STATE OF MICHIGAN

COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER,

Plaintiff-Appellee/Cross-Appellant,

v

DIRECTOR, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, and MIDLAND COUNTY PROSECUTING ATTORNEY,

Defendants/Cross-Appellees,

and

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, MICHIGAN CHAPTER,

Defendant/Intervenor-Appellant/ Cross-Appellee,

and

MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, MICHIGAN CHAPTER OF SHEET METAL & AIR CONDITIONING CONTRACTORS, and MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,

Defendants/Intervenors-Appellants/ Cross-Appellees,

and

SAGINAW COUNTY PROSECUTOR,

Intervenor.

FOR PUBLICATION
July 19, 2005
9:00 a.m.

No. 234037
Midland Circuit Court
LC No. 00-002512-CL

ON REMAND

Official Reported Version

Before: Whitbeck, C.J., and White and Donofrio, JJ.

WHITE, J.

This case is before us on remand from the Supreme Court. Plaintiff brought this action for declaratory and injunctive relief, challenging the constitutionality of the prevailing wage act (PWA), MCL 408.551 *et seq.*, as vague and as an unconstitutional delegation of legislative authority to private parties, specifically, unions and union contractors. The circuit court dismissed plaintiff's vagueness claim on defendants' motions for summary disposition, and allowed the delegation of legislative authority claim to proceed to discovery. Defendants-intervenors were granted leave to file an interlocutory appeal of the latter ruling, and plaintiff cross-appealed as of right the dismissal of its vagueness claim.

Our initial opinion concluded that, because plaintiff had not alleged an "actual controversy," it could not seek declaratory relief. Thus, we did not reach the merits of the constitutional challenges; we reversed the circuit court's denial of summary disposition of the delegation of legislative authority claim and affirmed the dismissal of the vagueness claim. See *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director (ABC I)*, unpublished opinion per curiam, issued August 5, 2003 (Docket No. 234037). Plaintiff applied for leave to appeal in the Supreme Court. After hearing oral arguments on plaintiff's application for leave, in lieu of granting leave to appeal, the Supreme Court reversed and remanded for reconsideration by this Court, stating:

> We reverse the decision of the Court of Appeals and hold that plaintiff has presented an "actual controversy" so that plaintiff can seek declaratory relief under MCR 2.605. We do not address the substantive issue regarding the constitutionality of the PWA; instead, we remand to the Court of Appeals for reconsideration and resolution of the defendants' appeal and plaintiff's cross-appeal on the merits. [*Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 120; 693 NW2d 374 (2005) (*ABC II*).]

Having considered the merits of the appeal and cross-appeal, we conclude that the PWA does not unconstitutionally delegate legislative authority to private parties, and so we reverse the circuit court's denial of summary disposition on that claim. In the cross-appeal, we conclude that the PWA is not unconstitutionally vague on its face or as applied, and affirm the circuit court's dismissal of those claims, though for somewhat different reasons.

I. Appeal

Defendants assert that plaintiff's challenge to the PWA as an unconstitutional delegation of legislative authority to private parties must fail because that precise claim was rejected by this Court in *West Ottawa Pub Schools v Director, Dep't of Labor*, 107 Mich App 237; 309 NW2d 220 (1981).

This Court reviews de novo the circuit court's denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The constitutionality of a statute is a question of law this Court reviews de novo. *Dep't of State v MEA-NEA*, 251 Mich App 110, 115-116; 650 NW2d 120 (2002). Legislation is presumed constitutional absent a clear showing to the contrary. *Caterpillar Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). Statutes must be construed in a constitutional manner if possible. *Id.*

A. *West Ottawa*

West Ottawa was an appeal of the circuit court's declaratory judgment and permanent injunction precluding enforcement of the PWA on the ground that the act constituted an unlawful delegation of legislative power to private parties, i.e., unions. This Court reversed, stating:

> Plaintiffs argue that, because the Department of Labor [now the Department of Consumer & Industry Services (CIS)[1]] is statutorily required to set the prevailing wage rate at union rate, the Legislature has unconstitutionally delegated its power to a private party. We cannot agree.
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> Article 4, § 1, of the Michigan Constitution prohibits the delegation of "legislative power". The Michigan doctrine of nondelegation has been expressed in terms of a "standards" test:
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> "'There is no doubt that a legislative body may not delegate to another its lawmaking powers. It must promulgate, not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what occasion, *provided, however that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits.'* (Emphasis supplied.)" *Detroit v Detroit Police Officers Ass'n,* 408 Mich 410, 458; 294 NW2d 68 (1980), quoting *Osius v St Clair Shores,* 344 Mich 693, 698; 75 NW2d 25 (1956).
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> The preciseness of the standards will vary in proportion to the degree to which the subject regulated requires constantly changing regulation. *Dep't of Natural Resources v Seaman,* 396 Mich 299, 309; 240 NW2d 206 (1976). As stated by the Court in *G F Redmond & Co v Michigan Securities Comm,* 222 Mich 1, 5; 192 NW 688 (1923):
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> "The power to carry out a legislative policy enacted into law under the police power *may be delegated to an administrative board under quite general language,* so long as the exact policy is clearly made apparent, and the administrative board may carry out in its action the policy declared and delegated * * *. This marks the line between arbitrary officiousness and the exercise of delegated power to carry out a designated policy under the police power."
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> In *Male v Ernest Renda Contracting Co, Inc,* 122 NJ Super 526; 301 A2d 153 (1973), *aff'd* 64 NJ 199; 314 A2d 361 (1974), *cert den* 419 US 839; 95 S Ct 69; 42 L Ed 2d 66 (1974), the court reversed the trial court's finding that the New Jersey prevailing wage act was unconstitutional as an unlawful delegation of legislative power to a private party. *Under the New Jersey act, the Commissioner*

[1] The CIS is now named the Department of Labor and Economic Growth (DLEG).

of Labor established the prevailing wages for state projects from collective bargaining agreements. The Commissioner did not adopt any further rules or regulations but took the collective bargaining agreement that covered the majority of the workers in the locality and used the wages in that agreement as the prevailing rate. In holding that the statute was not unconstitutional, the appellate court reasoned:

"We do not find that the act, or the Commissioner's interpretation thereof, presents a problem of delegation of legislative power. As we view the act, the Commissioner has not been delegated power to perform a legislative function; rather, he has merely been granted the power, as a matter of legislative convenience, to determine a set of facts, *i.e.*, the wage rates established under collective bargaining agreements in given circumstances. The Legislature has determined, for reasons set forth in section 1 of the act (NJSA 34:11-56.25), that the wages paid under collective bargaining agreements negotiated between labor unions representing a majority of the workmen engaged in the trade under collective bargaining agreements and their employers shall be the wages paid in the performance of public work. That public policy determination was for the Legislature. We find no constitutional bar thereto. To conclude, as the trial judge did, that under such a scheme 'the public is not sufficiently protected against such arbitrary or self-motivated action on the part * * * of such private party to whom the legislative function has really been delegated,' misses the point and actually constitutes a substitution of judicial judgment for that of the Legislature." *Male v Ernest Renda Contracting Co, supra,* 533-534.

Accord, *Kugler v Yocum,* 69 Cal 2d 371; 71 Cal Rptr 687; 445 P2d 303 (1968), *Union School Dist of Keene v Comm'r of Labor,* 103 NH 512; 176 A2d 332 (1961), *Baughn v Gorrell & Riley,* 311 Ky 537; 224 SW2d 436 (1949), *Metropolitan Water Dist of Southern California v Whitsett,* 215 Cal 400; 10 P2d 751 (1932). [Contra,] *Industrial Comm v C & D Pipeline, Inc,* 125 Ariz 64; 607 P2d 383 (1980) [sic, 1979], *Bradley v Casey,* 415 Ill 576; 114 NE2d 681 (1953), *Wagner v Milwaukee,* 177 Wis 410; 188 NW 487 (1922).

While we recognize that there is a split of authority on this issue, we are persuaded that *Male, supra,* presents the better view. *The Michigan Legislature has not delegated any legislative, policy-making authority to the Department of Labor. The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality. The Department of Labor's determination of that prevailing wage does not amount to the setting of any state policy.* The Department is merely authorized *to implement what the Legislature has already declared to be the law* in Michigan.

In our judgment, *the basic premise of plaintiffs' argument is invalid. Plaintiffs maintain that the prevailing wage statute is constitutionally defective because it delegates to the unions, or to the unions and contractor/employers together, the authority to determine the wage rate on state projects. The statute*

contains no such delegation. Rather, the statute expresses the policy that wages equal to union scale are to be paid to both union and nonunion workers on public construction projects. *The Legislature did not confer on the unions and the contractor/employers the power to set the prevailing wage rate for public contracts.* It merely adopted, as the critical standard to be used by the Department of Labor in determining prevailing wage [sic], the wage rate arrived at through a collective bargaining process which is completely unrelated to and independent of the prevailing wage statute. The purpose of collective bargaining is not to set the wage scale for *public* projects but rather to set the wage scale for *all* construction projects.

There is a vital distinction between conferring the power of making what is essentially a legislative determination on private parties and adopting what private parties do in an independent and unrelated enterprise. . . . [*West Ottawa,* 107 Mich App at 242-248 (emphasis added).]

We conclude that *West Ottawa* is on point and we reject plaintiff's unlawful delegation challenge.[2]

B. Supplemental Briefing After Remand

After the Supreme Court remanded this case to this Court, 472 Mich at 129, this Court granted plaintiff's motion to file a supplemental brief. Defendants filed a response brief. Having reviewed the supplemental briefs after the remand, we conclude that plaintiff's arguments are largely addressed by our adoption of *West Ottawa*[3] and that the remaining issues are without merit.

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[2] Our adoption of *West Ottawa* notwithstanding, we acknowledge the validity of plaintiff's arguments that the CIS, now the DLEG, should refine its internal methods of gathering information from which it determines prevailing wage rates (e.g., so that if a two-tiered wage system has been negotiated it is made known to the CIS and incorporated into its prevailing wage determination and the possibility of an arbitrary rate is thus foreclosed). However, plaintiff's complaints are properly addressed to the Legislature, not the courts, as the complaints center on the wisdom of tying prevailing wage rates under the PWA to collectively bargained agreements. "A valid statute is not rendered unconstitutional on the basis of improper administration." *Council of Organizations and Others for Education about Parochiaid, Inc v Governor,* 455 Mich 557, 570-571; 566 NW2d 208 (1997).

[3] Plaintiff's supplemental brief asserts:

> [T]he PWA constitutes an unlawful delegation of legislative authority because it requires the Michigan Department of Labor and Economic Growth ("DLEG") to adopt in wholesale fashion the agreements of interested private third parties for setting wage rates under the law. The PWA grants authority to unions and unionized contractors to establish one set of high rates applicable to public

(continued…)

Plaintiff's supplemental brief draws this Court's attention to *J A Croson Co v J A Guy, Inc,* 2003 NLRB LEXIS 328, a hearing referee's decision issued on June 27, 2003, subsequent to *J A Croson Co v J A Guy, Inc*, 81 Ohio St 3d 346; 691 NE2d 655 (1998).[4] Plaintiff asserts that

> litigation of that Ohio state court case (*Croson*) has continued through the NLRB, the recent result of which calls into question whether or not job targeting programs are as protected as the Intervenors contend.
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> * * *
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> Now the Board [NLRB] has determined that valid arguments exist to warrant a finding that job targeting programs may be inimical to state prevailing wage projects as well. . . .

The referee's decision in *J A Croson,* 2003 NLRB LEXIS 328, is neither binding nor persuasive authority. The issue addressed therein has no bearing on a constitutional analysis of Michigan's PWA. Specifically, the referee's decision addressed a technical timing issue, i.e., in the event a state court suit is preempted by the NLRB's exclusive jurisdiction, at what time does the state suit become an unfair labor practice in violation of the National Labor Relations Act.

To the extent that plaintiff's supplemental brief asserts that job targeting is "a collusive practice [that] springs from the collective bargaining process . . . [and] is precisely the kind of practice that taints the collective bargaining process in relation to the PWA," as noted in our

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(…continued)

> works projects through their collective bargaining agreements, to which all contractors are bound on public construction projects, but does not constrain them from negotiating another set of lower and more market reflective rates for use on privately-funded projects. This "two-tier" rate system is negotiated with one eye fixed firmly on the PWA, because it provides safe harbor for the artificially high public works wage rates in an otherwise competitive marketplace. The collusive practice of job targeting—which springs from the collective bargaining process and effectively establishes a two-tier rate system—is precisely the kind of practice that taints the collective bargaining process in relation to the PWA. Because the rates negotiated for use on PWA projects are artificially high, and because they result from collusive bargaining to the detriment of the Michigan tax-paying public, and because the DLEG is powerless under the statutory scheme to prevent it, the PWA constitutes an unlawful delegation of legislative authority to private parties.

[4] In *J A Croson,* 81 Ohio St 3d 346, an unsuccessful bidder on two public projects brought suit against the successful bidder, alleging that by cooperating with the union to receive subsidies under a job targeting program, the successful bidder violated Ohio's prevailing wage law. The Ohio Supreme Court held that the NLRA, at § 29 USC 157, preempts the Ohio state prevailing wage regulations "to the extent that those provisions could be construed to restrain or inhibit the federally protected use of job targeting programs." *Croson,* 81 Ohio St 3d at 358.

initial opinion,[5] we agree with the circuit court that plaintiff had acknowledged that job targeting or market recovery programs do not violate antitrust laws and may constitute protected concerted activity under the NLRA. Plaintiff's supplemental brief raises nothing to alter our original analysis.

We reverse the circuit court's determination allowing discovery to proceed and order that summary disposition enter in defendants' favor on the unconstitutional delegation of legislative authority challenge.[6]

II. Cross-Appeal

On cross-appeal, plaintiff argues that the PWA is unconstitutionally vague, both on its face and in application. The circuit court dismissed plaintiff's vagueness challenges, and we affirm.

A. Facial Challenge on Vagueness Grounds

Generally, "[t]he party challenging the facial constitutionality of an act 'must establish that no set of circumstances exists under which the [a]ct would be valid.[7] The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . . '" *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). "'[S]tatutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand.'" *BCBSM v Governor*, 422 Mich 1, 93; 367 NW2d 1 (1985), quoting *People v Howell*, 396 Mich 16, 21; 238 NW2d 148 (1976).

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process; however, to succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications. [16B Am Jur 2d, Constitutional Law, § 920, p 516, citing *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489; 102 S Ct 1186; 71 L Ed 2d 362 (1982).]

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[5] See *ABC I*, slip op at 11.

[6] Defendants' final argument in the principal appeal, that plaintiff failed to exhaust administrative remedies, was alluded to, but not squarely raised below, nor was it addressed by the circuit court. Thus we do not address it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

[7] Facial challenges are permitted in other limited contexts. For example, if the law challenged reaches a substantial amount of constitutionally protected conduct, i.e., where free speech or free association is affected, it may be facially challenged. See *Kolender v Lawson*, 461 US 352, 358 n 8; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

In this case, because the PWA does not implicate constitutionally protected conduct, plaintiff may succeed in a facial vagueness challenge only if it demonstrates that the law is impermissibly vague in all its applications.[8] Because plaintiff neither argues nor supports that the PWA is impermissibly vague in all its applications, its facial challenge on vagueness grounds fails.

B. "Vagueness as Applied" Challenge

> To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. The statute cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application. A statute is sufficiently definite if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. [*People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000), quoting *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999) (citations deleted).]

We reject plaintiff's "vagueness as applied" challenge because we agree with defendants that the misdemeanor provision of the act does not apply to a simple failure to pay according to the contract. Whether construed strictly as a criminal statute or broadly as a remedial statute, the words of the statute itself must control. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538, 545-546; 565 NW2d 828 (1997). The PWA makes it a misdemeanor to violate a provision of the act. MCL 408.557. The act requires the contractor to include prevailing wage provisions in a covered contract, MCL 408.552, and to post prevailing-wage information at the construction site and keep accurate records of the actual wages paid, MCL 408.555. The act also authorizes the contracting agent to terminate a contractor's right to proceed with any part of the contract for which prevailing wages are not, in fact, paid, and to complete the contract with another contractor at the original contractor's expense. MCL 408.556. While the act contemplates that the contractor will pay the prevailing wage, and provides for the right to terminate the contract for failure to do so, it cannot be said that the failure to pay the prevailing

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[8] In a supplemental authority brief filed during the pendency of the initial appeal to this Court, plaintiff cites *People v Barton*, 253 Mich App 601; 659 NW2d 654 (2002), and *People v Boomer*, 250 Mich App 534; 655 NW2d 255 (2002), as supporting its position. Plaintiff is incorrect, as the statutes challenged in those cases affected First Amendment interests. The ordinance challenged in *Barton* prohibited "any indecent, insulting, immoral or obscene conduct in any public place." 253 Mich App at 602. The *Barton* Court stated, "We note that defendant may challenge the ordinance as unconstitutionally vague on its face because it threatens First Amendment interests." 253 Mich App at 605. The statute at issue in *Boomer* provided that "[a]ny person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor." 250 Mich App at 536. The *Boomer* Court noted that the statute "impinges on First Amendment freedoms" in that it unquestionably "reaches constitutionally protected speech." 250 Mich App 541, 542.

wage in and of itself constitutes a violation of the provisions of the act.[9] Thus, we reject plaintiff's "vagueness as applied" challenge to the act because the challenge is based on an erroneous construction of the act.

C. Speculation About Standards

Plaintiff's final argument on cross-appeal is that the circuit court clearly erred in dismissing its claim that the PWA is unconstitutionally vague both on its face and in its application because discovery would show that nonunion construction contractors subject to the act must routinely speculate about whether their pay and work practices on prevailing wage projects comport with those derived from convoluted, constantly evolving, and generally unavailable collective bargaining agreements and unwritten understandings between trade unions and union contractors.

We conclude that this issue need not be addressed. "A valid statute is not rendered unconstitutional on the basis of improper administration." *Council of Organizations v Governor*, 455 Mich 557, 570-571; 566 NW2d 208 (1997). The criticisms plaintiff articulates here of the PWA, even if true, would not render the entire act unconstitutional. Plaintiff's promise that discovery would show these problems exist is not helpful. The alleged problems plaintiff's members have with the PWA relate to the CIS' administration of the act or should be addressed to the Legislature and do not affect the constitutionality of the act.

We affirm the dismissal of plaintiff's vagueness challenges and reverse the denial of summary disposition as to plaintiff's delegation challenge.

Donofrio, J., concurred.

/s/ Helene N. White
/s/ Pat M. Donofrio

[9] Nothing in *Western Michigan Univ*, argues to the contrary. The language relied on by defendants clearly states that the act requires that the contract contain certain provisions, and the issue presented here was not discussed.