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.

WHITBECK, C.J. (*concurring*).

I concur with the majority in this matter. I write separately to emphasize, briefly, several points that I consider to be of some importance.

I. Overview

At issue here is the constitutionality of the prevailing wage act,[1] sometimes referred to as the "Little Davis-Bacon Act" because the Legislature patterned it after the federal Davis-Bacon Act of 1931.[2]

The central provision of the prevailing wage act is § 2,[3] which provides:

> Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall not be paid less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. . . .

Section 4[4] of the prevailing wage act implements § 2 by providing a method for establishing the "prevailing wages and fringe benefits" based on collective bargaining agreements in the locality:

> The commissioner[5] shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers. . . .

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[1] MCL 408.551 *et seq.*

[2] 40 USC 276a *et seq.* (now 40 USC 3141 *et seq.*).

[3] MCL 408.552.

[4] MCL 408.554.

[5] The prevailing wage act defines the "commissioner" as "the [D]epartment of [L]abor." MCL 408.551(d). Under Executive Reorganization Order No. 1996-2, the Department of Labor became the Department of Consumer & Industry Services, MCL 445.2001, of which defendant Kathleen Wilbur was the Director. Under Executive Reorganization Order No. 2003-18, MCL 445.2011, the Department of Consumer & Industry Services became the Department of Labor and Economic Growth. I will use the abbreviation "CIS" in this concurrence to delineate the responsible department.

As the Attorney General points out, plaintiff Associated Builders and Contractors, Saginaw Valley Area Chapter (the Saginaw ABC) does not here contend that the Legislature lacks the authority to enact a prevailing wage act, nor does the Saginaw ABC contend that the Legislature lacks the authority to establish a method for the periodic adjustment of those rates without direct legislative action. Although the Saginaw ABC advances a number of contentions in this matter, there are two with which I am particularly concerned. The first is that, in practice, there is a "two-tier" rate system that allows unions and unionized contractors to establish one set of high rates applicable to public works projects but does not constrain them from negotiating another set of lower rates for use in privately funded projects. The second is that the rates negotiated for use on prevailing wage act projects—a phrase that the Saginaw ABC appears to use interchangeably with public works projects, presumably meaning those projects that are covered by the prevailing wage act—are "artificially high." I will deal with these two contentions in order below.

II. The "Two-Tier" System

The Saginaw ABC contends that the prevailing wage act is an unconstitutional delegation of legislative authority. In support of this contention, the Saginaw ABC asserts that the CIS is "a mere paper shuffler in the process of determining prevailing wages" and that "the regulation of wages and benefits on state-funded construction projects in Michigan is passed to unions and unionized contractors." The Saginaw ABC further asserts that, "working together in collusion," such unions and unionized contractors can set inflated wage and fringe benefit rates in collective bargaining agreements and, at the same time, "make side agreements to adhere to lower rate scales which enable unionized contractors to compete in the everyday, 'dog-eat-dog' private marketplace."

The Saginaw ABC identifies two types of such "side agreements": market recovery programs and job targeting programs. As I understand it, under a market recovery program a union may sacrifice wages in order to ensure that a unionized contractor can compete for the award of a contract for a given project. Such market recovery programs allow the modification of wages, fringe benefits, and work rules on a job-by-job basis. Thus, for example, the union may agree that operating engineers, who under the collective bargaining agreement with the unionized contractor are entitled to $25 an hour, will receive $23 an hour. As the defendants-intervenors frankly concede, unions institute such market recovery programs in the face of nonunion competition that pays a lower wage scale. Theoretically at least, the cumulative effect of the lower wages that the unionized contractor will pay allows that contractor to be competitive in bidding for projects and therefore "recover" the market that the contractor would otherwise have lost.

As I understand it, a job targeting program is a device for equalizing the pay of union members whose unionized contractor employer has successfully won a contract under a market recovery program. Using again the example of operating engineers who will make $23 an hour on a project pursuant to a market recovery program, the union will "target" that lower salary and will make up the difference between what the operating engineers would otherwise earn under the collective bargaining agreement, $25 an hour, with a subsidy from a job targeting fund that the union collects from the entire bargaining unit through additional dues.

The Saginaw ABC labels these programs a "recent form of obnoxious collusion" and asserts that, by effectively establishing a two-tier rate system, they "taint" the collective bargaining process in relation to the prevailing wage act. I would first note that this argument would have considerably more traction had the Saginaw ABC actually challenged the market recovery and job targeting programs at the trial court level. However, counsel for the Saginaw ABC made it clear that it was making no such challenge:

> *Mr. Masud*: Judge, ABC, and I will make very clear on this, because there's some other counter-claims that ABC needs to be concerned about.
>
> We are not challenging the lawfulness of market recovery. . . .
>
> We don't need to show that that process is illegal. In fact, we state in our brief that it is not—job targeting is not illegal. . . .
>
> * * *
>
> I will make it very clear for this record that ABC is not in any way, shape, or form challenging employers and Union's right to do these things.

Secondly, I note that the record is barren of *any* suggestion that the Saginaw ABC engaged in *any* effort through administrative proceedings to have the CIS consider these "side agreements" in establishing prevailing wages. As the defendants-intervenors point out, the doctrine of exhaustion of administrative remedies is well-settled in Michigan and requires a party to exhaust whatever administrative remedies are available before challenging an agency action in court.[6] There are a number of very good reasons for the doctrine.

> (1) [A]n untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary.[7]

It is certainly possible, as the Saginaw ABC asserts, that unions and unionized contractors are colluding to conceal the existence of their market recovery and job targeting programs from the CIS. It is certainly possible that this collusion taints the collective bargaining process. It is certainly possible that this taint results in higher wage rates for projects covered by the prevailing wage act. But there is not a scintilla of evidence in this record that this is so. And

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[6] *Judges of the 74th Dist v Bay Co*, 385 Mich 710, 728; 190 NW2d 219 (1971).

[7] *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977).

the reason that no such evidence exists in the record is that the Saginaw ABC made no attempt, by complaint, petition, or otherwise, to engage the accumulated technical competence of the CIS to determine whether any of these possibilities might be confirmed.

In summary, it is one thing to label an administrative agency, which might be able to settle such issues conclusively, as a mere paper shuffler; rhetoric is often its own reward. It is quite another to seek untimely judicial intervention that has the effect, intended or not, of disrupting an otherwise cohesive administrative scheme. And it is extraordinarily inefficient to then seek judicial review without the benefit of a full factual record developed before the agency. As a matter of law, therefore, the Saginaw ABC has failed here to exhaust its administrative remedies. The trial court thus erred when it denied summary disposition regarding the Saginaw ABC's unlawful delegation claim on the basis that there were material issues of fact about which discovery could proceed.

III. "Artificially High" Wage Rates

In support of its contention that the prevailing wage act is unconstitutionally vague, the Saginaw ABC asserts:

> [T]o say that the [prevailing wage a]ct requires the payment of "prevailing" wages in the locality is a misnomer. Union construction workers perform far less construction work in Michigan than do non-union construction workers. The wages paid to this minority of workers under collective bargaining agreements are well above [the] industry average. Since those high rates found in collective bargaining agreements are used exclusively to set the rates established by the CIS on prevailing wage projects, the "prevailing" wages under the Act are always far above the *average* for the industry. Thus, it cannot be said that they are truly "prevailing."
>
> Since trade unions are effectively able to force their exorbitant wage and fringe benefits rates on all publicly-funded construction projects in Michigan through the application of the [prevailing wage act], the overall impact of the [prevailing wage a]ct is to increase the cost to the government for public works construction projects over what they would cost in the open market.[8]

In a footnote, the Saginaw ABC goes further:

> The resultant unnecessary increased cost is not the only affront to Michigan taxpayers. The [prevailing wage a]ct's original purpose has a checkered past as well. According to the Michigan Supreme Court, the Act is patterned after the federal Davis-Bacon Act, 40 U.S.C. 276a, and has its same goals and purposes. *Western Michigan University v. State of Michigan*, 455 Mich 531, 535-

[8] Footnotes omitted.

> 536 (1977). The federal statute was enacted in 1931 in large part as a means by which to protect the higher wages of white construction workers in northern cities such as New York, Philadelphia and Detroit from being diluted through "cheap colored labor" from the southern states. Thiebolt, *Prevailing Wage Legislation*, Wharton School of the University of Pennsylvania, (1986), p. 30. There is very strong evidence that the Michigan [prevailing wage a]ct has reduced employment opportunities in particular for blacks. *Richard Vetter, supra,* referencing Robert P. Hunter, *Union Racial Discrimination is Alive and Well*, Mackinac Center for Public Policy, September 1977.

Now, it may well be that the Congress passed the Davis-Bacon Act in order to insulate white construction workers from competition by "cheaper" African-American workers from the south. It may well be that the Michigan prevailing wage act has reduced employment opportunities for African-Americans in this state. It may well be that the prevailing wage act's reliance on collective bargaining agreements as determinative of prevailing wages in a locality is misplaced. It may well be that the overall effect of the prevailing wage act is to increase the cost to the government for public works construction projects over what they would cost in the open market. It may well be that each of these factors is an "affront" to Michigan citizens and taxpayers.

Unquestionably, however, these are public policy questions.[9] Equally unquestionably, there is nothing in our judicial commission that empowers us, as compared to the Michigan Legislature, to address them. Our legal training makes us no more qualified to resolve these public policy issues than teachers or truck drivers, no more able to sense and act upon the public will than funeral directors or fire fighters, no wiser in charting a course for sound labor policy in the state than plumbers or physicians. If the prevailing wage act should be reconstituted or even repealed, then it is the Michigan Legislature—popularly elected by teachers and truck drivers, funeral directors and fire fighters, plumbers and physicians, and the rest of our diverse society to address precisely these types of public policy questions—that must undertake this task.

Thus, my personal opinion on the fairness or the soundness of the prevailing wage act—and, quite frankly, the opinion of the Saginaw ABC on the same public policy issues—has absolutely nothing to do with whether the act is unconstitutional by reason of unlawful delegation or vagueness. The Legislature is free to adopt bad policy; it is free to act unfairly; it is free to pursue ostensibly counterproductive or even downright foolish objectives, all without the judicial branch acting as a super-legislature and substituting its own version of what constitutes sound public policy. While this freedom is not unlimited—it is for this reason,

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[9] Of course, if the Legislature intended such public policy decisions to have a racially discriminatory effect, they would be subject to strict scrutiny by the courts. See, for example, *Washington v Davis*, 426 US 229, 241-242; 96 S Ct 2040; 48 L Ed 2d 597 (1976). But the Saginaw ABC has not brought an equal protection or due process claim asserting that the prevailing wage act is racially discriminatory on its face or as applied.

among others, that we the people enact constitutions—our scope of review is extremely limited and we must exercise it with the greatest restraint. As this Court has said:

> That a statute may appear undesirable, unfair, unjust, or inhumane does not itself render the statute unconstitutional and empower a court to override the Legislature. *Doe v Dep't of Social Services*, 439 Mich 650, 681; 487 NW2d 166 (1992). Arguments that a statute is unwise or results in bad policy should be addressed to the Legislature. *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992).[10]

If arguments that a statute needs change, or even repeal, should be addressed to the Legislature, then it most certainly follows that the courts should not step in to do what the Legislature has not done. And, as the attached chart shows, since 1972 there have been thirteen proposed amendments to exempt certain projects from the prevailing wage act. During the same period there have been ten attempts to repeal the act. However, no proposed amendment, or repeal, of the act has passed. In essence, the Saginaw ABC invites us to do what the Legislature has refused to do: repeal the prevailing wage act. As is clear from the majority opinion, today we have declined that invitation.

/s/ William C. Whitbeck

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[10] *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 462; 639 NW2d 332 (2001).

Michigan Prevailing Wage Act

History of Proposed Amendments

Year	Title	Primary Sponsor	Description	Status
2005	HB 4351	Rep. Hildenbrand	Eliminate requirement to pay prevailing wage on public school construction projects. To amend MCL 408.551.	Referred to Committee on Employment Relations, Training & Safety
2005	HB 4531	Rep. Hildenbrand	Eliminate requirement to pay the prevailing wage on public school projects. To amend MCL 408.551.	Referred to Committee on Employment Relations, Training & Safety
2003	HB 4161	Rep. Sheen	Eliminate requirement to pay prevailing wage on public school construction projects. To amend MCL 408.551.	Referred to Committee on Employment Relations, Training & Safety
2001	SB 82	Sen. Steil	Eliminate requirement to pay prevailing wage on public school academy projects. To amend MCL 408.551.	Referred to Committee on Education
2001	SB 84	Sen. Steil	Eliminate requirement to pay prevailing wage on public school projects. To amend MCL 408.551.	Referred to Committee on Education
2001	HB 4383	Rep. Gosselin	Eliminate requirement to pay prevailing wage on public school, bridge, highway and road projects. To amend MCL 408.551.	2nd Reading in Committee on Employment Relations, Training & Safety
2001	HB 4474	Rep. Kuipers	Exempt projects building bridges used only for snowmobiling from the Michigan prevailing wage act. To amend MCL 408.551.	Referred to Committee on Conservation and Outdoor Recreation
2000	SB 1353	Sen. Steil	Eliminate requirement to pay prevailing wage on public school academy projects. To amend 408.551.	Referred to Committee on Education
1999	HB 4193	Rep. Kuipers	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Employment Relations, Training & Safety
1999	HB 4271	Rep. Kukuk	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Employment Relations, Training & Safety
1999	SB 122	Sen. Steil	Eliminate requirement to pay prevailing wage on public school projects. To amend MCL 408.551.	Referred to Committee on Human Resources, Labor, Sr. Citizens & Vet. Affairs
1999	SB 207	Sen. Steil	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Human Resources, Labor, Sr. Citizens & Vet. Affairs
1998	HB 5506	Rep. Voorhees	Exempt bond projects approved by the state treasurer from the Michigan prevailing wage act. To amend MCL 408.558.	Referred to Committee on Education. Reported w/ recommendation to Committee on Labor & Occupational Safety
1997	SB 0131	Sen. Steil	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Human Resources, Labor, Sr. Citizens & Vet. Affairs

1997	SB 0805	Sen. Steil	Exempt certain projects subject to the Michigan prevailing wage act. To amend MCL 408.558.	Referred to Committee on Labor & Occupational Safety
1995	HB 4327	Rep. DeLange	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Human Resources & Labor
1995	SB 0095	Sen. Steil	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Human Resources, Labor & Veterans Affairs
1995	SB 0106	Sen. Shugars (& Steil)	Exempt institutions of higher education from the Michigan prevailing wage act. To amend MCL 408.551.	Referred to Committee on Human Resources, Labor & Veterans Affairs
1995	SB 0149	Sen. Honigman	Repeal the Michigan prevailing wage act. To repeal MCL 408.551 through 408.558.	Referred to Committee on Human Resources, Labor & Veterans Affairs
1993	HB 4812	Rep. Profit	Require the Department of Labor to file complaints when it knows of violations of the Michigan prevailing wage act.	Referred to Committee on Labor
1993	SB 92	Sen. Honigman	Repeal the Michigan prevailing wage act.	Referred to Committee on Labor
1991-1992	HB 4157	Rep. DeLange	Establish prevailing wages and fringe benefits on state projects pursuant to federal Davis-Bacon Act.	Referred to Committee on Labor
1991-1992	SB 318	Sen. Honigman	Repeal the Michigan prevailing wage act	Referred to Committee on Labor
1991-1992	SB 403	Sen. Emmons	Exempt construction of or work on state mental health projects from the prevailing wage requirements.	Referred to Committee on Labor
1989-1990	HB 4706	Rep. Owen	Assign penalties for violations of the prevailing wage act and prevent bidding on state contracts by violators.	Referred to Committee on Labor
1989-1990	SB 588	Sen. Cherry	Assign penalties for violations of the Michigan prevailing wage act and provide for the payment of wage differentials	Referred to Committee on Human Resources and Sr. Citizens
1987-1988	None	N/A	N/A	N/A
1985-1986	HB 4131	Rep. DeLange	Enact a prevailing wage act pursuant to the federal act.	Referred to Committee on Labor
1983-1984	HB 4364	Rep. O'Connor	Repeal requirement to pay prevailing wage for state projects.	Referred to Committee on Labor
1981-1982	None	N/A	N/A	N/A
1979-1980	HB 5464	Rep. Conroy	Require EDC's to pay prevailing wage and fringe benefits	Passed
1977-1978	HB 4233	Rep. Elliott	Include school district in the definition of locality.	Passed and Approved by Governor—MCL 408.551
1975-1976	None	N/A	N/A	N/A
1973-1974	None	N/A	N/A	N/A
1972	None	N/A	N/A	N/A