SC90963

IN THE SUPREME COURT OF MISSOURI

UTILITY SERVICE CO., INC.,

Plaintiff-Respondent,

v.

THE DEPARMENT 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 AMICUS CURIAE MISSOURI MUNICIPAL LEAGUE

WILLIAMS & CAMPO, P.C.

Joseph G. Lauber, Mo. Bar #52809
255 NW Blue Parkway, Suite 202
Lee's Summit, Missouri 64063
Telephone (816) 524-4646
Facsimile (816) 524-4645
jlauber@publiclawfirm.com
ATTORNEY FOR AMICUS CURIAE, THE MISSOURI MUNICIPAL LEAGUE
With consent from both parties

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[1] All statutory citations are to the 2000 edition of the Revised Statutes of Missouri, except as otherwise indicated.

JURISDICTIONAL STATEMENT

Amicus Curiae, Missouri Municipal League ("Municipal League"), adopts the jurisdictional statement of Plaintiff – Respondent, Utility Service Co., Inc. Further, Municipal League states that this substitute brief is presented to the Court with the consent of the parties.

STATEMENT OF FACTS

Amicus Curiae, Municipal League, adopts the statement of facts of Plaintiff – Respondent, Utility Service Co., Inc.

INTEREST OF AMICUS CURIAE

The Municipal League is an association of approximately 665 municipalities in the State of Missouri. The Municipal League provides a vehicle for cooperation in formulating and promoting municipal policy at all levels of government to enhance the welfare and common interests of municipalities' citizens.

The Municipal League believes that the trial court correctly found that the work done pursuant to the contract at issue in this case ("Contract") was maintenance work, exempt from prevailing wages. Although this case addresses the applicability of Missouri's prevailing wage law (Sections 290.210 to 290.340, RSMo) ("Prevailing Wage Act") to maintenance contracts for water towers, the Municipal League believes that this Court's decision in this case could have far-reaching implications for municipalities' approaches to the ongoing maintenance of their entire infrastructure, which ultimately could affect the health, safety, and welfare of the citizenry as a whole. In upholding the trial court's decision, this Court has the opportunity to formally establish a clear, easy-to-apply test for determining the applicability of the Prevailing Wage Act to public works carried out on existing facilities.

This brief is filed with the consent of all parties.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY CONCLUDED THAT THE FACILITIES WERE COMPRISED OF THE WATER TOWER, INCLUDING THE TANK, AND NOT THE INDIVIDUAL COMPONENTS. (RESPONDS TO APPELLANTS' POINT II)

State Dep't. of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Pub. Utils. of the City of Springfield, 910 S.W.2d 737, 745 (Mo.App. S.D. 1995)

Hadel v. Bd. of Educ. Of Sch. Dist. of Springfield, 980 S.W.2d 107, 113 (Mo.App. S.D. 1999)

Chester Bross Construction v. Mo. Dept. of Labor, 111 S.W.3d 425, 427-28 (Mo.App. S.D. 1995)

Sections 290.210 to 290.340, RSMo (2000) ("Prevailing Wage Act")

II. THE TRIAL COURT PROPERLY CONCLUDED THAT THE WORK DONE PURSUANT TO THE CONTRACT WAS MAINTENANCE, EXEMPT FROM PREVAILING WAGE REQUIREMENTS. (RESPONDS TO APPELLANTS' POINT I)

State Dep't. of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Pub. Utils. of the City of Springfield, 910 S.W.2d 737, 745 (Mo.App. S.D. 1995)

Chester Bross Construction v. Mo. Dept. of Labor, 111 S.W.3d 425, 427-28 (Mo.App. S.D. 1995)

Sections 290.210 to 290.340, RSMo (2000) ("Prevailing Wage Act")

III. THERE WOULD BE AN ADVERSE IMPACT ON CITIES THROUGHOUT THE STATE OF MISSOURI IF THIS COURT WERE TO HOLD THAT THE WORK CONTEMPLATED BY THE CONTRACT IS "CONSTRUCTION" AND NOT "MAINTENANCE."

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT THE FACILITIES WERE COMPRISED OF THE WATER TOWER, INCLUDING THE TANK, AND NOT THE INDIVIDUAL COMPONENTS.

A. Municipalities Need a Clear, Easy-to-Apply Test for Determining When the Prevailing Wage Act Applies to Work on Existing Facilities.

The Prevailing Wage Act requires workmen employed by or on behalf of any public body engaged in the construction of public works (exclusive of maintenance work) be paid not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed. § 290.230, RSMo. As defined by the General Assembly, "'construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair." § 290.210(1), RSMo. "'Maintenance' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased." § 290.210(4), RSMo.

As will be discussed in greater detail in Section II, the policy underlying the Prevailing Wage Act that requires broad interpretation of the term "construction" makes it appropriate to define that term by what it is not, i.e., "maintenance." *State Dep't. of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Pub. Utils. of the City of Springfield* ("*City Utilities*") provides the following rule:

> [W]hen the issue is whether certain work is "maintenance work," it is essential to identify *what* is the "existing facility." The elements of "maintenance work" are: (1) work that is repair, not replacement; (2) in an existing facility; and (3) there is no change or increase in the size, type, or extent of the existing facility.

910 S.W.2d 737, 745 (Mo.App. S.D. 1995) (citing § 290.210(4), RSMo) (emphasis in original). Thus, the threshold issues to be resolved when determining the application of the Prevailing Wage Act are: (1) whether the work will be done on existing facilities, and if so, (2) what comprises those facilities.

Of primary concern to municipalities is the desire to have a clear, easy-to-apply test for determining when the Prevailing Wage Act applies to work on existing facilities. Such a test would help municipalities avoid wasting public funds on unnecessary labor costs as well as reduce the incidence of costly and time consuming declaratory judgment actions to determine whether the Prevailing Wage Act applies.

B. Missouri Cases Support a "Scope of the Contract" Test for Determining "Existing Facilities."

While Missouri courts have yet to directly define the term "existing facilities" as used in the Prevailing Wage Act, an instructive common thread has developed in cases where the determination of "construction" or "maintenance" work has been at issue. Specifically, Missouri courts tend to accept a definition of "existing facilities" that directly corresponds to the scope of work to be completed under the contract in question.

In other words, the contract's scope determines whether the court will consider the entire structure or merely a component of a structure in determining whether there are "existing facilities" to which the Prevailing Wage Act applies.

The aforementioned "common thread" begins with *City Utilities* in 1995. The scope of the contract at issue in *City Utilities* was to remove asbestos insulation from the pipes and heater of one of seven electricity generating units in the defendant's power plant. *City Utilities* at 743. Although the Southern District expressly stated that it "[did] not decide the broad question of whether "existing facility" means entire building or component parts," the court nevertheless found that prevailing wages did not apply because the work completed pursuant to the contract did not change size, type, or extent of the unit's component pipes and heater.[2] *See City Utilities* at 746, fn. 7. Thus, the scope of the contract established the existing facilities subject to the work in question in *City Utilities*. *See id*.

In 1999, the Southern District applied the rule it set forth in *City Utilities* in *Hadel v. Bd. of Educ. of Sch. Dist. of Springfield*, 980 S.W.2d 107, 113 (Mo.App. S.D. 1999). The scope of the contract in *Hadel* was for removal and replacement of roofing materials on three separate school buildings. *Id*. at 109. The court held that the contract was for maintenance of an "existing facility" (and not construction) because the parties stipulated

[2] The court based its decision on fact that the Department of Labor and Industrial Relations did not controvert an affidavit establishing that the work did not change or increase the size, type, or extent of the unit's pipes and heater.

that so long as less than 20% of the roofing was replaced on each roof, the size, type, and extent of the roofing would not change.[3] *Id*. at 113. Once again, the work described in the scope of the contract correlated directly with the "existing facilities" in the case and led to the court's determination that the contract was for "maintenance" and not "construction" work.

In 2003, the Eastern District applied the *City Utilities* rule in *Chester Bross Construction v. Mo. Dept. of Labor*, 111 S.W.3d 425, 427 (Mo.App. S.D. 2003). The contract in *Chester Bross* was for the construction of a new highway. *See id*. at 426. The court held that the Prevailing Wage Act did apply, despite the fact that the work in question was maintenance of construction equipment on the worksite. The court reasoned that because there were no "existing facilities" on the worksite, the job was for new construction and not maintenance. *See id*. at 427-28. Despite the court's holding in this case, *Chester Bross* is still illustrative of Missouri courts' propensity to look to the scope of the contract to determine whether facilities exist, and of what those facilities are comprised.

In light of this line of cases, it is appropriate for this Court to formally establish a "scope of the contract" test to determine what constitutes "facilities" in the context of determining the applicability of Prevailing Wage Act requirements. Such a test permits

[3] Although *Hadel* involved the application of a competitive bidding requirement, the court found the distinction between construction and maintenance work for that requirement *in pari materia* with prevailing wage law requirements. *Hadel* at 112.

flexible application of the facts of each contract to the definitions provided in Section 290.210, RSMo, which better serves the policy requiring a broad interpretation of the term "construction" while at the same time giving meaning to the exception for "maintenance," thus giving meaning to all of the words of the statute.

C. The Extra-Jurisdictional Authority Cited by Appellants Also Supports a "Scope of the Contract" Test for Determining "Existing Facilities."

Appellants asks this Court to take the extreme position that regardless of the scope of the contract, if any work on any individual component of a contract could qualify as "construction," then the entire contract should be subject to the Prevailing Wage Act. *See e.g.*, Appellants' Substitute Brief at 19. To accept Appellants' position is to eviscerate the General Assembly's clear exception that maintenance work be excepted from the Prevailing Wage Act.

Ironically, the primary Pennsylvania case Appellants cite in their brief, *Kulzer Roofing, Inc. v. Dep't of Labor & Indus.*, supports the use of a "scope of the contract" test. 450 A.2d 259 (Pa. Commw. Ct. 1982). The scope of the contract in *Kulzer Roofing* was the replacement of a roof on a cell block at a state prison.[4] *Id*. at 260. In holding that

[4] The Pennsylvania statutes differ from Missouri's in that they do not include the exception of "replacement" work from maintenance, as Section 290.210, RSMo does. *Compare* 43 P.S. § 165-2(3) ("the repair of existing facilities when the size, type or extent of such facilities is not thereby changed or increased") *with* § 290.210(5), RSMo.

a component of the building (i.e., its roof) could constitute the "facility" for the purpose of prevailing wage law requirements, the Pennsylvania court retreated from an earlier position that "facilities" always meant the entire structure. *Id*. at 261. Appellants argue that *Kulzer Roofing* supports their argument that facilities should be determined on a component-by-component basis. *See* Appellants' Brief at 28-29. However, *Kulzer Roofing* made clear that where the scope of work to be completed pursuant to a contract is limited to a component of a structure, that component is the "facility." This interpretation completely accords with the "scope of the contract" test described above.

The second case Appellants rely on for this point dealt with street resurfacing, whereby several inches of material was removed and replaced with new material. *Borough of Youngwood v. Pa. Prevailing Wage Appeals Bd.*, 847 A.2d 724 (Pa. 2006). This more recent case reveals that that Pennsylvania courts may already use the "scope of the contract" test, in that the court looked to the ratio of maintenance work versus construction work to determine whether prevailing wages applied. *See id*. at 727-33.

D. Applying the "Scope of the Contract" Test to the Contract, It Is Clear That the "Facilities" Consisted of the Water Tower and Tank as a Whole.

Applying the scope of the contract test, it is clear that the trial court correctly determined that the water tower and tank, as a whole, was an "existing facility" under the

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("the repair, *but not the replacement*, of existing facilities when the size, type or extent of such facilities is not thereby changed or increased") (emphasis added).

Contract and not subject to the Prevailing Wage Act. The Contract provides for a comprehensive plan for the maintenance and upkeep of the water tower (inclusive of the tank). Components of the Contract include: annual inspection and servicing of the tank, engineering and inspection services needed to determine when maintenance and repair of the tank are necessary, periodic replacement of certain tank components when needed, cleaning and repainting of the interior and exterior of the tank, installation of an anti-climb device on the structure's access ladder, and placement of a lock on the tank's roof hatch. L.F. at 155-56. The Contract is clearly designed to provide for the ongoing maintenance of the entire structure of the water tower, including the tank.

Appellants would have this Court rule that despite the overwhelming provisions for maintenance throughout the balance of the Contract, if the annual inspection of the water tower and tank revealed that a manhole cover or gasket needed to be replaced, the whole Contract becomes "construction" and subject to the Prevailing Wage Act. *See* Appellants' Substitute Brief at 21. Such an outcome completely ignores the General Assembly's stated intent that maintenance work be exempt from the Prevailing Wage Act. Thus, this Court should hold that the trial court correctly determined that the water tower, including the tank, is an "existing facility" upon which the maintenance work described in the Contract is to be performed, and not subject to the Prevailing Wage Act.

E. The Trial Court Properly Relied on the Albritton Affidavit as a Lay Person's Summary of Conditions.

Appellants argue that Mr. Albritton's affidavit cannot define the "existing facilities" in this case. *See* Appellants' Substitute Brief at 30. Ironically, Appellants attempted to rely on a similar affidavit in *City Utilities* to establish certain "existing facilities." *City Utilities* at 746 (noting that Appellants "contend[s] that even if the asbestos insulation is not a facility, the Woods affidavit establishes that the pipes and heater are 'facilities'"). Nevertheless, contrary to Appellants' argument in this case, Mr. Albritton's affidavit does not make a legal conclusion, but rather a factual summary of the conditions upon which the Contract would be performed.

While statutory construction is a matter of law and not fact, determinations of questions of law are informed by the facts of a given case. *St. Louis Co. v. B.A.P.*, 25 S.W.3d 629, 631 (Mo.App. E.D. 2000). *City Utilities* instructs that "the proper function of an affidavit is to state facts and not conclusions" and "conclusory allegations in an affidavit are insufficient to raise questions of fact in a motion for summary judgment." *City Utilities* at 746. "However, when observations do not require expertise, conclusive answers by a lay witness are permissible *when used to articulate a summary of conditions*." *Id*. (citing *Galvan v. Cameron Mutual Insurance*, 733 S.W.2d 771, 774 (Mo.App. E.D. 1987) (emphasis added).

In the case at bar, the Contract established a long list of work for Respondent to complete that encompassed all parts of the existing water tower and tank. L.F. at 155-

158. Consistent with the holding in *City Utilities*, Mr. Albritton's statement that the water tower and tank comprise the "existing facilities" is one of fact, not law. "Witnesses are permitted to express conditions in terms understandable to the average person, even though the term utilized is a summary of a combination of sensory impressions or physical conditions." *Whitney v. Central Paper Stock Co.*, 446 S.W.2d 415, 419 (Mo.App. E.D. 1969).

Mr. Albritton's affidavit merely articulates a summary of the conditions based on the scope of the Contract. Mr. Albritton's observation that the Contract involves work regarding the annual inspection and servicing the tank, steel replacement, water level indicators, sway rod adjustments, installation of an anti-climb device on the ladder, repainting the tank inside and out, and placing a lock on the tank's roof hatch, appropriately summarize that the facilities subject to the Contract consist of the entire water tower and tank. *See City Utilities* at 746.

As was the case in *City Utilities*, Appellants failed to offer evidence to contradict Mr. Albritton's affidavit and, the trial court had no choice but to take the facts set forth in his affidavit as true. Thus, the trial court correctly concluded that the "existing facility" upon which the work would be undertaken pursuant to the Contract was the water tower and tank, as a whole.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT THE WORK DONE PURSUANT TO THE CONTRACT WAS MAINTENANCE, EXEMPT FROM PREVAILING WAGE REQUIREMENTS.

A. For Purposes of Determining the Application of the Prevailing Wage Act, All Work Under a Contract for Public Works Is Either Construction or Maintenance.

The trial court properly concluded that "[a]ll work under a contract for public works must be either construction or maintenance. When something is being built or constructed, rather than being repaired, the work is construction work." L.F. at 161. For purposes of applying the Prevailing Wage Act, it is appropriate (and indeed necessary) to interpret "construction work" as being mutually exclusive from "maintenance work."

As discussed above, the General Assembly's definition of "construction" includes "construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair." § 290.210(1), RSMo. "'Maintenance' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased." § 290.210(4), RSMo. Based on the plain language of these definitions, repair work is not construction work except when the repair is "major," in which case those repairs are deemed "construction" for purposes of the Prevailing Wage Act.

In their Brief, Appellants suggest that maintenance is a "subset" of "construction." Appellants' Substitute Brief at 27. This suggestion misconceives the court's point in *City Utilities*, and if taken too far, would eviscerate the General Assembly's exception for maintenance work from the Prevailing Wage Act. The sentence on which Appellants rely[5] in making this suggestion is better understood in context of the court's immediately succeeding footnote, which Appellants failed to reference. That footnote restates the General Assembly's mandate that the Prevailing Wages Act *not apply* to maintenance work.[6] *City Utilities* at 740. It is a more consistent conclusion that the passage Appellants quote (see footnote 5) from *City Utilities* is illustrative of the Court's recognition that components of the definition of "construction" may qualify for the maintenance exception in certain circumstances.

By way of example, "painting and decorating" is enumerated as a type of work that can fall within the definition of "construction." § 290.210 (1), RSMo. However,

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[5] The Court in *City Utilities* states: "However, § 290.230 does not require that the prevailing wage be paid for 'construction' work that is 'maintenance' work." *City Utilities* at 740. Appellants' specious interpretation of this statement suggests that the Court indicated "maintenance" is a subset of "construction."

[6] Footnote 2 of *City Utilities* states in its entirety: "The specific language of §290.230 requires that the prevailing wage rate be paid by 'any public body engaged in the construction of public works, *exclusive of maintenance work.*' (Emphasis ours.) *See also* § 290.220."

repainting an existing facility does not change the size, type, or extent of the facility to which it is applied. Repainting repairs damaged portions of paint previously applied to the facility and improves its general appearance. Thus, not all painting is related to "construction"; repainting is maintenance work pursuant to the definition provided at Section 290.210(4), RSMo. *Cf. City Utilities* at 740.

Maintenance and construction are intended to be mutually exclusive. Otherwise, it would be impossible to distinguish the two for purposes of practical application of the law. To blur the lines as Appellants suggest would render the definition of "maintenance" useless and would completely contravene the intended application of the Prevailing Wage Act. *See* Appellants' Substitute Brief at p. 23.

Chester Bross demonstrates the mutual exclusivity of these terms. In that case, the court held that work a mechanic conducted in repairing, servicing, and maintaining construction machinery on a job site was "construction work." The court's holding turned on the fact that the highway was new (thus, there was no existing highway to maintain). 111 S.W.3d at 427-28. While *Chester Bross* explores the mutual exclusivity of these terms where there are no "existing facilities," it also accentuates the logical counterpoint that where facilities do exist, ascertaining whether the work in question is "maintenance" is a threshold step in determining whether the Prevailing Wage Act applies. The case at bar deals with the "flip-side" of the issue addressed in *Chester Bross*, and provides this Court with the opportunity to provide municipalities with a

definitive, easy-to-apply test for the application of the Prevailing Wage Act when the work at issue is to be done on existing facilities.

Because the definition of "construction" (and therefore the application of the Prevailing Wage Act) is intended to be broadly construed, it is appropriate to clearly define its exceptions to determine what construction is not. Once the exception is clearly defined, then construction is simply everything else. Accordingly, the trial court was correct in concluding that "construction" and "maintenance" are mutually exclusive.

B. The Test for Determining Whether Work Is "Maintenance" or "Construction" Is Whether the Work Would Result in a Change or Increase in the Size, Type, or Extent of the Existing Facility.

Because the Contract was for work on existing facilities, the trial court correctly applied the test to determine whether the work was maintenance: does the work result in a change or increase in the size, type, or extent of the existing facility? *See City Utilities*, 910 S.W.2d at 745. As stated above, the definitions of "construction" and "maintenance" make those terms mutually exclusive. Because the policy of the Prevailing Wage Act requires the term "construction" to be broadly construed, it is appropriate to define that term by what it is not: "maintenance." Thus, where public works are performed on existing facilities, as determined by the scope of the contract (discussed in Section I above), the Municipal League suggests a different two-part test than that of the Appellants for determining the applicability of Prevailing Wage Act: first, will the work

contracted for be on existing facilities? If not, then the work is construction. *See Chester Bross* at 427-28. If the work is on existing facilities, then the second prong of the test asks whether the work satisfies the definition of "maintenance." If not, then the work is "construction." *Cf. City Utilities* at 746.

The above-stated test is based on Missouri cases where the distinction between "construction" and "maintenance" has been at issue: *See City Utilities* and *Chester Bross*. In *Chester Bross*, the work at issue was repairs, services, and maintenance to construction machinery on a public construction project site. *Chester Bross* at 426. There the court held that, "workers, including the mechanic herein, involved on the site of construction of the highway, by definition, cannot be involved in maintenance work when there is no 'existing facility.'" *Id*. at 427-28. *Chester Bross* thus provides a basis for the first prong of that test: where there are no existing facilities, then the work contracted for is always construction and will be subject to the Prevailing Wage Act.

The test is also consistent with the analysis in *City Utilities*. The work in *City Utilities* involved the removal of asbestos insulation installed on the pipes and heater of a city-owned, steam powered electric generator. *City Utilities* at 743. Without analyzing the definition of "construction," the Southern District concluded that the removal of insulation was "maintenance" because the work under the contract did not "'change' the 'size, type or extent of the existing facility' as would remove this contract from the category of 'maintenance work.'" *Id*. at 746. Thus, the analysis in *City Utilities* forms the basis of the second prong of the test illustrated above. Specifically, where there are

existing facilities, the court applies the definition of "maintenance" without reference to the definition of "construction." *See id*. at 745. Because the work in *City Utilities* did not change the size, type or extent of those facilities, it did not rise to the level of "construction" work. *Id*. at 746.

Applying the test derived from *City Utilities* and *Chester Bross* to the case at hand, it is clear that the trial court properly concluded that the work under the Contract was maintenance, and therefore exempt from the Prevailing Wage Act. As discussed above, in light of the scope of the Contract, the work completed and to be completed pursuant to the Contract will performed on existing facilities comprised of an existing water tower and tank. Therefore, application of the first prong of the test results in an affirmative answer, which permits application of the second prong.

Analysis of the second prong also makes clear that the trial court was correct in its conclusion that the subject work was "maintenance" and therefore Prevailing Wage Act did not apply. As provided in *City Utilities*, "[t]he elements of 'maintenance work' are: (1) work that is repair, not replacement; (2) in an existing facility; and (3) there is no change or increase in the size, type, or extent of the 'existing facility.'" *City Utilities* at 745.

Work pursuant to the Contract consists of annual inspection and cleaning of the water tank to remove mud, silt, and other accumulations. L.F. at 156. The Contract also contemplates specialized engineering services for the purpose of inspecting and

identifying whether any repairs are necessary to maintain the integrity of the water tower. L.F. at 156. The Contract provides for steel replacement and welding if the engineering inspection identifies that repairs are necessary. L.F. at 156. Additionally, the Contract includes cleaning and repainting the exterior and interior of the tank on an as-needed basis to maintain the exterior's structural soundness and appearance, and to repair the interior lining to prevent or eliminate corrosion. L.F. at 156-57. Finally, the Contract provides for the installation of an anti-climb device on the tower's access ladder and a lock on the roof hatch of the tank to maintain the tower's security. L.F. at 157.

The work under the Contract does not rise to the level of replacement of the water tower. *See* L.F. at 160. Furthermore, there will be no change or increase in the size, type, or extent of the water tower once the work on the contract is completed. Thus, the trial court's holding should be affirmed.

C. The "Magnitude of the Work Test" Was Expressly Rejected in *City Utilities*.

In its brief, Appellants twice emphasizes that the work under the Contract would cost approximately 24% of the cost to replace the water tower and tank. Appellants' Substitute Brief at 18, 21. It appears that Appellants are attempting to argue that a "magnitude of the repair" test should apply with regard to the determination of whether the Contract should be classified as "construction" or "maintenance." That argument is

without merit. Indeed, the "magnitude of the repair" test was expressly rejected in *City Utilities*.

Previously, Appellants promulgated a rule attempting to define the term "major repair" (which is a component of the definition of "construction") to include work "where the amount of repair involves twenty percent (20%) or more of the…existing facility." *City Utilities* at 743. The court invalidated Appellants' rule because it contradicted the statutory scheme and improperly broadened the coverage of the Prevailing Wage Act. *Id*. at 744. In so doing, the court stated:

> [T]he test to be applied for "maintenance work' is not 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. The clear inference is that the legislature did not intend that a test for magnitude be used to determine the Act's applicability.

Id. Any attempt by Appellants to resurrect their argument that a "magnitude of the repair" test should be used to determine whether the Contract was for "construction" or "maintenance" should likewise be rejected.

Moreover, even if this Court were to consider cost as a relevant factor in determining whether this work is "construction" or "maintenance," the 24% of total cost of reconstruction figure set forth by the Appellants also informs the Court that it is more

than **four times** more expensive to reconstruct the water tower and tank completely than it is to enter into a contract for the maintenance of the existing facilities.

Because the work performed and to be performed pursuant to the Contract did not change the size, type, or extent of the existing facilities, the trial court correctly determined this work was "maintenance" and, therefore, exempt from Prevailing Wage Act.

III. THERE WOULD BE AN ADVERSE IMPACT ON CITIES THROUGHOUT THE STATE OF MISSOURI IF THIS COURT WERE TO HOLD THAT THE WORK CONTEMPLATED BY THE CONTRACT IS "CONSTRUCTION" AND NOT "MAINTENANCE."

Because the Prevailing Wage Act was enacted for the public's welfare, courts must "interpret it broadly so as to accomplish the greatest public good." *Long v. Interstate Ready-Mix, L.L.C.*, 83 S.W.3d 571, 575 (Mo.App. W.D. 2002). To determine how to "accomplish the greatest public good," the Court must be mindful of the competing policies also affecting the "public good."

If the Court were to hold that the work to be completed pursuant to the Contract is "construction" rather than "maintenance," it would have a chilling effect on the willingness of cities (and other public bodies providing water service) to enter into agreements for preventative maintenance of their water towers (and other infrastructure). It is undisputed that the application of the Prevailing Wage Act results in increased labor costs for construction projects. Given this reality, and faced with budget limitations and

the need to protect public funds, cities will be reluctant to enter into preventative maintenance contracts to ensure the upkeep and care of their water towers if those contracts will be subject to the Prevailing Wage Act. In the present economy, municipal budgets are extraordinarily tight. Accordingly, application of the Prevailing Wage Act to preventative maintenance contracts on water towers will render them unaffordable luxuries. Without preventative maintenance on water towers, the incidence of contamination, water shortages, and structural failures will increase.

It is good public policy to hold that the Contract is for maintenance work on existing facilities. The Contract provides for the annual inspection of the tank, including engineering services to determine when repairs are necessary to maintain the tank and tower. L.F. at 156. The Contract also provides for repainting of the interior of the tank to eliminate or remove rust spots that contaminate the water stored inside. *See* L.F. at 157. If preventative maintenance contracts are deemed subject to the Prevailing Wage Act, cities will be reluctant to enter them because of the financial constraints of paying prevailing wages. The end result will be reduced levels of safety and quality of the water being distributed and consumed by Missouri residents. Such a result is especially troubling given that it would contravene General Assembly's intent to exempt maintenance work from the Prevailing Wages Act.

Failure to uphold the trial court's decision could also have an adverse economic impact. There are hundreds of cities and water districts located throughout Missouri and nearly all of them have at least one water tower. If these entities are less likely to enter

into preventative maintenance contracts for their water towers (for the reasons stated above), it will increase unemployment and worsen already difficult economic times.

Finally, the Prevailing Wage Act's policy of ensuring a specific standard of wages is directly contrary to many cities' requirement for competitive bidding. Competitive bidding ensures that cities pay a fair price for the construction of critical public improvements. A decision to uphold the trial court's determination that the Contract is not "construction," but rather "maintenance" (exempt from the Prevailing Wage Act) furthers the purpose of competitive bidding, and also supports the policy to exclude maintenance work from the Prevailing Wage Act.

CONCLUSION

For the reasons stated above, Amicus Curiae Missouri Municipal League respectfully urges this Court to uphold the trial court's decision. The trial court correctly concluded that the existing facilities upon which the work established in the Contract would be carried out were comprised of the water tower, including the tank. The trial court was also correcting in concluding that the work established in the Contract would not change or increase the size, type, or extent of the water tower, including the tank. Accordingly, the Prevailing Wage Act did not apply to the work established in the Contract.

Respectfully submitted,

WILLIAMS & CAMPO, P.C.

By: _____

Joseph G. Lauber, Mo. Bar #52809
255 NW Blue Parkway, Suite 202
Lee's Summit, Missouri 64063
Telephone (816) 524-4646
Facsimile (816) 524-4645
jlauber@publiclawfirm.com
ATTORNEY FOR AMICUS CURIAE,
THE MISSOURI MUNICIPAL LEAGUE
With consent of the parties

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of Amicus Curiae Missouri Municipal League complies with Rule 84.06 and that:

(1) The signature block contains the information required by Rule 55.03;

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Joseph G. Lauber Mo. Bar # 52809
Williams & Campo, P.C.
Attorney for Amicus Curiae,
The Missouri Municipal League

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I hereby certify that on this _____ day of October, 2010, a true and correct copy of the above and foregoing document was mailed first-class, postage prepaid to:

Charles W. Hatfield, Esq.
Tricia A. Workman, Esq.
Stinson Morrison Hecker
230 West McCarty Street
Jefferson City, Missouri 65101
Attorney for Respondent

and

Chris Koster, Esq.
Missouri Attorney General
and
Jeremiah J. Morgan, Esq.
Deputy Solicitor General
207 W. High Street
P. O. Box 899
Jefferson City, MO 65102-0899.
Attorneys for Appellants

and

Ronald C. Gladney,Esq.
James R. Kimmey, Esq.
James P. Faul, Esq.
Bartley Goffstein, L.L.C.
4399 Laclede Ave.
St. Louis, Missouri 63108
Attorneys for Amicus Curiae,
Missouri State Building and
Construction Trades Council, AFL-CIO

_____
Joseph G. Lauber
Attorney for Amicus Curiae,
The Missouri Municipal League