13-1133

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

GREGORY GRIM, ERIC CROWDER,
JEFFERY RATLIFF, GARY RHODES,
BRIAN MOORE, JAMIE GRAY, and
ROBERT BENDER,

Plaintiffs,

v.

RECEIVED
OCT 10 2013

Civil Action No. 13-C-111
Judge Paul Zakaib, Jr.

EASTERN ELECTRIC, LLC,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending before the Court are Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Summary Judgment. On February 27, 2013, the Court convened a hearing on said motions. The parties appeared by their respective counsel.

I. FINDINGS OF FACT

1. Eastern Electric is a locally owned, small business located in Mount Nebo, West Virginia.

2. On or about February 13, 2007, the Purchasing Division of the Department of Administration of the State of West Virginia issued Request for Quotation No. GSD076425 ("RFQ") for an open-end contract on behalf of the Department of Administration's General Services Division to perform certain electrical work.

3. The RFQ was prepared by Krista Ferrell, a senior buyer with the Purchasing Division.

4. The RFQ stated that questions concerning bids could be submitted to Ms. Ferrell.

5. When Eastern Electric learned of the RFQ, it expressed interest in bidding on the project. Because the RFQ was for work to be performed at Department of Administration owned buildings, Michael Harlow, one of Eastern Electric's members, telephoned Ms. Ferrell to determine whether prevailing wage rates would be applicable to the work performed under the RFQ.

6. Mr. Harlow and Eastern Electric's other members questioned whether prevailing wage rates were applicable because the RFQ was silent on the issue. In their experience in bidding on prevailing wage projects, the request for proposal and contract documents always specified in clear terms if prevailing wage applied.

7. Obviously, the applicability of the prevailing wage rates would significantly affect the amount bid by Eastern Electric. It would also affect the amount the State would have to pay for such work.

8. This RFQ did not contain any such specifications. In fact, the RFQ contained no mention of prevailing wage whatsoever.

9. Accordingly, Mr. Harlow telephoned Ms. Ferrell in her capacity as a representative of the State to determine whether prevailing wage rates were applicable.

10. Ms. Ferrell explained to Mr. Harlow that prevailing wage rates would not apply to the work performed under the RFQ because it was a maintenance contract. Ms. Ferrell explained that such maintenance work is not subject to prevailing wage.

11. Therefore, relying on Ms. Ferrell's statement and on the plain language of the RFQ, Eastern Electric submitted a bid for work to be performed at non-prevailing wage rates.

12. Specifically, Eastern Electric bid $50.00 per hour for Master-level electrician labor; it bid $45.00 per hour for Journeyman-level electrician labor. If prevailing wage rates

were applicable to the RFQ, then Eastern Electric would have bid $78.84 and $73.84 for the labor, respectively.

13. Eastern Electric was awarded the job. Therefore, on or about April 8, 2007, it entered into an open-end contract with the Department of Administration (hereinafter "GSD Contract"). Like the RFQ, the GSD Contract did not specify that prevailing wages were applicable to the work being performed.

14. Eastern Electric then began performing services on behalf of the General Services Division at various Department of Administration facilities. Most of the work occurred in the greater Charleston area, including work at the State Capitol, the Governor's Mansion, and a facility in South Charleston referred to as Building 74.

15. In or about May 2008, Eastern Electric and the Department of Administration renewed the GSD Contract for another one-year term.

16. During 2007 and 2008, no official with the State of West Virginia ever suggested that Eastern Electric's employees should have been paid prevailing wage for the work performed under the GSD Contract.

17. In fact, the State continued to make representations that prevailing-wage rates were not applicable to the work performed under the GSD Contract. For example, in December 2008, Kristin Moores, Eastern Electric's business manager, inquired of Eastern Electric's primary contact with the State's General Services Division, David Parsons (who is the Operations and Maintenance Manager for the State) as to whether prevailing-wage rates were applicable.

18. Mr. Parsons confirmed in a written email that prevailing-wage rates did not apply to the work being performed under the GSD Contract.

19. On or about February 9, 2009, Frank Jordan, an investigator with the West Virginia Division of Labor, commenced an investigation regarding whether Eastern Electric's employees should have been paid prevailing wage for the work performed under the GSD Contract.

20. After learning of the investigation, Eastern Electric, with the assistance of counsel, immediately contacted the Department of Administration regarding the issue. Eastern Electric wanted to ensure that its pay practices were in compliance with the GSD Contract and West Virginia law.

21. A meeting was held between Mr. Harlow, Chris Skaggs (who is another member of Eastern Electric), Eastern Electric's counsel, the Department of Administration's general counsel, and other officials from the Department of Administration. During the course of that meeting, the Department of Administration again reassured Eastern Electric that the work performed pursuant to the GSD Contract was not subject to prevailing wage.

22. However, the Division of Labor continued with its investigation. Because of the ongoing Division of Labor investigation, Eastern Electric elected to cancel the GSD Contract. Although it did not believe that prevailing wages were applicable, it could not risk committing any prevailing wage violation as such could bankrupt the company given the low price bid on the GSD Contract.

23. An administrative hearing was never held before the Division of Labor. Based upon information and belief, the Division of Labor never took any formal measures to require Eastern Electric to pay prevailing wages related to the work performed under the GSD Contract.

II. CONCLUSIONS OF LAW

A. The Summary Judgment Standard.

1. The West Virginia Rules of Civil Procedure require that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(C).

2. "[C]ircuit courts should not hesitate to summarily dispose of litigation where the requirements of the Rule are satisfied." *Jividen v. Law*, 194 W. Va. 705, 713, 461 S.E.2d 451, 459 (1995).

3. Therefore, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

B. Plaintiffs Claims are Barred by the Statute of Limitations.

4. The West Virginia Wages for Construction of Public Improvements Act, which is frequently known as the Prevailing Wage Act ("PWA"), West Virginia Code § 21-5A-1, *et seq.*, does not include a specific statute of limitations.

5. Accordingly, because no limitation is otherwise provided, either a one-year or a two-year statute of limitations must apply under West Virginia law. The general statute of limitations in West Virginia, which must apply to claims under the PWA, is as follows:

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the

> right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

See W. Va. Code § 55-2-12.

6. Here, Plaintiffs filed the instant lawsuit for damages under the PWA on July 26, 2011. *See* Complaint.

7. It is undisputed that Plaintiffs stopped performing work under the GSD Contract in May 2009. It is also undisputed that Plaintiffs received their final paychecks for work performed on the GSD Contract in or about May 2009.

8. Under West Virginia law, a cause of action for a wage-and-hour violation accrues each payday when the employee is not paid all of the compensation he or she alleges is owed. *See Lipscomb v. Tucker County Comm'n*, 197 W. Va. 84, 91, 475 S.E.2d 84, 91 (1996).

9. Thus, Plaintiffs' cause of action last accrued in or about May 2009. Because either a one-year or two-year statute of limitations applies to Plaintiffs' PWA claims, the claims must be time-barred because Plaintiffs did not file their Complaint until July 26, 2009.

10. Further, the Court notes that Plaintiff Robert Bender moved to intervene in this action on July 27, 2012. Accordingly, the Court notes that Mr. Bender's claims are also time barred.

11. Plaintiffs contend that the PWA provides for a three-year statute of limitations. The Court, however, notes that the PWA (W. Va. Code § 21-5A-1 to W. Va. Code § 21-5A-11) contains no reference to a statute of limitations whatsoever. Accordingly, under West Virginia law, the general statute of limitations prescribed by West Virginia Code § 55-2-12 must apply.

12. Plaintiffs also contend that the West Virginia Code of State Rules, W. Va. C.S.R. § 42-7-1, *et seq.*, provides for a three-year statute of limitations.

13. The Court, however, finds that the West Virginia Code of State Rules does not provide for a three-year statute of limitations. The only reference to a possible three-year statute of limitations in West Virginia C.S.R § 42-7-1, *et seq.*, is a reference to a notice that must be posted by a contractor subject to the PWA. The notice is to provide that "[t]he limitation to such civil action by the workmen is a period of three (3) years and venue of such action shall be in the county where the work is performed." West Virginia C.S.R § 42-7-3.1(g)(5).

14. The Court finds that this oblique reference to a statute of limitations in a notice is insufficient to create a three-year statute of limitations under West Virginia law. The Court finds that if the Legislature intended for a three-year statute of limitations to apply to the PWA, then it would have so provided in the PWA. In addition, the Court notes that the alleged three-year statute of limitations provided for in W. Va. C.S.R § 42-7-3 must be more explicit if it is to trump the well-recognized rule that either a one-year or two-year statute of limitations applies to claims pursuant to W. Va. Code § 55-2-12 unless specific statutory language to the contrary.

C. Plaintiffs Are Not Entitled to Prevailing Wages under the PWA.

15. The Court finds that West Virginia Code § 21-5A-9 provides the exclusive penalties for violation of the PWA.

16. Specifically, the PWA provides as follows:

> Any skilled laborer, workman or mechanic who is engaged in construction on a public improvement let to contract, who is paid less than the posted fair minimum rate of wages applicable thereto, may recover from such contractor or subcontractor the difference between the same and the posted fair minimum rate of wages, and in addition thereto, a penalty equal in amount to such difference, and reasonable attorney fees. The venue of said action shall be in the county where the work is performed: Provided, however, **That**

an honest mistake or error shall not be construed as a basis for recovery under this subsection.

See W. Va. Code § 21-5A-9(b) (emphasis added).[1]

17. The Court finds that the PWA states in clear and unambiguous terms that "an honest mistake or error shall not be construed as a basis for recovery under this subsection." *See* W. Va. Code § 21-5A-9(b). Thus, if an honest mistake or error occurred, then there can be no recovery whatsoever of prevailing wages pursuant to the clear terms of West Virginia Code § 21-5A-9.

18. The Court finds that any other interpretation would be contrary to the clear intent of the Legislature. As the Supreme Court of Appeals has recognized, "if the legislative intent is clearly expressed in the statute, this court is not at liberty to construe the statutory provision, but is obligated to apply its plain language." *See Dan's Carworld, LLC v. Serian*, 223 W. Va. 478, 484, 677 S.E.2d 914, 920 (2009); *see also DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed."); Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.").

19. Here, the PWA is not ambiguous. The statutory language is clear: the "honest mistake or error" is a complete bar to civil liability.

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[1] The PWA also allows for fines to be levied against a contractor. *See* W. Va. Code § 21-5A-9(b). That provision of the PWA is not at issue in this case.

D. The Court Finds that the "Honest Mistake or Error" Principle Applies to This Case.

20. The PWA and its interpreting regulations contain a number of mandatory notice provisions that must be included in both the solicitations for bid ("RFQ") and contract. It is the public authority's duty to place said provisions in the pertinent documents. In this case, it is the State's duty to include any prevailing wage language in the RFQ and GSD Contract, if it applied.

21. First, the PWA requires that the advertisement from the government agency soliciting bids from private employers must include or must comply with the following requirement:

> Any public authority authorized to let to contract the construction of a public improvement, shall, before advertising for bids for the construction thereof, ascertain from the state commissioner of labor, the fair minimum rate of wages, including fair minimum overtime and holiday pay, to be paid by the successful bidder to the laborers, workmen or mechanics in the various branches or classes of the construction to be performed; and **such schedule of wages shall be made a part of the specifications for the construction** and **shall be published** in an electronic or other medium and **incorporated in the bidding blanks** by reference when approved by the commissioner of labor where the construction is to be performed by contract.

See W. Va. Code § 21-5A-3 (emphasis added).

22. The Court further recognizes that the regulations interpreting the PWA set forth the duties of the public authority as follows:

> Any **public authority** authorized to let to contract the construction of a public improvement, **shall**, before advertising for bids for construction thereof, the fair minimum rate of wages is to be paid by the successful bidder to workmen in the various categories, branches or classes of the construction to be performed; and **such schedule of wages shall be attached to and made a part of the specifications** for the construction and **shall be printed on the bidding blanks.**

See W. Va. C.S.R. § 42-7-4.1 (emphasis added).

23. The Court finds that the RFQ at issue here failed to include any of the mandatory language required by the PWA and interpreting regulations. Specifically, the RFQ does not contain any schedule of wages for the work to be performed under the RFQ. Indeed, the RFQ contains no reference to prevailing wages whatsoever.

24. In addition to the requirements for the RFQ, the PWA requires that the contract between the public authority and private employer contain mandatory statements regarding prevailing wage. In particular, the PWA requires as follows:

> In all cases where any public authority has ascertained a fair minimum rate or rates of wages as herein provided, and construction of a public improvement is let to contract, **the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder** and all his subcontractors **to pay a rate or rates of wages which shall not be less** than the fair minimum rate or rates of wages as provided by this article.

See W. Va. Code § 21-5A-6 (emphasis added).

25. Similarly, the Division of Labor's regulations interpreting the PWA require the public authority to clearly state that the prevailing wage rates are applicable inasmuch as the regulations require every contract to which the State of West Virginia is a party and to what falls under the definition of the PWA, "must include in its specifications a provision stating the Fair Minimum Wage Rates as determined by the Commissioner of Labor, which shall be paid for each craft or classification of all workmen needed to perform the contract in the locality in which the public work is performed." *See* W. Va. C.S.R. § 42-7-1.1.

26. In addition, the Division of Labor's regulations further provide:

> The specifications for every contract for any public work as defined herein shall contain at least the following conditions, provisions and requirements:

(a) The fair minimum wage rates as shall have been determined by the Commissioner of Labor which must be paid to the workmen employed in the performance of the contract. **The contract shall specifically provide that the contractor** and/or subcontractor or subcontractors **shall pay no less than the wage rates** as determined in the decision of the Commissioner and shall comply with the conditions of the West Virginia Act on wages for construction of public improvement, passed March 11, 1961, and made effective ninety (90) days from passage, and the regulations pursuant thereto, to assure the full and proper payment of said rates. **Further, the wage rates as determined shall be printed on the bidding blanks and attention should be specifically noted to these facts within the body of the advertisement for bids.**

(b) The contract **shall contain** the **stipulation that such workmen shall be paid no less than prevailing wage rates** and such other provisions to assure payment thereof as heretofore set forth in this section.

. . .

(e) The contract shall provide that no workmen may be employed on the public work except in accordance with the classifications set forth in the decision of the Commissioner. . .[2]

(g) The contract shall provide that the contractor and each subcontractor shall post for the entire period of construction the wage determination decisions of the Commissioner in a prominent and easily accessible place or places at the site of the work. . . .

(l) The contract shall also provide that the contractor and each subcontractor shall file a statement at the request of the Commissioner and a final statement at the conclusion of the work on the contract with the Commissioner, under oath, certifying that all workmen have been paid wages in strict conformity with the provisions as prescribed by this Section 3 of these regulations, or if any wages remain unpaid to set forth the amount of wages due and owing each workman respectively. . . .

See W. Va. C.S.R. § 42-7-3.1 (emphasis added).

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[2] The Court also finds that the GSD Contract allowed for Master-level electricians and Journeyman-level electricians to be billed at different rates. The Division of Labor's regulations do not include these different job positions as it relates to prevailing wage.

27. The Court finds that the GSD Contract does not contain any of the required elements set forth in West Virginia C.S.R. § 42-7-3.1 that the State should have included if prevailing wages were to apply.

28. Here, the Court finds that the RFQ and GSD Contract failed to contain any mandatory prevailing wage language as required by the PWA and the Division of Labor's regulations interpreting the statute.

29. The Court recognizes that the United States Supreme Court has held that such requirements like those contained in the PWA exist "so that the contractor may know definitely in advance of submitting his bid what his approximate labor costs will be." *See Univs. Research Assoc., Inc. v. Coutu*, 450 U.S. 754, 776 (1981) (interpreting similar statutory language in federal Bacon-Davis prevailing wage statute).

30. The Court also finds that, according to the testimony of Ms. Ferrell of the State of West Virginia, the standard language included in contracts to which the prevailing wage applies is as follows:

> WAGE RATES: THE CONTRACTOR OR SUBCONTRACTOR SHALL PAY THE HIGHER OF THE U.S. DEPARTMENT OF LABOR MINIMUM WAGE RATES AS ESTABLISHED FOR KANAWHA COUNTY, PURSUANT TO WEST VIRGINIA CODE 21-5A, ET, SEQ. (PREVAILING WAGE RATES APPLY TO THIS PROJECT).

(emphasis original).

31. The Court finds that neither the RFQ nor the GSD Contract included this explicit and mandatory language.

32. The Court notes that the Supreme Court of Appeals of West Virginia has not yet addressed the "honest mistake or error" defense under the PWA. Therefore, the Court will look to analogous case law to examine the issues.

33. In a case similar to this case, a Texas court addressed whether electricians could recover prevailing wages for work they had performed on behalf of a school district where the public bids and contract between the employer and public authority failed to contain a schedule of prevailing wages. *See Cullipher v. Weatherby-Godbe Corp.*, 570 S.W.2d 161 (Tex. Civ. App. 1978). Like the West Virginia PWA, the Texas prevailing wage law also included a requirement that the public authority awarding the contract ascertain and specify in the contract the prevailing wage rates applicable to the work to be performed. *See id.* at 162-63 (quoting Art. 5159a, Tex. Rev. Civ. Stat. Ann. (1971)).

34. The *Cullipher* court concluded that because the contract did not include the prevailing wage specifications as required by the prevailing wage statute, the employees could not recover the prevailing wages. The court explained the purpose of the requirement "is two fold: (1) To inform the bidder/contractor of the wages he must pay his employees engaged in work on public contracts, and (2) to protect workman from working at rates below the prevailing wages in the locality." *Id.* at 164. The Texas court recognized that these provisions of the statute "are for the benefit of the bidder/contractor." *Id.*

35. More recently, a Massachusetts court reached the same conclusion under an analogous Massachusetts prevailing wage statute. *See McGrath, III v. ACT, Inc.*, No. 08-ADMS-40018, 2008 WL 5115057 at *1 (Mass. App. Div. Nov. 25, 2008).

36. In *McGrath, III*, an employee sued his private employer to recover prevailing wages for work performed at municipal buildings. *See id.* at *1. The contract between the employer and the government entity provided for "prevailing labor and material rates" but the uncontroverted evidence as to the intended meaning of the phrase was that it did not refer to prevailing wages required by state law. *See id.*

37. Like the case here, "[d]uring the relevant time, [the contractor] did not bid on any such work as a prevailing wage job, and none of [the contractor]'s municipal customers advised [the contractor] that [the Massachusetts prevailing wage statute] apply to [the contractor]'s work." *See id.* Like the instant case, "[a]s far as [the contractor] knew, none of its municipal customers had requested that any state agency determine the statutorily required wage for any job on which [the contractor] worked." *See id.*

38. Because the municipal government did not comply with the requirements of the prevailing wage statute, the Massachusetts appellate court upheld the trial court's grant of summary judgment in favor of the employer, finding that no prevailing wages were owed. *See id.* The Court made this finding even though it recognized that the work performed by the plaintiff fell within the ambit of the prevailing wage statute.

39. Here, neither the RFQ nor GSD Contract contain any statement that prevailing wage applied. Therefore, the Court will apply the "honest mistake or error" defense.

40. The Court also finds that the general reference in the GSD Contract that the "Seller shall comply with all Federal, State, and local laws, regulations and ordinances, including, but not limited to, the prevailing wage rates of the West Virginia Division of Labor" does not mandate that prevailing wages must be paid for work performed under the GSD Contract.

41. Courts that have considered similar language in contracts have held that this language does not mandate the application of prevailing wages. *See Foundation for Fair Contracting Ltd. v. N.J. State Dept. of Labor – Wage & Hour Compliance Div.*, 720 A.2d 619 (N.J. Super. 1998).

42. Like the West Virginia statute, New Jersey's prevailing wage statute requires all contracts subject to the prevailing-wage requirement to "stat[e] the prevailing wage rate which can be paid (as shall be designated by the commissioner) to the workers employed in the performance of the contract and the contract shall contain a stipulation that such workers shall be paid not less than such prevailing wage rate." *Id.* at 621 (citing N.J.S.A. 34:11-56.27). The contract at issue in *Foundation for Fair Contracting* included the following language: "comply with all applicable State, Federal and local laws, rules and regulations, whether because the Developer received the Balanced Housing Funds or otherwise, including but not limited to, any affirmative action and/or prevailing wage laws." *Id.* at 622. The court found that this language was not sufficient to create a responsibility to pay prevailing wages:

> We do not find that language determinative. First, it requires compliance with "applicable" laws; if the Act is not otherwise applicable, this provision does not make it so. Second, the express reference to "any ... prevailing wage laws," without citing the Act and stating it to be applicable, suggests only that the drafters required Circle F to comply with any applicable federal or state prevailing wage law.

Id. at 622.

43. The Court concludes the same here. The GSD Contract requires compliance with federal, state, and local laws; if the PWA is not otherwise applicable, then the "compliance" provision of the GSD Contract does not make it so. Second, the compliance provision also fails to cite the PWA by name or code provision as required by the plain language of the PWA. *See* W. Va. Code §§ 21-5A-3, 21-5A-6.

44. In addition to the fact that the RFQ and GSD Contract did not include the mandatory notice about prevailing wage rates, the Court also finds that it is uncontroverted that

Eastern Electric undertook specific due diligence to determine whether the prevailing wage rates were applicable prior to bidding on the contract.

45. The RFQ provides that questions regarding the GSD Contract or bid submission should be directed to Krista Ferrell with the State of West Virginia Purchasing Division. Michael Harlow, a member of Eastern Electric, has testified under oath by way of affidavit that he spoke to Ms. Ferrell on the phone and inquired as to whether prevailing wage rates were applicable to the project. Ms. Ferrell told Mr. Harlow that prevailing wage rates did not apply because the contract was a maintenance contract. Relying on the statement from the designated official with the State responsible for answering questions about the nature of the RFQ, Eastern Electric then submitted a bid on the project that did not include prevailing wage calculations.

46. Ms. Ferrell's representations about the prevailing wage were consistent with the lack of mandatory wage statements included in the RFQ or GSD Contract. According to Ms. Ferrell, the contract did not include mandatory prevailing wage language.

47. The Court also notes that the State officials responsible for administering the GSD Contract continued to represent for the life of the contract that prevailing wages did not apply. In December 2008, David Parsons, the Operations and Maintenance Manager for the State's General Services Division expressed that prevailing wage did not apply. Similarly, the Department of Administration's general counsel and other State officials expressed the same.

48. The Court finds that it was reasonable for Eastern Electric to rely on the representations made by the State as to the application of the prevailing wage. The PWA clearly intends for the public authority – in this case the State – to determine whether prevailing wages must be paid. Thus, Eastern Electric's reliance on the State's representations that prevailing

wage did not apply must show that any failure to pay prevailing wage rates if due was an honest mistake or error.

49. Accordingly, the "honest mistake or error" principle applies to this case. Therefore, it serves as a complete defense under the clear language of the PWA.

E. Application of Prevailing-Wage Rates Would Lead to an Absurd and Unfair Result.

50. The Court further finds that the "honest mistake or error" defense is further supported by the amount Eastern Electric bid on the project.

51. Because Eastern Electric was told that prevailing wage did not apply to the project, Eastern Electric submitted a bid in the amount of $50.00 per hour for a Master-level electrician and $45.00 per hour for a Journeyman-level electrician. At the time of the submission of bids, the prevailing wage rate (hourly rate and benefits) in Kanawha County was $42.17 per hour. This represents a difference of only $2.83 per hour between the applicable rate and the Journeyman rate.[3]

52. In addition to the $42.17 per hour prevailing wage rate, Eastern Electric would also incur other costs, including Social Security taxes, Medicare taxes, workers' compensation premiums, insurance premiums, federal unemployment taxes, and state unemployment taxes. Those costs are approximately $6.10 per hour per employee.

53. In addition, Eastern Electric incurred approximately $14.00 per hour in overhead costs.

54. Thus, to simply break even, Eastern Electric would have to bill at least $62.01 per hour. This does not even include making a profit.

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[3] The vast majority of the work performed under the Contract was performed by Journey-man level electricians and was billed at that rate.

55. Therefore, if prevailing wage applied, on average, Eastern Electric would lose more than $17.00 per hour per employee.

56. The fact that Eastern Electric submitted hourly bids lower than this rate demonstrates that it had a good faith and honest belief that prevailing wage was not applicable.

57. In addition, the Court finds that it would violate the public policy of West Virginia to not apply the "honest mistake or error" principle. It would lead to an unfair and absurd result if Eastern Electric were required to reimburse its employees wages that are above and beyond what the company received from the State of West Virginia for work performed on the GSD Contract.

58. When drafting the PWA, the Legislature included the "honest mistake or error" defense to prevent any such situation from occurring.

59. Therefore, the Court ORDERS that Plaintiffs' claim for violation of the Prevailing Wage Act be dismissed with prejudice.

F. Plaintiffs Cannot Recover Damages Under the WPCA.

60. Plaintiffs also seek to recover liquidated damages under the West Virginia Wage Payment & Collection Act ("WPCA") for damages they are allegedly owed under the PWA. The Court, however, finds that the PWA provides the exclusive remedy for any violation of the same inasmuch as it allows an employee to recover: (1) the difference between wages paid and the applicable prevailing wage rate; (2) an additional amount equal to the prevailing wages owed; and (3) attorney fees. *See* W. Va. Code § 21-5A-9(b).

61. Although the Supreme Court of Appeals has not addressed this issue, in analogous cases the Supreme Court of Appeals has held that damages that an employee can

recover under another statute do not constitute wages within the meaning of the WPCA, and therefore, the WPCA does not apply to allow recovery of additional damages.

62. In *Conrad v. Charles Town Races, Inc.*, 206 W. Va. 45, 521 S.E.2d 537 (1998), the Supreme Court of Appeals examined whether damages paid to employees pursuant to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109, constitute wages for purposes of the WPCA. The Supreme Court of Appeals concluded that back pay awarded under the WARN Act does not constitute wages for purposes of the WPCA. *See Conrad,* 206 W. Va. at 50, 521 S.E.2d at 542.

63. In a similar case, in *Taylor v. Mutual Mining, Inc.*, 209 W. Va. 32, 543 S.E.2d 313 (2000), the Supreme Court of Appeals affirmed that damages owed to employees for violations of other statutes do not constitute wages for purposes of the WPCA. In *Taylor*, the Court held that a Mine Safety and Health Administration award of back pay and benefits and an arbitrator's award of reinstatement plus back pay were awards of damages and were not wages within the meaning of the WPCA. *See id.* at 37, 543 S.E.2d at 318. Significantly, the *Taylor* Court also held that an award of graduated vacation pay did not constitute wages for purposes of the WPCA.

64. The clear import of the Supreme Court of Appeals' decisions in *Conrad* and *Taylor* is that damages awarded as a result of legal proceedings do not constitute "wages" for purposes of the WPCA. The Court finds that the same is true for damages awarded under the PWA. Therefore, the WPCA has no application to the facts of this case, and Plaintiffs cannot recover damages under the WPCA.

65. Therefore, the Court ORDERS that Plaintiffs' Wage Payment and Collection Act claim be dismissed with prejudice.

66. Accordingly, it is ORDERED that all claims against Eastern Electric, LLC are dismissed with prejudice.

The Court notes and preserves all parties' objections and exceptions to this Order.

The Clerk is hereby ORDERED to send a certified copy of this Order to counsel of record as follows:

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All of which is so ORDERED and DECREED.

ENTERED this 7th of Oct, 2013.

Judge Paul Zakaib, Jr.

Prepared by:

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7 DAY OF October 2013
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA