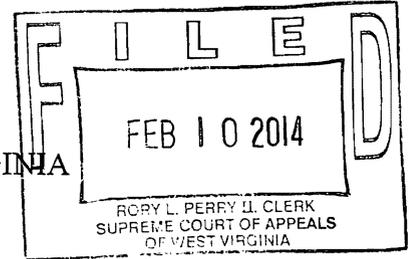


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Gregory Grim, *et al.* ,  
Petitioners,

v.

Docket No. 13-1133

Eastern Electric, LLC.,  
Respondents.

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PETITIONERS' INITIAL BRIEF

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## **Assignments of Error**

The Circuit Court of Kanawha County erred in its Order as follows:

1. *The Circuit Court erred in not applying this Court's numerous holdings regarding the review of motions for summary judgment, including but not limited to, not evaluating the facts presented by the Plaintiff/Petitioner in accordance with this Court's holdings regarding reviewing motions for summary judgment.*
2. *The Circuit erred in finding that the Petitioners' prevailing wage claims are barred by the statute of limitations;*
3. *The Circuit erred in finding that the prevailing wage law is the exclusive remedy for the Petitioners' claims.*
4. *The Circuit Court erred in finding that Respondent's failure to pay the prevailing wages was an "honest mistake or error".*
5. *The Circuit Court Erred in finding that the payment of prevailing wages to work at issue "would lead to an absurd and unfair result."*
6. *The Circuit Court Erred in finding that the Petitioners/Petitioners cannot recover damages under the Wage Payment and Collection Act.*

## **Statement of the Case**

In April, 2007, Respondent Eastern Electric, LLC (hereinafter "Eastern Electric or "Respondent") was awarded a contract (No. GSD076425) with the West Virginia Department of Administration for electrical construction work at various public state buildings – *including the West Virginia State Capital building and the West Virginia Governor's Mansion*. Work on this contract began in May of 2007, and with the renewal of the contract in 2008, continued through May of 2009.

Petitioners are all former employees of Respondent Eastern Electric who performed construction work as electricians for Respondent Eastern Electric pursuant to the contract with the Department of Administration at various times during the period 2007 to 2009. The work

performed by the Petitioners pursuant to the contract at issue was construction work as defined in the Wages for Construction of Public Improvements (“West Virginia Prevailing Wage Act” W. Va. Code at § 21-5A-1 *et seq.*) and the Wage Payment and Collection Act (W. Va. Code § 21-5-1 *et seq.*). Despite the clear application of the West Virginia Prevailing Wage Act, Respondent Eastern Electric failed to compensate the Petitioners at the applicable prevailing wage rate for work performed or in accordance with the Wage Payment and Collections Act.

On October 7, 2013, following a change in venue, the Circuit Court of Kanawha County granted the Respondent’s Motion for Summary Judgment. In doing so, the Circuit Court held that: the Petitioners’ prevailing wage claims are barred by the statute of limitations; that the prevailing wage law is the exclusive remedy for the Petitioners’ claims; that Respondent’s failure to pay the correct wages was a “honest mistake or error”; and that applying the payment of prevailing wages to work at issue “would lead to an absurd and unfair result.”

The Petitioners ask this Court to reverse the Court’s Order and remand this matter to the Circuit Court for further proceedings that are consistent with the laws of this State.

### **Summary of Argument**

The facts and the law in this matter are clear and uncontroverted:

- In April of 2007 Respondent was awarded a contract with the West Virginia Department of Administration, General Services Division (“GSD”) to provide electrical construction in various public state buildings in various locations in West Virginia.
- Each of the Petitioners worked for the Respondent for various times during the period at issue from 2007 to 2009.<sup>1</sup>

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<sup>1</sup> See A.R. 11 wherein Respondent admits Petitioners were so employed during varying periods of time between 2007 and 2009. Petitioners Grim and Crowder were employed by Respondent throughout the period 2007 through

- During that time the Petitioners performed electrical construction work under the Respondent's contract with the West Virginia Department of Administration in various public state buildings in various locations in West Virginia including the West Virginia State Capital Building and the West Virginia Governor's Mansion; and,
- During that time the Petitioners were not paid the prevailing wage for the electrical construction work they performed for the Respondent pursuant to the contract with the Department of Administration in various public state buildings in various locations in West Virginia.

It is uncontested that the electrical construction work performed by the Petitioners for the Respondent was construction work within the meaning of the West Virginia Prevailing Wage law. It is uncontested that the Respondent failed to pay the wages and fringe benefits due to the Petitioners by the Prevailing Wage law. The Circuit Court's decision holds that the Respondent is not required to pay Prevailing Wage due because of an honest mistake or error. The Circuit Court also finds that the Petitioners cannot pursue an action pursuant to the Wage Payment and Collection Act. The Petitioners argue that the Circuit Court erred in its holdings under these two important laws and failed to follow this Court's numerous holdings regarding the awarding of summary judgment decisions.

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2009; Petitioners Ratliff, Rhodes and Moore were employed by Respondent during 2007 and 2008 and part of 2009; Plaintiff Gray was employed by Respondent in part of 2008 and 2009. Plaintiff Bender was employed by Respondent for a period in 2009.

## **Standard of Review**

It has long been the law that a review of a circuit court's grant of a motion for summary judgment is de novo, applying the same standard as the circuit court. (*Powderidge Unit Owner's Ass'n v. Highland Properties, Ltd.* (474 S.E.2d 872,878 (1996))).

## **Statement Regarding Oral Argument**

Petitioners state that this matter should be set for oral argument in that the parties have not waived oral argument and the Petitioners' opposition to the Circuit Court's actions is not frivolous. Petitioners believe that oral argument will assist this Court in its decisional process. Petitioners believe that oral argument pursuant to Revised Rules of Appellate Procedure 20 is appropriate in that this matter involves issues of fundamental public importance, and inconsistencies or conflicts among the decisions of a lower tribunal.

## **Argument**

*The Prevailing Wage Law* — WV Code § 21-5A-1 *et seq.* provides that it is the policy and the practice of the State of West Virginia and its subdivisions<sup>2</sup> to ensure that a wage that is no less than the rate of wages for similar work in the locality is paid to all workers<sup>3</sup> engaged in the construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract of public improvements including public buildings.<sup>4</sup>

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<sup>2</sup> W.Va. Code § 21-5A-1(1) defines public authority as “any officer, board or commission or other agency of the state of West Virginia, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement, including any institution supported in whole or in part by public funds of the state of West Virginia or its political subdivisions, and this article shall apply to expenditures of such institutions made in whole or in part from such public funds.”

<sup>3</sup> The law of this State provides exceptions for persons hired by a public authority on a regular or temporary basis or engaged in temporary or emergency repairs. (W.Va. Code § 21-5A-1(7)) These exceptions do not apply to the instant matter.

<sup>4</sup> West Virginia Code § 21-5A-1(4) defines “public improvement” as “all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the state of West Virginia or any political subdivision thereof.”

As the West Virginia Supreme Court stated in *Affiliated Construction Trades Foundation v. The University of West Virginia Board of Trustees* (557 S.E.2d 863 (2001)):

“Like its federal counterpart<sup>5</sup>, the prevailing wage provisions found in West Virginia Code § 21-5A-1 to 11 (Repl.Vol. 1996 & Supp. 2001) were enacted for the purpose of protecting laborers engaged in the construction of public improvements from substandard wages by ensuring the payment, at a minimum, of the prevailing level of wages. Section two of our wage act announces the unmistakable policy of this State to secure the payment of the prevailing wage for construction performed on public improvements “by or on behalf of any public authority.” (*Id.* at 873)

There simply is no argument that the contract entered into between the Respondent and the West Virginia Department of Administration at issue in this proceeding was let for construction, reconstruction, improvement, enlargement, painting, decorating, or repair of public improvement including various public buildings – it was a contract to which the prevailing wage of this state applied.<sup>6</sup>

*The Law of Wage Payment and Collection* - West Virginia Code § 21-5-1 *et seq.* provides that every person doing business in this state shall “settle with its employees at least once in every two weeks, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services.” (West Virginia Code § 21-5-3)

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The West Virginia Code at § 21-5A-1(5) defines “construction industry” as “that industry which is composed of employees and employers engaged in construction of buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures or works whether private or public on which construction work as defined in subsection (2) of this section is performed.”

The West Virginia Code at § 21-5A-1(2) defines “construction” as follows: “The term ‘construction,’ as used in this article, shall mean any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term ‘construction’ shall not be construed to include temporary or emergency repairs.”

<sup>5</sup> The Court footnote at this point states, “see Davis-Bacon Act, 40 U.S.C § 276a to 276a-5 (1994)”.

<sup>6</sup> The statute further provides that any worker who is paid less than the prevailing wage “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.” (West Virginia Code § 21-5A-9(b)).

The law defines “wages” as follows:

§ 21-5-1(c) The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: **Provided**, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.

The law defines “wages due” as follows:

§ 21-5-1(i) The term "wages due" shall include at least all wages earned up to and including the fifth day immediately preceding the regular payday.

The law provides the following remedies for employees:

§21-5-4(e) If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he or she would have been entitled to had he or she rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition.

As this Court is aware, it has long held that the Wage Payment and Collection Act is, “remedial legislation designed to protect working people and to assist them in collection of compensation wrongly withheld” (citing *Mullins v. Venable*, 171 W.Va. 92, 94, 297 S.E.2d 866, 869 (1982)). In the instant matter compensation has wrongly been withheld and the Petitioners have sought the assistance of the Wage Payment and Collection Act in the collection of that compensation.

*The Law of Summary Judgment* - As this Court is well aware, the standard for granting Motions for Summary Judgment has been often stated by this Supreme Court of Appeals as, “A Motion for Summary Judgment should be granted only when it is clear that there is no genuine

issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law” Williams v. Precision Coil, Inc. 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) quoting Syllabus Point 1, Andrik v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992), quoting Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). In addition, this Court, in Alpine Property Owners Association, Inc. v. Mountaintop Development Company, et al., 179 W.Va.12, 17, 365 W.E.2d 57, 62, has also stated in this regard that,

In determining on review whether there is a genuine issue of material fact between the parties, this Court will construe that facts ‘in a light most favorable to the losing party,’ Masinter v. Webco Co., 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980) Because summary judgment forecloses trial on the merits, this Court does not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, Masinter, 164 W.Va. at 243, 262 S.E.2d at 436, or where factual development is necessary to clarify application of the law Lengyel v. Lint, 167 W.Va. 272, 281, 280 S.E.2d 66, 71 (1981)

In addition, the West Virginia Supreme Court of Appeals has held that “A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances.” Johnson v. Mays, 191 W.Va. 628, 630, 447 S.E.2d 563, 565 (1994) (quoting Aetna Cas. & Sur. Co. v. Federal Ins. Co. 148 W.Va. 160, 133 S.E.2d 770 (1963)).

Moreover, “If it appears that there is a genuine issue to be tried, the motion for summary judgment is denied and the case is allowed to proceed to trial in the usual way.” Employers’ Liab. Assurance Corp. v. Hartford Accident & Indem. Co., 151 W.Va. 1062, 1072, 158 S.E.2d 212, 218 (1967).

In 2001 this Court in Law vs. Monongahela Power Co., 210 W.Va. 549, 557-558, 558 S.E. 2d 349, 356 - 357 set out its standard for the granting of summary judgment as follows:

#### IV. Circuit Court Standard for Consideration of Summary Judgment Motion

In syllabus point three of Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E. 2d 770 (1963), this Court explained that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." In syllabus point three of Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, (1994), this Court explained as follows: "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." As this Court emphasized in Williams v. Precision Coil, Inc. 194 W.Va. 52, 459 S.E.2d 329, (1995), "[s]ummary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.'" Id. At 59, 459 S.E. 2d at 336 (quoting Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4<sup>th</sup> Cir. 1951)).

This Court has also emphasized that, "[i]n determining on review whether there is a genuine issue of material fact between the parties, this Court will construe the facts 'in a light most favorable to the losing party.'" Alpine Property Owners Association, Inc. v. Mountaintop Development Company, et al., 179 W.Va.12, 17, 365 S.E.2d 57, 62 (1987) (quoting Masinter v. Webco Co., 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980)).

The nonmoving party is entitled to "the benefit of all inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [.]'" Williams v. Precision Coil, Inc. 194 W.Va. 52, 59, 459 S.E.2d 329, 336, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Likewise, we have concluded that "[t]he inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the light most favorable to the party opposing the motion." Hanlon v. Chambers, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995). "On a motion for summary judgment, neither a trial nor appellate court can try issues of fact; a determination can only be made as to whether there are issues to be tried. To be specific, if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper." Id. at 105, 464 S.E.2d at 747.

As we observed in Armor v. Lantz, 207 W.Va. 672, 535 S.E.2d 737 (2000), "[c]ourts must strenuously avoid assuming the role of trier of fact in ruling on motions for summary judgment:" Id. at 677, 535 S.E.2d at 742 "[W]here varying inferences may be drawn from the same evidence, we must view the underlying facts in a light most favorable to the non-moving party." Id. at 677, 535 S.E.2d at 742.

This Court has also consistently held that summary judgment is only proper where there is no genuine issue of material fact and where the moving party is “entitled to judgment as a matter of law.” *Painter v. Peavy*, 451 S.E.2d 755, 758 (1994))<sup>7</sup>.

In the instant matter, as discussed below, the Circuit Court failed to comply with the standard that has been set by this Supreme Court of Appeals.

Assignment of Error Number 1: *The Circuit Court erred in not applying this Court’s numerous holdings regarding the review of motions for summary judgment, including but not limited to, not evaluating the facts presented by the Plaintiff/Petitioner in accordance with this Court’s holdings regarding reviewing motions for summary judgment.*

As discussed above this Court has been clear regarding the role of Circuit Courts in evaluating and deciding motions for summary judgment. A review of the cases cited herein hold the following:

- A motion for summary judgment should not be granted if there are genuine issues of fact for a jury and where inquiry into the facts is not desirable to clarify the application of the law;
- A motion for summary judgment should only be granted where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party;
- A Court must construe the facts in a light most favorable to the losing party;
- The opposing party is entitled to the benefit of all inferences and that all inferences must be viewed in the light most favorable to opposing party;

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<sup>7</sup> At Syl. Pt 4 of *Painter* this Court held that summary judgment is only appropriate where the record take as a whole could not leave a rational trier of fact to find for the nonmoving party.

- Neither the trial nor appellate Court can try or weigh issues of fact and that if there is any evidence in the record from any source where a reasonable inference can be drawn in favor of the opposing party summary judgment is not proper.
- A summary judgment is proper only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

In the instant matter the Circuit Court violated each and every one of these clear standards and erred in failing to apply this Court's numerous holdings. Briefly stated not only did the Circuit Court fail to review that facts and inferences, fail to review the record as a whole, fail to view the facts and the inferences in a light most favorable to the Petitioners, but in finding that both the prevailing wage and the wage payment and collection laws of West Virginia do not apply to the instant matter the Circuit Court failed to correctly apply the law of this State. The Respondent was not entitled to a judgment as a matter of law because the prevailing wage and wage payment collection laws do apply to the instant matter.

In reviewing the Circuit Court's Order it is important to review the facts in the record of this proceeding.

*The Work Performed by the Petitioners for the Respondent Under the Contract with the West Virginia Department of Administration was Electrical Construction Work.* The record of this proceeding illustrates that it is uncontroverted that the work performed was electrical construction, reconstruction, improvement, or repair of public buildings. There are many examples from the record that support this fact.

The Request for Quotation ("RFQ") is entitled, "Electrical Construction, Maintenance and Repair" (A.R. 46). The RFQ states that the GSD "is contracting to provide electrical construction, maintenance, and repair services to a variety of equipment housed in numerous

Department of Administration owned facilities located throughout West Virginia...” (A.R. 54) The RFQ defines construction as: “work associated with the addition, removal, or re-location of electrical circuits in accordance with NEC code requirements”, and defines repairs as: “repair work performed on an as required basis to correct a malfunction or failure in an electrical system. No construction, preventive maintenance, or repairs are to be performed without authorization by the Owner.” (*Id.*)

The Purchase Order (No. GSD076425) is entitled “Repairs, alterations, modifications & maintenance” and repeats the definitions of repairs and construction. (A.R. 61 hereto, hereinafter referred to as “Purchase Order” or “contract”) The Purchase Order states that the work will be as follows: “... limited repairs, alterations and modifications, and maintenance of department of administration owned facilities ...”

Throughout the term of the contract with the Department of Administration, Respondent did perform electrical construction work on a variety of projects at various state owned facilities in West Virginia. Each of the various projects was given to the Respondent on a purchase order or “work order”. Upon completion of a job or project, or partial completion, the lead electrician for Respondent, Plaintiff Gregory Grim, completed an Installation/Service Report, which was generally signed off on by the Department of Administration official in charge of that particular building or location. (A.R. 74-75) Upon completion, or partial completion, of a project, Respondent sent an invoice to the Department of Administration. Each invoice contained a brief description of the work performed, the number of work hours spent to perform the work, materials costs, etc.

The purchase orders, Respondent’s invoices forwarded for payment to the Department of Administration, as well as and the Installation/Service Reports prepared by Plaintiff Grim for the

Respondent repeatedly describe the work as demolishing existing wiring, lights and receptacles and installing new electrical cables, conduit, wiring, lights and receptacles. A representative selection of these documents are attached hereto as A.R. 117<sup>8</sup> and clearly illustrate the type of work performed by the Petitioners for the Respondent pursuant to the contract with the Department of Administration. For example:

Tax and Revenue Building - Installation/Service Report: "Installed new 12 space 125a power panel/new 3 pole 60a breaker to feed panel. Made electrical modifications to break and vending machine area per prints. Ran ¾" conduit set boxes and pulled wire. Made all modifications & new tie ins." Invoice amount: \$4,188.63. (A.R. 117-118)

Lot 98 - Installation/Service Report: "Installed new 200 amp meter base Disconnect and 200 amp GE panel for new 200 amp service. Reworked wiring to 100 amp disconnect for trailer [*sic*] when it arrives. Installed all new recepticals [*sic*] and switches in bldg. Installed new lights and cages on lights. Installed conduit wiring and recepticals for future garage door openers and drop cord plug in in ceiling. Reworked and pulled wiring to bathroom and installed GFI outlet. Checked all lights & recepticals using existing power at bldg." Invoice Amount: \$6,028.67. (A.R. 119-121)

Building 5 - Installation/Service Report: "Installed new 100 amp panel with 60 amp main breaker and 4 20 amp [breakers] Ran conduit from existing panel and installed 40 amp breaker to feed new panel and tied existing recept[acle] to new panel." Invoice amount: \$3,451.11. (A.R. 123-125)

Building 1 [Capitol], MB-12 - Installation/Service Report: "Removed old fixtures, installed new T5 HO fixtures w/new conduit and recept[acle] for all lights. Installed new conduit runs for existing fire alarm and recept[acle] ckts. Installed all new recept[acle] in room, new switches and all breakers conduit and wiring associated with new lights and recept[acle]. Demo old conduit and wiring/and old Cat 5 and coax cable." Invoice amount: \$7,253.40. (A.R. 126-128)

Building 21, Fairmont - Installation/Service Report: "Installed conduit & wiring and new GFI recept[acle] in elevator pit for sump pump. Installed conduit and wiring from panel on 5<sup>th</sup> floor to feed new roof vent fan. Traced out wiring and disconnected feed for roof flood light & demo all wiring and conduit (as per Dave Parsons)." Invoice amount: \$2,738.86. (A.R. 129-131)

Chiller Building to Lot 98 - Installation/Service Report: "Install Fiber optic from hub in Chiller Bldg. to trailer at lot 98 including 2" conduit from pole to trailer." Invoice amount: \$2,550.43. (A.R. 132-134)

Building 1, Main Capitol - Installation/Service Report: "Install conduit and wiring to new 125 amp 3 phase panel. Install 10 duplex recept[acles], 2 twistlock recept[acles] and all breakers, boxes and wiring associated with same. Rewired lighting and installed new

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<sup>8</sup> It should be noted that, although many of these documents, which were received from Respondent during the discovery process, are marked as "Confidential", the parties have agreed they are not, in fact, confidential documents, in that they are subject to release under the Freedom of Information Act.

switches to separate lites [*sic*] from adjacent room to EB90.” Invoice amount: \$5,033.77. (A.R. 135-137)

Fountain Area, Capitol Complex - Invoice: “...replace conduit and systems feeding pole lights in Fountain Area at Capitol Complex. Dates of Service: 11/21/07 – 2/12/08. Scope of work performed during this time period: Built both contactor panels, hung power panels and contactor panels, Ran conduit to east and west fountain areas.” Invoice amount: \$10,383.34. (A.R. 138)

Fountain Area, Capitol Complex - Invoice: “...replace conduit and systems feeding pole lights in Fountain Area at Capitol Complex. Dates of Service: 2/13/08 -5/2/08. Scope of work performed during this time: installed conduits for the 480v subpanel & for the main feed to the panels, installed conduits that run out of rooms to the exterior, most junction boxes have been set in place and conduits are stubbed up in the junction boxes.” Invoice amount: \$25,868.45. (A.R. 139)

Building 1 (Capitol) Press Room Hall - Invoice: “demo all conduit and wiring, demo all controllers and disconnects for old cooling unit, re-route all wiring for receptacles and install new lighting boxes and receptacles, and to nstall new wiring and switches for lights.” Invoice amount: \$4,052.33. (140-141)

House Clerk’s Office - Installation/Service Report: “Demo existing wire mold, boxes and wiring. Install new boxes wiring and recepticels [*sic*]. Install new Cat 5 drops. Install new lighting and switches. Install new breakers.” Invoice amount: \$44,690.26. (A.R. 142-144)

Building 74, 3<sup>rd</sup> floor - Installation/Service Report: “Demo existing romex cables. Install new conduit and wiring to all of 3<sup>rd</sup> floor. Install new lights and recepticles [*sic*]. Install new Motion sensor switches.” Invoice amount: “\$800.00. (A.R. 145-146)

Building 74, 1<sup>st</sup> floor - Installation/Service Report: “electrical rewire of the 1<sup>st</sup> floor” “Demo existing romex wiring. Install conduit and wiring new light fixtures and hew recept[acles] and switches. Demo existing maglocks and wiring.” Invoice amount \$67,209.56. (A.R. 147-148)

Building 74, 1<sup>st</sup> floor - Installation/Service Report: “demo and electrical renovations at Building 74, South Charleston, on the first floor.” “Demo existing romex cable. Install new conduit and wiring to all of 1<sup>st</sup> floor. Install new lights and recepticals [*sic*]. Install new motion sensor switches.” Invoice amount: \$31,755.52. (A.R. 149-151)

Building 74, 3<sup>rd</sup> floor - Installation/Service Report: “demo and electrical renovations at Building 74, South Charleston, on the 3<sup>rd</sup> floor.” “Demo existing romex cables. Install new conduit and wiring to all of 3<sup>rd</sup> floor. Install new lights and recepticals [*sic*]. Install new motion sensor switches.” Invoice amount: \$3,731.25. (A.R. 152-154)

Building 74, 2<sup>nd</sup> floor - Installation/Service Report: “demo and electrical renovations at Building 74, South Charleston, on the 2<sup>nd</sup> floor.” “Demo existing romex cables. Install new conduit and wiring to all of 2<sup>nd</sup> floor. Install new lights and recepticals [*sic*]. Install new motion sensor switches.” Invoice amount: \$61,585.43. (A.R. 155-156)

Building 74, 1<sup>st</sup> floor - Installation/Service Report: “Demo existing romex cables. Install new conduit and wiring to all of 1<sup>st</sup> floor. install new lights and recepticals [*sic*]. Install new motion sensor switches.” Invoice amount: \$14,871.43. (A.R. 157-158)

Building 74, 2<sup>nd</sup> floor - Installation/Service Report : “Demo existing romex cables. Install new conduit and wiring to all of 2<sup>nd</sup> floor. Install new lights and recepticals [*sic*]. Install new motion sensor switches.” Invoice amount: \$4,048.33. (A.R. 159-160)

Building 74, 3<sup>rd</sup> floor - Installation/Service Report: "Demo existing romex cables. Install new conduit and wiring to all of 3<sup>rd</sup> floor. Install new lights and recepticals [sic]. Install new motion sensor switches." Invoice amount: \$50,026.74. (A.R. 161-162)

Building 74, 3<sup>rd</sup> floor - Installation/Service Report: "Demo existing romex cables. Install new conduit and wiring to all of 3<sup>rd</sup> floor. Install new lights and recepticals [sic]. Install new motion sensor switches." Invoice amount: \$27,847.15. (A.R. 163-164)

Senate Chambers: "Installed 34 new floor recepticals[sic], replaced all existing recepticals. Cut channels in concrete for communications cables. Installed new wiring to each receptical." Invoice amount: \$11,397.71. (A.R. 165-167)

Building 1, MB-1 - Installation/Service Report: "Demo all existing electrical in MB-1. Install new conduit and wiring for lights and recepticals [sic]. Relocated sump pump controller and reinstalled recepticals [sic] for sump pumps." Invoice amount: \$11,104.06. (A.R. 168-170)

Building 1, EB-3 -Installation/Service Report: "Demo existing electrical circuits in room. Demo existing power panel. Install new power panel. Ran conduit and pulled new wiring for lighting and recepticals [sic] in room. Closed out job pending installation of ceiling and walls. Installed splice box for fire alarm." Invoice amount: \$11,479.87. (A.R. 171-172)

Building 18 - Installation/Service Report: "Installed new 300 amp service w/2 150 a[mp] disconnects and 2 150 amp power panels. Ran conduit and wire to tie existing [circuits] to new panels. Traced and identified existing ckts." Invoice amount: \$10,732.05. (A.R. 173-175)

Fountain Area, Capitol Complex - Installation/Service Report: "Installed underground conduit to all outer perimeter lights and cut sono tubes and prepared to pour concrete. Researched existing lighting." Invoice amount: \$39,018.79. (A.R. 176-178)

Tax and Revenue - Installation/Service Report: "Installed conduit wiring and breakers to relocate existing machines and install two additional machines. Installed conduit wiring and breakers, also researched all existing wiring and circuitry to relocate and rearrange cubicals on 2<sup>nd</sup> and 3<sup>rd</sup> floor. Assisted Charleston office in relocation of cubicals." Invoice amount: \$15,044.09. (A.R. 179-180)

Building 1 boiler room - Installation/Service Report: "Install new conduit, wiring, switches, breakers and lights in MB69. Also demo existing lighting." Invoice amount \$7,087.38. (A.R. 181-182)

In addition to the above-referenced documentary evidence of the duties that the Petitioners performed, in testimony in this proceeding the Petitioners consistently describe the work performed for Eastern Electric under the contract with the Department of Administrations as:

"We installed new wiring, new systems, electrical systems. We performed construction on various office spaces to remodel or improve the office spaces in a number of different state buildings throughout the state..." (A.R. 73-74)

“That job [State Building 74] was broken up into three separate work orders. The three separate work orders are for the three individual floors in the building. It was a three-story building. We went into the building, and we removed all of the existing wiring in the building, all the existing lighting in the building, and all of the existing receptacles and switches in the building, and we began – upon completion of that, we began the process of rewiring the building, installing new conduit, new wiring, new receptacles, new switches, and new lighting...” “We rewired the entire building, installed new wiring, conduit, lighting, receptacles, and switches on all three floors.” (A.R. 75-76)

Building 22, Tax and Revenue: “Again, we did the same thing. We installed a new panel, fed that panel – that sub-panel from an existing panel in the electric room. We ran conduit from the panel out to the areas where they were moving the vending machines to and where they were installing the new receptacles in the break area, and from that point we pulled new wire out to those junction boxes and installed MC cable from the junction boxes down to the new devices, the new receptacles.” (A.R. 82)

With regard to the Department of Environmental Protection Building Mr. Grim testified that “...they were installing new servers in their server room, which required power for each of those servers. We ran conduit above the drop ceiling from the panel into the server room to the back side of the servers, installed junction boxes above the ceiling, and installed conduit from the boxes down to the surface of the wall behind the racks or the servers and installed new receptacles; they were twist-lock receptacles for the new servers.” (A.R. 83)

“We ran new wiring from the power panels to the attic above the [Governor’s] press conference room. In order to get the new wiring into the walls, we had to cut a hole in the block wall above the attic, cut our new hole in the wall inside the press conference room where the receptacle is going to go. We had to take a piece of chain --- it’s a small jack chain; drop down through that block; and just by luck hit the hole where your new receptacle’s going to be, and pull the new wiring down the wall with that jack chain. We installed the new receptacles, which before the installation was complete, we had to do some concrete patchwork around the receptacles, the new receptacles...” (A.R. 87)

Regarding the Capitol fountain lighting project: “We actually replaced – dug new ditches from the main Capitol Building out to the light poles that were there, install new conduit from the building out to the light poles, and the existing system that the lights were being used – that they were being run on at that time was, I believe, a 120-volt system, and this is the project that Eastern [Electric] engineered a 480-volt system for the new lighting and we installed the new 480-volt system which had all new conduit out to the light poles, new wiring out to the light poles. Several underground junction boxes were needed for that, and we installed a new 480-volt contactor panel in the basement, in the electric room and we installed new transformers in the base of the lights that converted 480 to 120 for a new receptacle on each pole.” (A.R. 87)

“The House Chambers – they were looking for a new system to control the lighting in the House Chamber. They wanted to take it off of a manual control where someone actually had to go physically turn the lights on every day. This system allowed it to be operated from a computer, that a timer could be set for the lights in the House Chamber to come on at a certain time of day and go off at a certain time of day.... We installed the mini PLC, which was provided by Eastern Electric... which is basically a small computer of its own. That computer operated a lighting contactor which I installed in the electric room. I took the existing lighting circuits off of the switches they were on and put them into this lighting contactor, and the PLC

controlled the contactor ... I moved the wiring from the existing switches that they were controlled from and put them into the cabinet or the box that I put the contactor in.” (A.R. 90)

The testimony of the other Petitioners is consistent with Plaintiff Grim’s description of the work performed.

*Investigation by the West Virginia Division of Labor*– Beginning in approximately February of 2009, the West Virginia Division of Labor (hereinafter “the Division” or “WV DOL”) conducted an investigation regarding the failure of the Respondent to pay the prevailing wage to Petitioners and other employees of Respondent for electrical work then being done on State Building 74 in South Charleston, West Virginia. According to deposition testimony of Frank Jordan, WV DOL Investigator (A.R. 201 hereto, Jordan Deposition Transcript), as part of their investigation, the West Virginia Division of Labor utilizes the “Electrician” description for electrical construction work covered by the prevailing wage. The work falling within this occupational title of work description states:

This classification applies to workers who are performing the installation, assembly, construction, inspection, operation and repair of all electrical work within the property lines of any given property (manufacturing plants, commercial buildings, schools, hospitals, power plants and parking lots). . . The work falling within this occupational title of work description includes 1. Planning and layout of electrical systems that provide power and lighting in all structures. 2. Handling and moving of any electrical materials, equipment and apparatus on the job site where power equipment and rigging are required. 3. Burning, welding, brazing, bending, drilling and shaping of all copper, silver, aluminum, angle iron and brackets to be used in connection with the installation and erection of electrical wiring and equipment. 4. Measuring, cutting, bending, threading, assembling, forming and installing of all electrical raceways (conduit, wireways, cabletrays), using tools, such as hacksaw, pipe threader, power saw and conduit bender. 5. Installing wire in raceways (conduit, wireways, troughs, cableways). This wire may be service conductors, feeder wiring or branch circuit wiring. 6. Chasing and channeling necessary to complete any electrical work, including the fabrication and installation of duct banks and manholes incidental to electrical, electronic, data, fiber optic and telecommunication installation. 7. Splicing wires by stripping insulation from terminal leads with knife and pliers, twisting or soldering wires together and applying tape or terminal caps. 8. Installing and modifying of lighting fixtures. This includes athletic field lighting when installed on stadium structures or supports other than wooden poles or both; Installing and modifying of all electrical/fiber optic equipment (AC / DC motors, variable frequency drives, transformers, reactors, capacitors, motor

generators, emergency generators, UPS equipment, data processing systems and annunciator systems where sound is not a part thereof). 9. Installing raceway systems utilizing conduit, conduit bodies, junction boxes and device boxes for switches and receptacles. This may also include wiring systems utilizing other methods and materials approved by the NEC (National Electrical Code). 10. Installation of main service equipment, distribution panels, subpanels, branch circuit panels, motor starter, disconnect switches and all other related items. 11. Installing wiring of instrumentation and control devices as they pertain to heating, ventilating, air conditioning (HVAC) temperature control, energy management systems, building automatism systems, and electrically or fiber optic operated fire/smoke detection systems where other building functions are controlled. 12. Installing conduit and other raceway longer than ten feet when used for the following: Fire alarm systems, security systems, sound systems, closed circuit television systems or cable television systems, or any system requiring mechanical protection or metallic shielding (telephone systems). 13. Testing continuity of circuits to insure electrical compatibility and safety of components. This includes installation, inspection and testing of all grounding systems including those systems designed for lighting protection. 14. Removing electrical systems, fixtures, conduit, wiring, equipment, equipment supports or materials involving in the transmission and distribution of electricity within the parameters of the building property line if reuse of any of the existing electrical system is required. This may include the demotion, removal and disposal of the electrical system. (A.R. 212-213)

The testimony in this matter of Gregory Grim is that the work performed by the Petitioners for the Respondent pursuant to the contract with the Department of Administration conformed with the Division's description. (A.R. 100-101)

The Division also testified that the Petitioners performed this type of work for Eastern Electric under the contract with the Department of Administration. When asked by counsel for Respondent if the work performed by Petitioners was construction work, Jordan testified "Under definition of an electrician classification for prevailing wage, everything they were doing is described under that definition." (A.R. 198-199)

In fact, as discussed below, while the Division's Investigation was not brought to hearing due to the backlog of similar matters, the Division concluded that the work performed by the Petitioners was covered by the West Virginia Prevailing Wage statute. (A.R. 215)

As noted above, the law states that the prevailing wage applies to construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public

improvement let to contract. It simply is impossible to find that the work performed by the Petitioners for the Respondent pursuant to the contract with the Department of Administration was not covered by that law. Yet the Circuit Court found that the prevailing law did not apply and the Respondent was entitled to a judgment as a matter of law.

*The Contract with the Department of Administration is covered by the Prevailing Wage Law* - Again, the record has example after example of clear language making it obvious that the laws of West Virginia and the prevailing wage law apply to the contract at issue.<sup>9</sup>

For example, *on the back of every page* of the RFQ is a statement that says, “The laws of the State of West Virginia and the Legislative Rules of the Purchasing Division shall govern all rights and duties under the Contract, including without limitation the validity of this Purchase Order/Contract.”<sup>10</sup> (A.R. 47)

The record is also clear that the *back of every page of the Purchase Order/Contract* (A.R. 62)<sup>11</sup> at issue in this matter states that not only do the laws of West Virginia apply, in language that parallels the RFQ, but in addition states:

4. **COMPLIANCE:** Seller shall comply with all Federal, State and local laws regulations and ordinances including, but not limited to, the prevailing wage rates of the WV Division of Labor. (Emphasis original)

Of course, not only do the material documents in this matter state that the laws of this State – including the prevailing wage law – apply to the Respondent’s contract with the Department of Administration, but as discussed above, the work actually performed clearly is

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<sup>9</sup> Even if the contract did not specifically state that payment of the prevailing wage was required, which it does, the nature of the work itself and the fact that the work was performed on public buildings for a public entity, would make it obvious that the Prevailing Wage Act applied to the work at issue.

<sup>10</sup> Exhibit 1 does not include repeated reproduction of the repetitious back page. See deposition transcript of Krista Ferrell, Buyer Supervisor for the Purchasing Division of the Department of Administration. (A.R. 236)

<sup>11</sup>. See deposition transcript of Krista Ferrell. (A.R. 245-246)

covered by the definition of this State's prevailing wage law. In fact, it is the work itself that controls whether or not the prevailing wage is required to be paid.

If the work performed falls within work covered by the prevailing wage law, then the contract is covered by the prevailing wage law – without regard to what an employee of GSD (General Services Division) might have opined.<sup>12</sup> The only exceptions to the law are when employees are hired “by the public authority on a regular or temporary basis or [persons] engaged in making temporary or emergency repairs.” (*W. Va. Code* § 21-5A-1(7)) Neither exception is applicable to the instant matter.

The West Virginia Division of Labor found, after a review of the work performed for the Respondent on just one state building (Building 74) by the Petitioners and others pursuant to the contract with the Department of Administration, that the Respondent Eastern Electric failed to pay the required prevailing wage for the work stating, “The results of that investigation are reflected in the enclosed audit, which finds that they [employees of the Respondent including the Petitioners] are owed prevailing wages in the amount of \$135,330.63.” (A.R. 215)

Simply put there is nothing in the record to support anything other than that the work performed by the Petitioners was subject to both the West Virginia Prevailing Wage Act (*West Virginia Code* at § 21-5A-1 *et seq.*) and the Wage Payment and Collection Act (*West Virginia Code* § 21-5-1 *et seq.*).

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<sup>12</sup> In his deposition in this matter, David Parsons, Operations and Maintenance Manager of the General Services Division, testified that he did tell Respondent's business manager, Kristin Moores, in an email that prevailing wage didn't apply to the contract because it was for maintenance work. However, Mr. Parsons further testified that he consulted no one in making this comment to Ms. Moores, and only based his response on “general feeling and the practice.” (A.R. 264) However, as Mr. Parsons also testified, he was not responsible or making a determination regarding payment of prevailing wages on contracts. (A.R. 261) The Circuit Court however, ignored this testimony and rather merely stated that Mr. Parsons indicated in an email that prevailing wage rates do not apply to the work at issue. (A.R. 1411). The Circuit Court erred in this regard by violating this Court's holding for consideration of motions for summary judgment including taking the record as a whole, not weighing issues of fact and not construing the facts in the light most favorable to the opposing party.

In the instant matter, however the Circuit Court weighed facts (as discussed below), failed to view the facts in a light most favorable to the Petitioners (as discussed below) and by holding that the prevailing wage and wage payment and collection laws do not apply to the instant matter (discussed below) erred in holding that the Respondent was entitled to a summary judgment as a matter of law.

*Assignment of Error Number 2 - The Circuit erred in finding that the Petitioners' prevailing wage claims are barred by the statute of limitations;*

Beginning at Conclusions of Law B, the Circuit Court states that the West Virginia Wages for Construction of Public Improvements Act, frequently known as the Prevailing Wage Act does not include a specific statute of limitations. "Accordingly", according to the Circuit Court, because no limitation is otherwise provided, either the one-year or two-year statute of limitations must apply under West Virginia law." (A.R. 1413-1414) The Circuit Court is incorrect.

The Court the looks to West Virginia Code § 55-2-12, and no case law whatsoever, in support of its holding that civil actions for recovery of the prevailing wage must be brought within one or two years. As this Court is aware West Virginia Code § 55-2-12 provides 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.

In looking to this statute the Circuit Court ignores the clear language of West Virginia Code § 55-2-12 which applies to personal actions regarding damages to property, personal

injuries actions in situations where “in case party die, it could not have been brought at common law by or against his personal representatives.” None of these provisions are applicable to the instant matter. This Court in citing West Virginia Code § 55-2-12 notes that it is a statute of limitations for tort actions, “In West Virginia, tort actions must be brought within a maximum of two years of the time they accrue. W.Va.Code § 55-2-12 (1981 Replacement Vol.)” (*Sewell v. Gregory*, 371 S.E.2d 82, 84, 179 W.Va. 585, 587 (W.Va., 1988)) The instant action is not a tort action.

In coming to its conclusion that the provisions of West Virginia Code § 55-2-12 apply to the instant matter, the Circuit Court misconstrues and ignores the clear language of West Virginia Legislative Rule C.S.R § 42-7-3.1(g)(5) which establishes a three-year statute of limitations for prevailing wage cases stating, “The limitation to such civil action by the workman is a period of three (3) years and venue of such action shall be in the county where the work is performed.” The Circuit Court rather found that this clear regulatory statement was an “oblique reference to a statute of limitations” and that the WV DOL “must be more explicit if it is to trump the well-recognized rule that either the 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.” (A.R. 1415). The Circuit Court again cites no law whatsoever in support of these Conclusions of Law.

In making these holdings, the Circuit Court ignored this Court’s long-standing holdings regarding the weight given to the interpretations of statutes by bodies charged with their administration. As this Court held in *Hardy County v. West Virginia Division of Labor*, (445 S.E.2d 192, 191 W.Va. 251 (1994) at Syllabus Point 2”

" 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syllabus Point 4, *Security National Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, W.Va. , 277 S.E.2d 613 (1981), appeal

dismissed, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 [ (1982) ]." Syl. Pt. 1, Dillon v. Bd. of Educ., 171 W.Va. 631, 301 S.E.2d 588 (1983).

In the instant matter the Circuit Court simply failed to provide the Division of Labor the great weight its interpretation of the prevailing wage statute that it clearly deserved.

Let us also be clear that the law of this State is very clear that the statute of limitations for bringing actions under the WV Wage Payment and Collection Act, as the Petitioners have done here, is five years. (*Goodwin v. Willard*. 185 W.Va. 321, (1991)) The Petitioners' claims in the instant matter allege violation of the the Wage Payment and Collection Act are therefore all timely and the statute of limitations holdings of the Circuit Court must fail.

*Assignment of Error Number 3 - The Circuit erred in finding that the prevailing wage law is the exclusive remedy for the Petitioners' claims.*

At Conclusion of Law C (A.R. 1415), the Circuit Court held, that prevailing wage law at West Virginia Code § 21-5A -9 provides the exclusive remedy for violations of the prevailing wage law. The short section C provides no further discussion or citation of any law whatsoever regarding this holding. Rather the Court seems to begin its discussion regarding the alleged honest mistake or error (see Assignment of Error 4 below). The Circuit Court cites to no supporting law in West Virginia in support of its assertion because there is no supporting law in West Virginia. The Circuit Court's naked assertion effectively bars the Petitioners' rights to assert claims pursuant to the West Virginia Wage Payment and Collections Act, is an error and must be reversed.

*Assignment of Error Number 4 - The Circuit Court erred in finding that Respondent's failure to pay the prevailing wages was an "honest mistake or error".*

The Circuit Court finding that the Respondent's failure to pay prevailing wages on construction work on public building such as the Capital Building of West Virginia and the

Governor's Mansion was an honest mistake or error is inconsistent with the facts of this case and the law of this state. The Circuit Court holding that alleged honest mistake or error was based on its findings that the contract at issue does not contain any of alleged "required" or "mandatory" regarding the applicability of prevailing wage. (A.R. 1420) In addition the Circuit Court found that neither the contract at issue nor the RFQ contained "any statement that prevailing wage applied" and that the contract provided only a "general reference" to the application of the prevailing wage (A.R. 1422) The Circuit Court's holdings are a variance with the facts.

These findings are particularly troubling and in error given that the fact that the work at issue was construction work within the meaning of the West Virginia Prevailing Wage law was not contested, that the Respondent's paid its employees prevailing wages for performing the same or similar work on other public construction projects and that the back of every page of the Purchase Order/Contract at issue in this matter states that not only do the laws of West Virginia apply but that the Respondent must comply with the laws of this State and the United States including but not limited to the prevailing wage law:

4. **COMPLIANCE:** Seller shall comply with all Federal, State and local laws regulations and ordinances including, but not limited to, the prevailing wage rates of the WV Division of Labor. (Emphasis original)

The Circuit Courts holdings which for a key foundation of its Decision in this matter are inconsistent with the facts and are not in compliance with this Court's holdings regarding a Circuit Court's consideration of a motion for summary judgment. The Circuit Court's Order therefore must be reversed.

*Good Faith Mistake* – In upholding the Respondents failure to pay the Petitioners the appropriate prevailing wage for the work performed on the contract in question, the Circuit Court relied on a defense of mistake regarding coverage of the Prevailing Wage Act. However, when

one looks at the facts in the record of this proceeding, it is impossible to support the holding that an honest mistake was made by the Respondent regarding coverage of the Prevailing Wage Act. This is particularly true given the fact that the record in this proceeding finds that is uncontroverted that the Respondent paid its employees – including some of these Petitioners – prevailing wages on other public funded jobs for undertaking the same work the Petitioners undertook pursuant to the contract at issue. Time and again the testimony and evidence in this matter shows that the Respondent paid its employees the prevailing wage rate for work on other government projects. For example, Petitioner Gregory Grim testified (A.R.103-104) that his weekly time sheets for the period April 23, 2007 through May 10, 2007 (A.R. 282), indicate that he worked several days on a project referred to as “WSSFD” for which he was paid the prevailing wage. WSSFD is the White Sulphur Springs Fire Department, a public entity, and the work performed consisted of running conduit, pulling wire and installing lighting and receptacles – the same type of work he performed for Eastern Electric under the state contract at issue. Mr. Grim also testified that he worked on other jobs for the Respondent for which he received the prevailing wage, including the Summerville Municipal Building and a high school in Princeton, West Virginia. Similarly, records indicate that Plaintiff Eric Crowder also performed work for Eastern Electric, including Sherwood Lake, Summersville Fire Department, and Elkins Middle School, for which he was paid the prevailing wage. (A.R. 286)

Therefore, given that the record reflects that the Respondent knew that it was obligated to pay the prevailing wage rate for other public work – work that was consistent with the type of work performed pursuant to the contract at issue – and, in fact did pay the prevailing wage rate for this other work prior to, during and after the contract at issue, it is impossible to see how the

Circuit Court could find in granting a motion for summary judgment that there is no genuine issue of fact for a jury as to whether the Respondent knew what the work at issue was prevailing wage work.

Simply stated the Respondent knew what prevailing wage work was – performed some prevailing wage work even the day before the work started on the contract with the GSD – and knew that the work performed under the contract at issue was the same type of work. In addition, the requirement that the Respondent comply with the prevailing wage statute was printed on the back of every page of the Purchase Order Agreement at issue. If the Circuit Court’s holding were to be successful in arguing that a good faith mistake somehow blocked the application of the law in these circumstances – including work on the West Virginia Capital Building - then the prevailing wage law would have no meaning.

In support of the its holding argument regarding mistakes, the Circuit Court cites a Massachusetts District Court Opinion in *McGrath, III v. ACT, Inc.* (No. 08-ADMS-400018, Nov. 25, 2008) While the Opinion does not discuss the issue of mistakes, it does discuss the issue of whether an individual was due the Massachusetts prevailing wage. In *McGrath, III* there was a dispute as to the meaning of language regarding “prevailing labor and material rates” contained in a series of contracts. However, the Plaintiff failed to invoke Mass. Rules of Civil Procedure Rule 56(f) which would have permitted discovery on that issue prior to the consideration of a motion for summary judgment. Without the benefit of the facts uncovered during additional discovery at issue it is impossible to determine how the Massachusetts Court would have ruled. The Massachusetts Opinion is therefore of little or no value in the instant matter. This is particularly true given the undisputed facts in the instant matter that the Petitioners undertook identical work for the Respondent on other public projects and were paid the prevailing wage for their efforts. In addition, the West Virginia Supreme Court in *Themeworks v. West Virginia*

*Department of Labor* (No. 11-0884 June 8, 2012) discussed below stated that it looked to violations of the statute and not the contract in a situation regarding the failure to pay prevailing wages for prevailing wage work.

*The “Requirement” Of Particular Language* – As discussed herein the Circuit Court held that the prevailing wage law did not apply to the instant matter because the contract failed to include certain required or mandatory language. (A.R. 1420) If the Circuit Court is correct in its assertion that prevailing wage only applies when the public authority utilizes some purported mandatory language, then all a public authority would have to do to undercut the prevailing wage law would be to not include the language or the posting requirement. Such an outcome would be a perversion of the law.

In this regard, the Circuit Court cites *Universities Research Association, Inc. v. Coutu* (450 U.S. 754 (1981)) in support of the proposition that the failure of a public authority to include prevailing wage rates in the contract is sufficient justification for the employer not to pay the prevailing wage. (A.R. 1420) Of course, the United States Supreme Court said no such thing. The U. S. Supreme Court in *Coutu* was addressing the question of whether the federal Davis-Bacon Act included private right of action. In reviewing this question the Supreme Court noted that the contract at issue in *Coutu* included provisions that required the contract to be modified if Davis-Bacon Act work was undertaken. Further, the Supreme Court found that the contract had been “administratively” determined to call for Davis-Bacon work. In the instant matter the contract itself includes the statement that the contract is covered, the work that was performed under the contract is construction work as defined by the prevailing wage law, and the WV Division of Labor has found that prevailing wages should have been paid.<sup>13</sup>

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<sup>13</sup> The Circuit Court also looks to a 1978 Court of Civil Appeal of Texarkana, Texas case. (*Cullipher v. Weatherby-Godbe Construction Co.*, 570 S.W.2d 161 (1978)) In that case, the Texas Court upheld a lower court which held

This Supreme Court of Appeals should note that it issued a Memorandum Decision in *Themeworks v. West Virginia Department of Labor* (No. 11-0884 June 8, 2012) that addresses an analogous situation. In *Themeworks*, the West Virginia Supreme Court was presented a petition by a subcontractor (Themeworks) whose employees performed research, fabrication and installation of historical exhibits in the new State Museum. The state had contracted with Design and Production, Inc. (D&P) for the work on the Museum and had included a provision stating that the work was subject to the prevailing wage. In turn, D&P subcontracted some of the work to Themeworks and included a “flow down” provision stating that the terms and conditions of its contract with the State flowed to Themeworks including the prevailing wage.

Themeworks did not pay its employees the prevailing wage arguing that the work was not construction and that it was not contractually obligated to pay the prevailing wage, in part, because D&P had not put them on notice of its requirement to pay prevailing wage rates for the work. The Court rejected the contractual argument and rather looked to the violation of the statute; “However, the ultimate conclusion of the Commissioner and the circuit court was that Themeworks violated the Act, not that Themeworks breached a contract. Accordingly we find no error.” (Themeworks Decision at p. 4) Similarly, in the instant matter the Respondent violated the law which cannot be overridden by an interpretation of the contract.

Moreover, many courts have held that prevailing wages must be paid to workers performing work on a public improvement project regardless of whether the public contract contained such a requirement. In *Ohio Asphalt Paving v. Ohio Dep't of Indus. Relations*, 63

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that “no one but the public body issuing the contract could determine the prevailing wage rate for the locality” and that the employee “must show that a generally prevailing wage rate had been determined by the public body issuing the contract.” (*Id.*, 164). Of course, under the law of West Virginia it is the Division of Labor that determines the prevailing wage rate, not the entity issuing the contract. Additionally, in the instant matter the Division of Labor has determined that the prevailing wage rate does apply to the work at issue. Finally, the purchase order itself indicates that the contract shall comply with the prevailing wage statute. The thirty year old Texas case has no lessons for this Court.

Ohio St. 3d 512 (Ohio 1992), the Ohio Court held that an employer can be liable for failure to pay prevailing wages even though the prevailing wage rate was not promulgated in the contract with the government entity, stating:

As we read them, the prevailing wage provisions and supporting precedent unmistakably require a contractor to pay its employees the prevailing wage on all public improvement contracts covered by R.C. Chapter 4115. Simply because the public authority failed in its duty to fix the prevailing wage rates within the contracts in issue does not mean that the contractor is excused from its statutory duty of ensuring compliance. In our view, a contrary holding would undercut the express provisions of R.C. Chapter 4115 as well as prior Ohio case law that requires contractors to strictly comply with the prevailing wage provisions.

*Id.* at 517 (followed by *Bowland v. Esprit Contrs., Inc.*, 2000 Ohio App. LEXIS 3383 at\*4 (Ohio Ct. App., Cuyahoga County July 27, 2000)).

Following suit, the California Court in *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976, 987 (Cal. 1992) observed that:

[B]oth the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.

Petitioners respectfully submit that this Court should follow these holdings and reject the Circuit Court's finding that prevailing wage rates do not apply because the critical documents at issue did not in some way include some required or mandatory exact wording. The fact is that the key documents contained clear language that Respondent must comply with all laws, "including but not limited to the prevailing wage rates of the WV Division of Labor." To uphold

the Circuit Court's holdings that the language itself was insufficient, that the work itself is not what controls or that the Respondent was somehow – despite its work history and the words of the key documents – would be to undercut the prevailing wage law of this State. The Circuit Court's holdings are in error and must be overturned.

Finally, this Court should note, regarding the issue of the alleged mistake by the Respondent, that such a fact is clearly a material fact that belongs with jury and not to be weighed by the Circuit Court while considering a motion for summary judgment. The Circuit Court was in error in granting the Respondent's Motion for Summary Judgment by deciding this material fact that is at issue in this proceeding and therefore the Circuit Court's holdings must be overturned.

*Assignment of Error Number 5 - The Circuit Court Erred in finding that the payment of prevailing wages to work at issue "would lead to an absurd and unfair result."*

At Conclusions of Law E (A.R. 1425) the Circuit Court found that application of prevailing wages on construction work on public building such as the Capital Building of West Virginia and the Governor's Mansion would lead to an absurd and unfair result for the Respondent. The Circuit Court then essentially argues that Respondent would lose money if the Respondent was required to comply with the law. The Circuit Court held that the fact Respondent submitted a low bid in some unexplained manner "demonstrates that it had a good faith and honest belief prevailing wage was not applicable." (A.R. 1426)

Let us be clear there is nothing in the record to support such a finding. In fact, the record clearly shows that the Respondent knew (as discussed above) that work such as this on public projects was covered by the prevailing wage. This effort by the Circuit Court to value the lost

profit of the Respondent over the lost wages – set by statute – of the workers is not supported by the law of West Virginia.

It is also worth noting that the Circuit Court has once again failed to follow this Court’s holdings regarding consideration of motions for summary judgment. The Circuit Court is once again weighing facts and failing to provide the Petitioners the benefit of all inferences that can be drawn from the evidence in the record – in this case the inference that the Respondent by submitting a low bid was attempting to obtain work by undercutting other bidders and shifting the losses onto the workers. The Circuit Court’s actions constitute an error and must therefore be reversed.

*Assignment of Error Number 6 - The Circuit Court Erred in finding that the Petitioners/Petitioners cannot recover damages under the Wage Payment and Collection Act.*

The Circuit Court found that the Petitioners could not recover “damages” pursuant to the West Virginia Wage Payment and Collection Act (West Virginia Code § 21-5-1 *et seq.*) and therefore Ordered the Petitioners’ Wage Payment and Collections Act claim to be dismissed. (A.R. 1426-1427). The Circuit Court, in looking to *Conrad v. Charles Town Races, Inc.* (521 S.E.2d 537, 206 W.Va. 45 (1999)) and *Taylor v. Mutual Mining, Inc.* 543, S.E.2d 313, 209 W.Va. 32 (2000)), states 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 the Petitioners cannot recover damages under the WPCA.” (A.R. 1427). The Circuit Court is incorrect.

In making its holding regarding the alleged inapplicability the Wage Payment and Collections Act, the Court misstates the clear holding of *Conrad* and *Taylor* in that the damages

at issue in those two cases were not amounts awarded for “labor or services rendered” and therefore were not “wages” under the Wage Payment and Collection Act. Rather, the amounts in *Conrad* and *Taylor* were a “form of damages for violation of the collective bargaining agreement” and amounted to a “form of damages” that did not qualify as ‘wages’ under the Act.” (Taylor, 318). In the instant matter, the Petitioners’ have brought this civil action in an effort to recover wages due for time actually worked for the Respondent.

The Circuit Court’s findings were clear error because there is no doubt that the WPCA has been violated and is applicable to this matter. The statute provides that every person doing business in this State shall “settle with its employees at least once in every two weeks, unless otherwise provided by special agreement, and pay them the *wages due*<sup>14</sup>, less authorized deductions and authorized wage assignments, for their work or services.” See W. Va. Code § 21-5-3. {emphasis added} Employees asserting violations of the WPCA are provided with the following remedies:

If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he or she would have been entitled to had he or she rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition.

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<sup>14</sup> The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, that nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article. W.Va. Code § 21-5-1(c).

The term "wages due" shall include at least all wages earned up to and including the fifth day immediately preceding the regular payday. W. Va. Code § 21-5-1(i).

W.Va. Code §21-5-4(e).<sup>15</sup>

In the instant matter, the Respondent failed to pay the Petitioners the wages due for labor or services rendered and the Petitioners have brought a civil action to recover such wages - the WPCA therefore applies.

The WPCA establishes a broad private right of action, and it does so in a manner that clearly rejects the trial court's finding that the Petitioners cannot maintain an action under the WPCA. West Virginia Code § 21-5-12 (a) states in relevant part, "*Any person* whose wages have not been paid in accordance with this article...may bring *any legal action* necessary to collect a claim under this article." Here, it is uncontested that the Respondent failed to pay Petitioners prevailing wages, thus, Petitioners have brought a legal action to collect under the WPCA. To deny Petitioners their private right of action and to permit the Respondent to absolve itself from any liability because it simply refused to pay the correct wages would truly be an injustice and in direct contradiction of the laws of this State.

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<sup>15</sup> The remainder of the section in place at the relevant time period is as follows:

**§21-5-4. Cash orders; employees separated from payroll before paydays.**

(a) In lieu of lawful money of the United States, any person, firm or corporation may compensate employees for services by cash order which may include checks or money orders on banks convenient to the place of employment where suitable arrangements have been made for the cashing of such checks by employees for the full amount of wages.

(b) Whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.

(c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

Petitioners allege violations of Wage Payment and Collection Act including this section.

To the extent the Circuit Court is holding that a governmental action like the prevailing wage law cannot form the basis for the wages due under the Wage Payment and Collection Act there is no support law in West Virginia for the Circuit Court's position. The Petitioners further note that this Court has held that an individual can pursue a grievance and civil court appeal for unpaid wages based on a County Adopted monthly wage scale as well as a civil action for violations of the Wage Payment and Collection Act based on that same County's monthly wage scale and its longevity allowance. (*Lipscomb v. Tucker County Commission* 475 S.E.2d 84, 197 W.Va. 84 (1999)).

### **Conclusion**

The record is clear that for every hour worked by the Petitioners<sup>16</sup> they were due the prevailing wage rate applicable under the Prevailing Wage Act of West Virginia. The record is also clear that the Petitioners were paid significantly less than the prevailing wage rate for each such hour.<sup>17</sup> Petitioners expert, Dr. Clifford B. Hawley has undertaken the calculations required to determine what each Petitioner would have made if they were paid the correct wage. (A.R. 1054 and later supplemental report). The amount of wages due to the Petitioners is significant.

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<sup>16</sup> Petitioners' pay records and weekly time sheets respectively are provided herewith as follows: Gregory Grim, A.R. 314 and 370; Eric Crowder, A.R. 483 and 539; Jeffrey Ratliff, A.R. 652 and 686; Gary Rhodes, A.R. 761 and 794; Brian Moore, A.R. 851 and 887; Jamie Gray, A.R. 960 and 983; and, Robert Bender, A.R. 1025 and 1031. (Petitioners have redacted home addresses from payroll records)

<sup>17</sup> Petitioners were paid between \$12.00 and \$17.00 per hour for the work in question (see A.R. 314 through 1031), while the hourly prevailing wage rates for the periods at issue ranged between \$29.38 in 2007 to \$30.45 in 2008 and 2009, excluding fringe benefits. The West Virginia prevailing wage rates add an additional amount to be paid for fringe benefits ranging from \$12.79 per hour in 2007, to \$12.74 in 2008 and \$13.82 in 2009. The Petitioners in this matter have testified that they received few if any fringe benefits during their employment with the Respondent and did not receive health benefits from the Respondent. (A.R. 101-102) A.R. 1051 hereto contains relevant hourly prevailing wage and fringe benefit rates as established by the West Virginia Division of Labor for the Electrician classification for Kanawha County (where the vast majority of work was performed) and which are available on the West Virginia Secretary of State website at: <http://www.sos.wv.gov/administrative-law/wagerates/Pages/HistoricalWageRates.aspx>

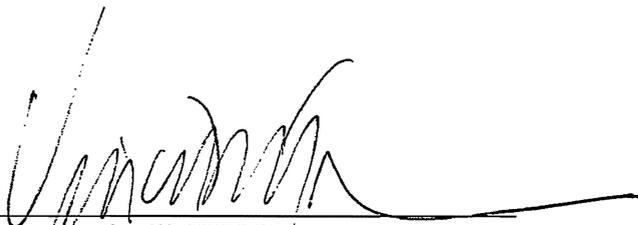
The Circuit Court in the instant matter, as detailed above, has issued an Order that prevents the Petitioners from accessing the Courts of West Virginia to recover their lost wages. The Circuit Court in the instant matter has not only committed numerous errors that should cause this Court to reverse the Circuit Court's actions, but the Circuit Court has held that it would be "unfair and absurd" (A.R. 1426) to require the Respondent to comply with the laws of this State because the respondents might lose money. With all due respect, the Petitioners have worked long hours for the Respondent and have not be paid the wages that the law of this State requires. For the Circuit Court to find that it would be unfair and absurd to uphold the law is reason alone for this Court to reverse the Circuit Court's actions.

The Circuit Court goes on to state that the Legislature of this State included the honest mistake or error defense "to prevent any such situation from occurring." (A.R. 1426). That is, according to the Circuit Court, the Legislature intended that the honest mistake or error language was to be used to prevent unfair and absurd situations where a contractor would lose money on a public contract by paying its employees the correct prevailing wage. That is, according to the Circuit Court, the Legislature intended the honest mistake or error language to apply not to situations where mathematical errors or mistakes but to prevent the application of the prevailing wage law to an entire public contract and years of work – where the application of the law is clear in the key documents and in the type of work performed. If that were the law of West Virginia it would undercut the clear policy and law of this State and lead to employers and public entities developing schemes to ensure the prevailing wage no longer applied to the construction of public improvements in West Virginia.

The Petitioners therefore pray that this Court reverse the Circuit Court's decision and return this matter to the Circuit Court so that the Petitioners may obtain the justice they deserve.

Respectfully submitted this 7<sup>th</sup> day of February, 2014.

Petitioners,  
By Counsel

A handwritten signature in black ink, appearing to read 'Vincent Trivelli', with a long horizontal line extending to the right.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Gregory Grim, *et al.*.,  
Petitioners,

v.

Docket No. 13-1133

Eastern Electric, LLC.,  
Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 10, 2014 a true and correct copy of the **Petitioners' Initial Brief and Appendix Record** were served upon the following via hand delivery to the following attorney and address:

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