.R. 30-3.030(2), which provides, in relevant part: “Every apprentice shall be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate for the class or type of worker specified in the applicable wage determination.” Under the plain wording of the regulation, and as the Division of Labor Standards of the Missouri Department of Labor and Industrial Relations interprets it, apprentices are to be paid at the percentage, as set out in their registered apprenticeship programs, of the applicable journeyman prevailing wage rate, as set out in the Division’s annual wage determination.

The Missouri Court of Appeals, Southern District, understood that the regulation requires that apprentices be paid at their applicable percentage times the journeyman rate. But it misunderstands the specification, “journeymen hourly rate . . . specified in the applicable wage determination.” Instead of looking at the Division’s wage determination, the Southern District looked for the rate set out in employers’ registered apprenticeship

programs. The Southern District determined that the journeyman rate as specified in the “applicable wage determination” meant “not the prevailing hourly wage rate, but rather the journeyman rate as specified in the registered program.” *State ex rel. Evans v. Brown Builders Elec. Co.*, 2007 WL 1238661, at *3 (Mo. App. S.D., April 30, 2007).

In equation form, the difference between the Division’s interpretation of the regulation and the Southern District’s interpretation is as follows:

Division’s Interpretation

$$\begin{array}{l} \text{Registered apprenticeship} \\ \text{program percentage}^1 \end{array} \times \begin{array}{l} \text{Prevailing wage rate} \\ \text{for apprentice’s occupation} \\ \text{and locality (as set out in} \\ \text{the Division’s annual wage} \\ \text{determination)} \end{array} = \begin{array}{l} \text{Prevailing wage rate} \\ \text{due to the apprentice} \end{array}$$

Southern District’s Interpretation

$$\begin{array}{l} \text{Registered apprenticeship} \\ \text{program percentage} \end{array} \times \begin{array}{l} \text{Journeyman’s wage rate} \\ \text{as specified in the} \\ \text{registered apprenticeship} \\ \text{program} \end{array} = \begin{array}{l} \text{Prevailing wage rate} \\ \text{due to the apprentice} \end{array}$$

¹Typically, in a registered apprenticeship program, the apprentices’ rates of pay are a rising percentage (based on progress through the program) of the applicable rate paid to fully qualified journeymen.

The Southern District’s conclusion misinterprets the regulation and is inconsistent with the manner in which the Division of Labor Standards of the Department of Labor and Industrial Relations applies the regulation. “Wage determination” is a term of art. As shown by § 290.262, RSMo, the Department of Labor and Industrial Relations is to annually investigate wages in each locality and to make a “determination” each year as to the prevailing “wage” rates for the various construction occupations. *See also* 8 C.S.R. 20-5.010 (“PURPOSE: This rule specifies procedures for filing objections to wage orders, including prevailing *wage determinations*”); 10 C.S.R. 20-4.040(18)(H) (bid specifications for clean water projects to be paid for with public grants “shall contain the current prevailing *wage determination* issued by the Missouri Department of Labor and Industrial Relations, Division of Labor Standards”); 10 C.S.R. 60-13.025(8)(H)8 (bid specifications for public water system improvement projects receiving public financial assistance “shall contain the current prevailing *wage determination* issued by the Missouri Department of Labor and Industrial Relations, Division of Labor Standards, if otherwise required by law”) (emphasis added in quotation from each regulation).

As can be seen from these uses of the terms “determination” and “wage determination,” these terms refer to the prevailing hourly wage rate for each construction occupation, as shown in the annual wage determination of the Department. Prevailing *wage determinations* are made in this annual wage order issued by the Department. Registered apprenticeship programs do not make such “wage determinations” for prevailing wage purposes.

Elsewhere, 8 C.S.R. 30-3.030(2) provides: “Any worker listed on the payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in this rule, shall be paid not less than the applicable wage rate on the wage determination for the class or type of work actually performed.” The phrase “wage determination” as used in this sentence cannot mean a wage set out in the registered apprenticeship program because it governs a situation in which the worker is not a part of a registered program. The phrase, thus, must refer to the “wage determination” that sets out the prevailing wage rates as determined by the Department.² This is the same phrase used in the sentence at issue in this case, and it should be interpreted in the same way. The regulation in question here does refer to a “rate specified in the registered program for the apprentice’s level of progress, expressed as a percentage of the journeyman hourly rate,” but this rate from the registered apprenticeship program is a reference to the percentage of the full journeyman’s rate to be paid, not the wage rate itself. For example, an apprenticeship program might start a beginning apprentice out at 50 % of the full journeyman wage rate and then raise that percentage to 60 %, 70 %, 80 %, 90 %, and then to 100% of the journeyman wage rate as the apprentice gained more and more experience in the craft.

By its own terms, 8 C.S.R. 30-3.030(2) means that an apprentice on a project covered

² See also *HTH Cos. v. Missouri Dept. of Labor and Indus. Rels.*, 157 S.W.3d 224, 228 (Mo. App. E.D. 2004) (when the exceptions to the general authority under 8 C.S.R. 30-3.030 to pay workers designated as apprentices a percentage of the applicable prevailing wages apply, the regulation “requir[es] payment of full prevailing wages to apprentices”).

by the Prevailing Wage Law is to be paid at least the percentage of the journeyman wage rate that is set out in the registered apprenticeship program for the particular skill level of that apprentice multiplied by the applicable prevailing wage for the occupation at issue as determined by the Department and set out in the annual wage determination that applies to the project at issue.

The Southern District's interpretation of the regulation will result in an anomaly in the required pay for workers on public construction projects. Fully qualified journeyman workers will receive the prevailing rate of pay as determined by the Division of Labor Standards and set out in its annual wage orders for their work. *HTH Cos. v. Missouri Dept. of Labor and Indus. Rels.*, 157 S.W.3d 224, 227-28 (Mo. App. E.D. 2004). On the other hand, under the Southern District's interpretation, apprentice workers on the same projects will receive pay determined by multiplying the percentage of pay they are to receive based on their growing skills times the employer's standard journeyman's rate, rather than times the prevailing wage rate that journeyman workers are receiving.

Not only is this an anomalous result, it is also antithetical to the Prevailing Wage Law, which intends that workers on public works construction projects be paid the prevailing rate of wages generally paid in the locality for the type of work they are doing. The Southern District's conclusion that the pay of one subset of construction workers on public construction projects – apprentices – should not be based on the prevailing rate of wages that the other workers on the project are entitled to is contrary to this intent.

CONCLUSION

For the foregoing reasons, the State of Missouri urges this Court to reverse the judgment of the Butler County Circuit Court and to rule that apprentices on projects covered by the Prevailing Wage Law are to be paid at least the percentage of the journeyman wage rate that is set out in the registered apprenticeship program for the particular skill level of the apprentices multiplied by the applicable prevailing wage for the occupation at issue as set out in the annual wage determination that applies to the project at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, this 16th day of July, 2007, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 2086 words, excluding the Table of Contents and the Table of Authorities.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

Assistant Attorney General