

NO. A10-2173

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State of Minnesota  
**In Supreme Court**

Oscar Caldas, et al.,

*Appellants,*

vs.

Affordable Granite & Stone, Inc.,

*Respondent,*

Dean Soltis,

*Defendant.*

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**BRIEF OF AMICUS CURIAE  
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,  
MINNESOTA CHAPTER**

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**I. STATEMENT OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, MINNESOTA CHAPTER**

The National Employment Lawyers Association (“NELA”) is a non-profit organization of lawyers who represent employees. NELA has approximately 3,000 members nationwide. For decades, NELA has appeared as *amicus curiae* before the United States Supreme Court and United States Courts of Appeals to support precedent-setting litigation affecting the rights of individuals and classes of employees.<sup>1</sup>

The Minnesota Chapter of NELA (“Minnesota NELA”) has participated as *amicus curiae* on many occasions before the Minnesota Supreme Court. *See, e.g., Goodman v. Best Buy, Inc.*, 777 N.W.2d 755 (Minn. 2010); *Ray v. Miller Meester Advertising, Inc.*, 684 N.W.2d 404 (Minn. 2004); *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002); *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center*, 637 N.W.2d 270 (Minn. 2002); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998); *Williams v. St. Paul Ramsey Medical Center*, 551 N.W.2d 483 (Minn. 1996); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555 (Minn. 1996); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991).

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<sup>1</sup> The position that Minnesota NELA takes in this Brief has not been drafted or approved by any party or their counsel. The undersigned counsel wholly authored this Brief for the *amicus curiae* pursuant to Minn. R. Civ. App. P. 129.03. In addition, no person or entity other than Minnesota NELA, its members, and its counsel has made any monetary contribution to the preparation or submission of this Brief.

The undersigned are members of Minnesota NELA's *amicus curiae* committee and are qualified to address the legal and policy issues presented by the appeal herein. Minnesota NELA thanks the Minnesota Supreme Court for permitting this organization to appear here in the public interest.

### ARGUMENT

The Court of Appeals' decision allowing Affordable Granite & Stone ("AGS") to walk away from its contractual obligation to pay Appellants a prevailing wage sets an alarming precedent in this state. In one fell swoop, the Court has undermined the integrity of the prevailing wage system itself. The scope of this decision casts a shadow over every public job that calls for a prevailing wage. In addition to its sweeping negative impact on the public policy of the state and its cities, the Court of Appeals' decision is legally flawed.

Because the Court of Appeals' decision muddies the proverbial water, it bears repeating in this case that Appellants have three separate claims for relief: a common law contract claim based on an intended beneficiary theory; a statutory claim for wages under the Payment of Wages Act, Minn. Stat. § 181.71; and an unjust enrichment claim. The Appellate Court's decision obscures this fact. It misapprehends the nature of Appellants' claims and conflates its analysis of Appellants' contract claim with its misunderstanding of their wage claim. There is no genuine factual dispute that AGS agreed to pay Appellants the prevailing wage,

which was nearly \$30 an hour more than it actually paid them. But the crux of the Appellate Court's analysis focuses on whether Appellants have any authority to enforce AGS' promise. In other words, can Appellants hold AGS accountable by forcing it to pay them the wages promised? Despite precedent and compelling and overwhelming evidence supporting Appellants' position, the Court takes a confusing path in reaching an erroneous decision.

**II. PUBLIC POLICY SUPPORTS A CONCLUSION THAT APPELLANTS ARE ENTITLED TO ENFORCE THEIR RIGHT TO PAYMENT OF ALL THE WAGES THEY HAVE EARNED.**

Appellants' right to enforce AGS's sworn promise to pay a prevailing wage stems not from the Prevailing Wage Ordinance ("PWO") itself, as it is not an enabling ordinance. Rather the PWO establishes the threshold wage for the type of work Appellants were hired to do, and evinces the public policy supporting Appellants' claim. The Appellate Court wrongly concluded that Appellants' right, if any, to enforce this wage could emanate only from the contract between the city and AGS. From there, it concluded that the contracting parties did not grant Appellants a private right of action to enforce the prevailing wage, and therefore Appellants were left without recourse.

The analysis of Appellants' right to receive the wage AGS agreed to pay them is not nearly as contorted as the Court of Appeals has made it. The Payment of Wages Act authorizes legal action to recover wages that have been actually

earned and remain unpaid 24 hours after a request for payment. *See* Minn. Stat. § 181.13; Minn. Stat. § 181.14; *see also* Minn. Stat. § 181.171 (authorizing recovery of “compensatory damages” and attorney’s fees/costs in addition to statutory penalties); *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 125 (Minn. 2007) (affirming an employee can recover unpaid wages actually earned); *Kvidera v. Rotation Engineering and Mrg. Co.*, 705 N.W.2d 416, 422-23 (Minn. Ct. App. 2005) (ruling the employer violated the Payment of Wages Act by not providing earned pay to an employee); *Holman v. CPT Corp.*, 457 N.W.2d 740, 743 (Minn. Ct. App. 1990) (reversing summary judgment for the employer on the claims asserted under the Payment of Wages Act). Appellants requested payment and AGS has yet to pay them. The only question here and, ultimately AGS’ only defense to nonpayment, is whether the wages requested were actually earned.

This Court has ruled that when payment is mandatory, the wages in question have been “actually earned.” *Kvidera*, 705 N.W.2d 423 (Minn. Ct. App. 2005). There is no plausible argument in this case that the prevailing wage AGS agreed to pay was anything other than mandatory. To hold otherwise implies that AGS had discretion to violate the city’s prevailing wage ordinance, which is contrary to law and sound public policy.

Appellants are entitled to the difference between their actual pay and what they “actually earned,” along with statutory fees and their attorney fees. *See* Minn.

Stat. § 181.13. At a minimum, this was a question for the jury. *Holman*, 457 N.W.2d at 743.

The Court of Appeals actually failed to analyze Appellants' Payment of Wages claim. Instead, it confused this claim with a *Prevailing Wage Act* claim under Chapter 177. In doing so, the Court emphasized that Minnesota has yet to address the issue of whether a private right of action exists for such a claim. Importantly, for purposes of this action, this issue need not and should not be addressed.

The Court's citation to other jurisdictions' interpretation of similar prevailing wage acts is irrelevant, since Appellants have not asserted a Prevailing Wage Act claim. It is troublesome; however, because the Court's suggestion that Minnesota would not recognize a private right of action for a Prevailing Wage Act claim seems to have informed its decision about Appellants' right to enforce its *statutory* claim for payment of wages – a claim completely *independent from one* under the PWA.

Further, evidence that the Court conflated Appellants' statutory wages claim with their contract claim lies in its conclusion that the former was moot since the latter failed. “[B]ecause we conclude that appellants’ contract claim fails, we, like the district court, do not reach this issue.” *Caldas v. Affordable Granite & Stone*,

ADD. 63.<sup>2</sup> The statutory payment of wages claim and the common law contract claim are independent claims. While they can be related in some circumstances, one is not contingent upon the other. This Court should determine that Appellants may recover from AGS all wage payments they have actually earned.

**III. APPELLANTS MAY ENFORCE THE GUARANTEED WAGE TERMS OF AGS'S CONTRACT WITH THE CITY BECAUSE THEY ARE INTENDED BENEFICIARIES OF THAT CONTRACT.**

The Court of Appeals concluded that Appellants were not intended beneficiaries of AGS's contract with the city. *Caldas v. Affordable Granite & Stone*, ADD. 62-63. It reasoned that any benefit that did inure to Appellants was merely incidental; that Appellants are not mentioned in the relevant documents; and that the PWO fails to confer any right to Appellants. *Id.*

The Court's contention that AGS's contract with the city does not mention Appellants is puzzling, as the contract explicitly incorporates the PWO which mandates a prevailing wage for all of AGS's contractors and subcontractors. (*APP.* 572, 574, 584, 586-87.) AGS also represented under oath in a prevailing wage certificate ("PWC") that it would pay all of its employees prevailing wages. (*APP.* 706, 740). The CEO of the company even reiterated to the city in writing that AGS

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<sup>2</sup> For ease of reference, MN NELA will refer to the Court of Appeals decision which is contained in Appellants' addendum. References to "APP" and "ADD" refer to Appellants' Appendix and Addendum, respectively.

would pay a prevailing wage. (ADD. 9). Caldas and his co-plaintiffs may not have been mentioned by name, but they certainly were among AGS' employees, and as such were repeatedly mentioned within the contracting documents.

Moreover, the PWO, PWC, and the contract are replete with language evincing the parties' intent to ensure that all AGS employees that worked on the public project at issue received a prevailing wage. The very purpose of a prevailing wage is to benefit the employees who will earn it. It strains credulity for the Court to conclude that a \$28 an hour increase in pay amounts to nothing more than an "incidental" benefit. *See*, ADD. 63.

The court's focus on whether AGS and the city bestowed a private right of action on Appellants is misplaced. AGS and the city have no authority to give Appellants a private of action. "The well established general rule is that a municipal corporation cannot create by ordinance a private right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves." *See, e.g.*, E. McQuillin, *Municipal Corporations* § 22:1 (1998 3d ed.) (collecting cases). The real question here is whether the parties have bestowed a benefit on Appellants, nothing more, nothing less. *Cretex Cos., Inc. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). It belies logic to suggest that a 200% increase in pay can be construed as anything but a benefit to them.

#### IV. STATE'S LONG HISTORY OF EXPANSIVELY CONSTRUING PRINCIPLES UNDERLYING A CLAIM FOR UNJUST ENRICHMENT SUPPORTS APPELLANTS' CLAIMS.

The remedy sought by Appellants in their claim for unjust enrichment is not unusual or novel. In fact, claims seeking remedies as a result of unjust enrichment have been recognized by this Court nearly since the inception of Minnesota's statehood. Initially, the claim was referred to as one for "money had and received." See, *Klass v. Twin City Federal Savings and Loan Assoc.*, 291 Minn. 68, 190 N.W.2d 493, 494-95 (1971); *Heywood v. Northern Assur. Co. of Detroit, Mich.*, 133 Minn. 360, 158 N.W. 632, 633 (1916)("The action of money had and received is founded on the principle that no one ought unjustly to enrich himself at the expense of another, and the gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay over.").

This Court explained the character of the cause of action in *Brand & Co., v. Williams*, 29 Minn. 238, 13 N.W. 42 (1882):

An action for money had and received can be maintained whenever one man has received or obtained the possession of the money of another, which he ought in equity and good conscience to pay over. This proposition is elementary. There need be no privity between the parties, or any promise to pay, other than that which results or is implied from one man's having another's money, which he has no right conscientiously to retain. In such case the equitable principle upon which the action is founded implies the contract and the

promise. . .It is not necessary that the defendant should have accepted the money under an agreement to hold it for the benefit of the plaintiff, or that the party from whom he received it intended it for the plaintiff's benefit. . .

*Id.*

In *Heywood*, this Court stated that it had always favored the liberal extension of the use of this form of action, noting:

It has been held that the action lies against one who had received the proceeds of plaintiff's logs (*Libby v. Johnson*, 37 Minn. 220, 33 N.W. 783), or of his wheat (*Landin v. Moorhead National Bank*, 74 Minn. 222, 77 N.W. 35), or of his cattle (*Stoakes v. Larson*, 108 Minn. 234, 121 N.W. 1112), or of his checks (*Bank of the Metropolis v. First Nat. Bank of Jersey City* [C.C.] 19 Fed. 301), or the insurance on his tea (*Roberts v. Ely*, 113 N.Y. 128, 20 N.E. 606).

*Heywood*, 158 N.W. at 634.

In this case, AGS received the proceeds of Appellants' labor. The City paid AGS for this labor, consistent with the terms of the PWO and the contract. AGS accepted and kept the money. The money was supposed to be paid – by law and by agreement – to the Appellants. AGS kept the proceeds of Appellants' labor in violation of its legal and contractual obligations, creating a windfall which it “has no right conscientiously to retain.” *Brand & Co.*, 13 N.W. 42. This is precisely the type of conduct that this Court has long held can and should be addressed by a claim for unjust enrichment.

Notwithstanding this Court's history of endorsing unjust enrichment claims, the Court of Appeals ignored this history and instead focused on the defenses of

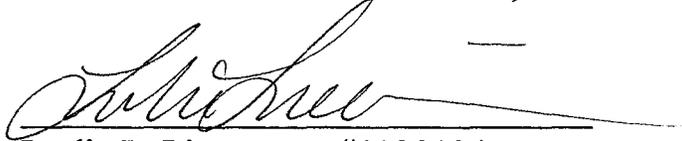
“unclean hands” and “laches.” In appropriate circumstances, these defenses may overcome a claim for unjust enrichment. But the Court of Appeals erred in applying those defenses in this case. As argued fully in Appellants’ brief, there is clearly no prejudice to the employer in this case. Thus, applying the defenses of laches and unclean hands in this case would undermine the City’s policy of supporting prevailing wages for work on public contracts and the Legislature’s policy to provide a two-year statute of limitations for wage claims.

### **CONCLUSION**

Minnesota NELA respectfully requests that this Court reverse the holding of the Court of Appeals.

Dated: September 21, 2011

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## CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief produced using proportional serif font, 14-point or larger. The length of this brief is 2,224 words. This brief was prepared using Microsoft Word.

Dated: September 21, 2011



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