

**OHIO COURT OF APPEALS
FIFTH APPELLATE DISTRICT
GUERNSEY COUNTY, OHIO**

MID-OHIO MECHANICAL, INC.	:	
	:	Case No. 06-CA-000013
Plaintiff-Appellant,	:	
	:	
v.	:	
	:	
EISENMANN CORPORATION,	:	
	:	
Defendant-Appellee.	:	

**AMICUS BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION IN
SUPPORT OF APPELLANT MID-OHIO MECHANICAL, INC.**

Donald W. Gregory (0021791)
Stuart W. Harris (0065781)
Kegler, Brown, Hill & Ritter Co., L.P.A.
65 E. State Street, Suite 1800
Columbus, Ohio 43215-4294
Telephone: (614) 462-5400
Fax: (614) 464-2634

Attorneys for Plaintiff-Appellant

R. Russell O'Rourke (0033705)
Michael J. Warrell (0021391)
O'Rourke & Associates Co., LPA
2 Summit Park Drive
Suite 650
Independence, OH 44131
Telephone: (216) 447-9500
Fax: (216) 447-9501
*Attorneys for Amicus Curiae
American Subcontractors Association*

John N. MacKay (0002801)
Robert A. Koenig (0020789)
Michael J. Podolsky (0075711)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43624
Telephone: (419) 241-9000
Fax: (419) 241-6894

Attorneys for Defendant-Appellee

Albert J. Lucas (0007676)
Stanley J. Dobrowski (0016805)
Calfee, Halter & Griswold, LLP
1100 Fifth Third Center
21 East State Strteet
Columbus, OH 43215-4242
Telephone: (614) 621-1500
Fax: (614) 621-0010
*Attorneys for Amicus Curiae
Mechanical Contractors Association
of Ohio*

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PRELIMINARY STATEMENT

The American Subcontractors Association (“ASA”) is a national non-profit corporation supported by membership dues paid by approximately 5,000 member companies throughout the country. Membership is open to all commercial construction subcontractors, material suppliers and service companies. ASA members are both union and non-union companies, ranging in size from the smallest private firms to the nation's largest specialty contractors. Hundreds of ASA’s member companies are located here in Ohio, with chapter offices in Cleveland, Columbus, Cincinnati and Dayton. The decision below profoundly impacts ASA's member companies as well as the thousands of Ohioans who are gainfully employed by these companies. The ruling below also adversely impacts all residents of Ohio since the ruling, if left standing, will drive up the cost of both public and private construction throughout the state due to the uncertainty created.

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Plaintiff-Appellant Mid-Ohio Mechanical, Inc. (“Mid-Ohio”), is a contractor from Licking County, Ohio. The Plaintiff-Appellant was hired as a subcontractor to Carden Metal Fabricators, Inc. (“Carden”) to perform part of the construction and installation of a paint line in the Byesville factory owned by L.D.M./Plastech (the “LDM”). Carden, in turn was a subcontractor to Eisenmann Corporation (“Eisenmann”), the Defendant-Appellee herein. Eisenmann’s contracted directly with the owner, LDM.

The work contracted by LDM was for the installation of a massive manufacturing line to be installed by Eisenmann and its subcontractors, including Carden and its

subcontractors, such as Mid-Ohio. The construction of the manufacturing line was designed, supervised, and inspected as any commercial construction project would be. Plans and specifications were prepared by an architect or engineer. The plans were approved by the Mid-East Ohio Building Department. Subsequently, the work of the original contractor and subcontractors was inspected by the Mid-East Ohio Building Department.

The massive manufacturing line has its own foundation, and is constructed with steel beams and columns, which are welded and bolted together and then set upon the foundation which supports the enormous weight of the equipment. The manufacturing line is then powered by electricity supplied to it by power lines physically connected to the utility lines serving the building itself. The manufacturing line is so large that it could neither be lifted nor removed from the building without substantial damage to the building.

III. LAW AND ARGUMENT

Proposition of Law No. 1: The plain language of Ohio Revised Code § 1311.01 (I) and (J) provides coverage by the Ohio Mechanic's Lien Law to the claims of a contractor, subcontractor or materialman when providing labor and materials as did the Appellant herein.

Proposition of Law No. 2: The construction industry only operates as it does because of its successful application of Mechanic's Lien Laws throughout the United States including the Ohio Mechanic's Lien Law. The clear intent of the Ohio Legislature is to permit all participants in the construction industry from property owner to original contractor to subcontractor to materialman to have certainty in their businesses. Such certainty includes the ready understanding that their efforts in the furtherance in improvement will not have to be analyzed to determine what taxing strategy may be sought by the owner.

Proposition of Law No. 3: The clear language of the Ohio Mechanic's Lien Statutes provides a broader scope of coverage than the common law test applicable to fixtures.

A. Introduction

Under the most common method of construction contracting project owners, such as LDM, hire contractors, such as Eisenmann, to perform labor and supply materials for construction projects. Those contractors frequently contract with subcontractors to perform a portion of their contractual obligations to the owner. These contractors contract with other subcontractors, such as Mid-Ohio, and materialmen to assist them in the discharge of their duties. Most commonly these subcontractors and materialmen are contractually prohibited from directly contacting the owner in any way. Also, most commonly, the owner does not pay for the labor performed or materials supplied in advance, but does so at predetermined intervals throughout the construction project. This process requires the contractors and subcontractors to advance funds on behalf of the owner for labor performed and materials supplied. At times, such as here, funds may be advanced by subcontractors and materialmen to the extent of hundreds of thousands of dollars. The only security for payment that these subcontractors and materialmen have for the funds advanced is the mechanic's lien.

Despite these distant relationships, lacking in privity, the Ohio Legislature, as well as every other state legislature in the country, realized that for the construction process to effectively work, subcontractors and materialmen needed to have some security for the fruits of their labors. In 1823, Ohio passed its first mechanic's lien law. These laws were based upon concepts realized by Thomas Jefferson and James Madison and enacted in Maryland to permit master builders to claim a lien on the property they improved.

The ruling in the court below ignores the plain language of the Ohio Mechanic's Lien statutes, contradicts recent Ohio precedent in a case directly on point and destabilizes the foundation of the construction industry. The lower court ruling, determined in effect that all subcontractors and materialmen, however distant, who would otherwise be protected by mechanic's lien rights, will first need to determine the ultimate intent of the owner of a project (whether it is the owner's intent to make the construction of a massive manufacturing line permanent). All original contractors, subcontractors and materialmen need to have certainty as to the nature of the financial exposure they have on a construction project. Specifically, they need to know whether they will have a secured interest in the property they have improved as intended by the Ohio Legislature or whether they are being offered no more than an unsecured promise to be paid.

B. The Ohio Legislature was Clear in its Intent to Insure that Subcontractors and Materialmen are Entitled to Mechanic's Lien Rights for the Fruits of their Labors

“Mechanics’ Lien” is a generic term used to refer to a claim or charge imposed by law upon specific real property to secure payment for work or materials furnished for its improvement.

The Mechanic's Lien statutes are intended to secure the claims of creditors, be they contractors, subcontractors, laborers, or materialmen, whose labor and materials have enhanced the value of the improved property but who otherwise would go uncompensated. Because mechanic's liens are statutory, the courts will be guided by the statutes in determining their validity and their priority and will not go beyond the limits of the statutes in affording relief to construction claimants.

The doctrine upon which a lien is founded is natural justice. It is fundamental that the party who has enhanced the value of property by improving it through his labor or materials shall have a claim on such property for the value of such labor or material. O'ROURKE, OHIO MECHANIC'S AND MATERIALMEN'S LIEN, (3RD EDITION) [SECTION 1.1, DEFINITION, PURPOSE, AND NATURE] (2001)(Citations Omitted)

It is not surprising that there is not any significant amount of legal precedent that relates to commonly used terms in the English language. The Ohio Legislature sought to

make Mechanic's Liens easily understandable by participants of the construction industry. Where terms exist that may be subject to more than one interpretation, the legislature selected other commonly used words to help define them. For example Ohio Revised Code §1311.01 (I) reads as follows:

“Materials” means all products and substances including, without limitation, any gasoline, lubricating oil, petroleum products, powder, dynamite, blasting supplies and other explosives, tools, equipment, or other machinery furnished in furtherance of an improvement.

Improvement, another simple term which might be open to some form of interpretation is defined in Ohio Revised Code § 1311.01 (j) as follows:

“Improvement” means constructing, or erecting, altering, repairing, demolishing, or removing any building or appurtenance thereto, fixture, bridge, or other structure

If the intent of the Ohio Legislature is not clear enough by the simple use of the term “materials” or the term “improvement”, the legislature made it abundantly clear that it intended to include the type of work performed by Mid-Ohio by the use of other significant words, specifically including the words “machinery” and “equipment” in the definition of “materials” and by adding the words “fixture” or other “structure” to the definition of the term “improvement.” Clearly, the labor and materials supplied by Mid-Ohio in the constructing, erecting, altering, and repairing of the LDM painting line by the creation and construction of the unique and massive structure use is within the intended subject of the Ohio Mechanic's Lien Law.

C. Ohio Legal Precedent, Directly On Point, Defeats the Tortured Analysis and Irrelevant Legal Issues Raised by the Appellee in the Trial Court

Although the case law is limited because the intent is so clear, there is one case in Ohio that is directly on point, *Tri-County Crane Rental, Inc. v. Watson Gravel, Inc.*, 2004-

Ohio-1262, 1st Dist. Ct. App., Hamilton Cty., Hamilton App. Nos. C-030392, C-030408, C-030424. Other cases cited by Appellee as to whether a manufacturing line is taxable as real estate or whether it is a chattel are irrelevant in the instant action. Tax laws are meant to be both revenue generating and as an incentive to specific business opportunity. The fact that the tax code and the multitude of cases which analyze it may wish to define taxable improvements in ways inconsistent with the Mechanic's Lien Laws is not relevant. If the Mechanic's Lien Law intended to use the definitions of the tax law, it would merely refer to the definitions used in the tax law, rather than setting out its own specific definitions. If mechanic's lines only covered land and "fixtures," the lien statutes would not refer to "appurtenances" and "other structures." Ohio Revised Code § 1311.01 (j) Any cases interpreting any intent of the legislature as it relates to the tax law, therefore, are irrelevant. Likewise, antiquated cases from the 1800's which seek to state definitions of fixtures approximately 140 years prior to the passage of our current Mechanic's Lien Law are equally irrelevant.

A proper and contemporary analysis of otherwise simple English words is found in the *Tri-County Crane* case. While cases relied upon by the appellee in the trial court action such as *Teaffe v. Hewitt*, 1853, 1 Ohio St. 511, analyze whether the equipment and machinery installed are fixtures for purposes of whether they are included within a mortgage, it does not address the modern statutory scheme of the mechanic's lien intended by the Ohio Legislature. In *Tri-County Crane* the issue was whether a dredge, whose dimensions were approximately 40 ft high, 30 ft. wide and 70 ft. long, weighing in excess of 100 tons, which was made of steel, was an improvement within the intention of the Ohio Mechanic's Lien law. The dredge, despite its tremendous size and weight, was not

even supported by a massive foundation as was the LDM paint line in the instant action, but was floated on pontoons, on a pond, in a gravel pit (the owner's business operation) located on the subject real estate. Despite the fact that the dredge was there solely for the benefit of the owner's business located on the real estate, the Court still found that it was a structure and improvement within the purview of the Ohio Mechanic's Lien Law. The court came to this decision even though the only attachment to the real estate itself was by cables and winches located on the shore line.

The *Tri-County* Court properly analyzes the concept of improvements as contemplated by the Ohio Legislature and the Ohio Mechanic's Lien Law. The *Tri-County* Court found that Ohio Revised Code § 1311.02 grants a lien to a subcontractor or materialmen who performs work for furnishes materials to a contractor or other subcontractor in connection to any improvement upon real property. Pursuant to Ohio Revised Code §1311.01 (J) the term "Improvement" "means constructing, erecting, altering, repairing, demolishing, or removing any building or appertinence thereto, fixture, bridge or other structure" Because such a common word as "structure" is not defined in the Revised Code, the *Tri-County* Court looked to Black's Law Dictionary for definition and found that it meant, "any construction, production or piece work artificially built up or composed of parts purposefully joined together." The *Tri-County* Court went on to hold that:

"...the dredge in this case as affixed to the land. It was attached to the shoreline by wenches and cables, and it floated on the pond in a gravel pit. The dredge was also massive, weighing over 100 tons. It was made up of several vertical and two horizontal steel beams, a clam shell, and conveyor belts that were all purposefully joined together. Further the dredge was necessary to the operation of the gravel pit. The dredge was used to dig up the aggregate, which was then deposited onto conveyor belts that transported it to the shoreline. The conveyor belts were in turn connected

to screening towers that segregated the aggregate. The dredge was integrated into the complex that comprised [the owner]’s gravel pit operations. Under these circumstances, we hold as a matter of law, that the dredge was a structure that constituted an improvement subject to a Mechanic’s Lien.”

In the instant action the improvements were more deliberately attached to and a part of the real estate than was the dredge in *Tri-County*. Like the dredge in the *Tri-County*, the improvements in the instant action were installed solely for the benefit of the owner’s business. Any arguments that the subject improvements are not improvements as contemplated by the Ohio Mechanic’s Lien Law are disingenuous. There is no contemporary case law in Ohio which provides that an original contractor, subcontractor, such as Mid-Ohio, or materialmen would be left without a Mechanic’s Lien right for the installation of a manufacturing line such as that painting line in the instant action.

D. The clear language of the Ohio Mechanic’s Lien Statutes provides a broader scope of coverage than the common law test applicable to fixtures.

In the absence of this Mechanic’s Lien right, original contractors, subcontractors and materialmen would be ill advised to provide their lowest and best bids for performing their work and supplying their materials because they would understand that they had an increased risk in not being paid. It is axiomatic that any lender who is loaning money to a borrower would provide that money at a lower rate if it has a secured interest in real estate. In the construction process, because materialmen, subcontractors and contractors are providing their labor and material in advance of being paid by the owner, they are loaning the dollar equivalent of the fruits of their labor to the owner. If the right to file a Mechanic’s Lien is diminished these “lenders,” particularly subcontractors and

materialmen who have no privity of contract with the owner, will be left with little choice but to increase their prices or refuse to do the work at all.

In the instant action, the subcontractor, supplying both labor and materials for the creation of a massive structure, that is physically attached to real estate is entitled to understand before it even bids to do the work, whether it will have Mechanic's Lien protection.

No one would dispute that an electrician that supplied and installed one electrical outlet, affixed to the electrical wiring of a building by three small screws and to the service box itself by two smaller screws, would fall within the purview of Ohio Revised Code § 1311.02 which provides:

Every person who performs work or labor upon or furnishes material in furtherance of any improvement undertaken by virtue of a contract, express or implied, with an owner, part owner, or lessee of any interest in real estate or his authorized agent, and every person who is a subcontractor, laborer, or materialmen, performs any labor or work or furnishes any material to an original contractor or any subcontractor in carrying forward, performing, or completing any improvement has a lien to secure a payment therefore upon the improvement and all interests that the owner, part owner, or lessee may have or subsequently acquire in the land or lease hold to which the improvement was made or removed.

If an original contractor, subcontractor or materialmen can anticipate that such a small improvement to real estate would be the subject of a Mechanic's Lien, it cannot rationally be possible that the same original contractor, subcontractor or materialmen would have to analyze whether a manufacturing line, such as the painting line in the instant action, is a similar improvement subject to a Mechanic's Lien.

For public policy reasons we cannot force an original contractor, subcontractor or materialmen to set out to analyze the ultimate intent of an owner of real estate and whether that intention is to make such a massive improvement a part of the realty itself.

If the line were easily mobile, either by virtue of not being affixed to the realty by welded and bolted I-beams, but by remaining on rollers or light enough to be easily lifted and moved without disassembly or damage, a person installing such equipment would be on notice that their efforts might not be an improvement to real property. The *Teaff* Court discussed whether carding machines and other related equipment became part of the realty for purposes of intent of the owner. It asked what the consequences of applying improvements such as the equipment used for a thriving business as “business related only” and not an improvement to the real estate. The court answered its question by determining that “The application of the same rule would convert benches and essential implements of the shoemaker’s shop, devices, hammers and machinery of the coopersmith and tinner, and the other mechanics and manufacturers, into realty.” *Teaff* at 539. Although Mechanic’s Lien Laws existed in Ohio at that time, and have existed since 1823, the *Teaff* Court was looking at secured transaction from the position of a mortgagee, not under the Mechanic’s Lien Law as security for someone whose labor and materials supplied and installed the equipment.

To permit the construction industry to continue to operate efficiently as it has, for 183 years, original contractors, subcontractors and materialmen need to be able to accurately anticipate whether their labor and materials supplied to an owner, part owner or lessee of real estate will be able to be secured by a Mechanic’s Lien. The absence of such certainty, available within the Ohio Mechanic’s Lien Law as set forth in Ohio Revised Code § 1311.01 through § 1311.36, would completely alter the structure of the construction industry itself. To affirmance of the trial court’s opinion would eliminate such certainty. The trial court’s opinion therefore must be reversed .

IV. CONCLUSION

All participants of the construction industry, the project owner, the original contractor, all subcontractors and all materialmen need to have the certainty and consistency that have been provided through the Ohio Mechanic's Lien laws for 183 years. These parties must be certain that they can anticipate whether their labor and materials supplied to that owner, will be secured because Mechanic's Lien rights are available. In the absence of such certainty and consistency, these parties are all essentially supplying their labor and materials on the basis of a signature loan to the owner.

To hold that the improvements performed in the construction and installation of the painting line for LDM is anything but an improvement to real estate would be gross distortion of longstanding law and would completely destabilize the construction industry. It is crucial for this issue to be resolved in order to avoid the economic uncertainty that all members of the construction industry will suffer without the benefit of the clear ability to understand whether Mechanic's Lien rights exist without the necessity of analyzing the ultimate intent of the owner.

For the reasons stated and in accordance of the foregoing authority, Amicus Curiae American Subcontractors Association prays that this Court reverse the decision of the Guernsey County Common Pleas Court.

Respectfully submitted,

R. Russell O'Rourke (0033705)
Michael J. Warrell (0021391)
O'Rourke & Associates, Co., LPA
2 Summit Park Drive, Suite 650
Independence, OH 44131
216/447-9500 / Fax 216/447-9501
rorourke@orourke-law.com
mwarrell@orourke-law.com
Counsel for Amicus Curiae
American Subcontractors Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered by regular U.S. Mail, postage pre-paid, and by facsimile to the following parties, this ____ day of May, 2006:

John N. MacKay, Esq.
Robert A. Koenig, Esq.
Shumaker, Loop, Kendrick, LLP
North Courthouse Square
1000 Jackson Street
Toledo, OH 43624
Attorney for Eisenmann Corporation

Donald w. Gregory, Esq.
Stuart W. Harris, Esq.
Kegler, Brown, Hill & Ritter Co., LPA
65 E. State Street, Suite 1800
Columbus, OH 43215-4294
Attorneys for Plaintiff-Appellant

Albert J. Lucas, Esq.
Stanley J. Dobrowski, Esq.
Calfee, Halter & Griswols, LLP
1100 Fifth Third Center
21 East State Street
Columbus, OH 43215-4243
*Attorney for Amicus Curiae
Mechanical Contractors Association of
Ohio*

Craig Kelly
33523 8 Mile Road
Livonia, MI 48152

Carden Metal Fabricators, Inc.
c/o Charles Pate, Statutory Agent and
Charles Pate, Individually
2519 South Lake Pleasant Road
Metamora, MI 48455

R. Russell O'Rourke (0033705)
Michael J. Warrell (0021391)