

NO. A10-2173

State of Minnesota
In Supreme Court

Oscar Caldas, et al.,

Appellants,

vs.

Affordable Granite & Stone, Inc.,

Respondent,

Dean Soltis,

Defendant.

**BRIEF OF AMICUS CURIAE
FAIR CONTRACTING FOUNDATION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF OBJECTIVITY1

INTRODUCTION OF AMICUS CURIAE.....1

STATEMENT OF THE CASE AND FACTS4

LEGAL ARGUMENT

 I. THE COURT OF APPEALS INCORRECTLY DETERMINED
 THAT PETITIONERS ARE NOT THE INTENDED
 BENEFICIARIES OF THE CITY’S PREVAILING WAGE POLICY5

 A. LEGISLATIVE HISTORY AND PUBLIC POLICY6

 B. INTENDED BENEFICIARIES V. UNINTENDED
 BENEFICIARIES10

 II. AFFORDABLE GRANITE & STONE’S DENIAL OF PREVAILING
 WAGES UNJUSTLY ENRICHED THE CONTRACTOR,
 REGARDLESS OF INDIVIDUAL EXPECTATIONS13

 III. EMPLOYEES WHO PERFORM PREVAILING WAGE WORK AND
 COMPLETE THE CONSTRUCTION PROJECT BEFORE
 RESORTING TO THE COURTS SHOULD NOT BE DENIED
 JUSTICE DUE TO UNCLEAN HANDS.....15

CONCLUSION.....17

CERTIFICATION18

TABLE OF AUTHORITIES

Minnesota Cases

<u>Cretex Cos., Inc. v. Constr. Leaders, Inc.</u> , 342 N.W.2d 135 (Minn. 1984)	5, 10
<u>First Nat'l Bank of St. Paul v. Ramier</u> , 311 N.W.2d 502, 504 (Minn. 1981)	13
<u>Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.</u> , 666 N.W.2d 320 (Minn. 2003)	5, 11
<u>Oscar Caldas, et. al., v. Affordable Granite & Stone, Inc.</u> , No. A10-2713 (Minn. Ct. App. May 23, 2011)	5, 14

Other State Cases

<u>Favel v. Amer. Renovation & Const. Co.</u> , 59 P.3d 412 (Mont. 2002), <u>cert. denied</u> 538 U.S. 1000 (2003)	11
<u>Hayen v. Ogle County</u> , 463 N.E.2d 124 (Ill. 1984)	12
<u>Pesantez v. Boyle Env'tl. Servs. Inc.</u> , 251 A.2d 11 (N.Y. App. Div. 1998)	11
<u>Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.</u> , 125 Cal.Rptr.2d 804 (Cal. App. 3rd Dist. 2002)	11

Federal Cases

<u>U.S. v. Binghampton Constr. Co.</u> , 347 U.S. 171, 176-177 (1954)	11
--	----

Minnesota Statutes

Minn. Stat. § 177.41-44	5, 8
-------------------------------	------

Federal Statutes

40 U.S.C. §§ 3141, et seq......5

Other Authorities

Anoka Co. Res. #90-94 (1990).....8

Anoka-Hennepin Ind. School Dist. #11 Prevailing Wage Policy (1992).....8

Chisago Co. Res. #050119-3 (2005).....8

City of Coon Rapids Chp. 12-600 (2007).....8

Dakota Co. Res. #95-55 (1995)8

Mpls. Ord., Ch. 24, Art. IV, § 24.220.....5, 8

St. Paul Admin. Code #82-078

St. Paul Pub. School Policy 715.00 (1995).....8

Legislative History

1 Davis-Bacon and Related Wage-Rate Statutes i (1970).....6

House Committee on Educations and Labor,
Legislative History of the Davis-Bacon Act,
87th Cong., 2d Sess., 1(Comm. Print 1962) (Legislative History).....6

Letter from Associated General Contractors of America Inc.
to President Hoover, Feb. 8, 19317

Request for City Council Committee Action from the
Department of Community Planning & Economic Development,
June 8, 20049, 10

Standing Committee on Transportation and Property Services,
Committee Meeting Minutes, Nov. 3, 19838

Legal Scholarship and Other Sources

Douglas Laycock, “The Scope and Significance of Restitution,”
67 Tex. L. Rev. 1277, 1278 (1989)..... 14

Elisburg, Wage Protection Under the Davis-Bacon Act,
28 Lab.L.J. 323, 324 (1977) 7

Fiscal Policy Institute, The Economic Development
Benefits of Prevailing Wage (May 2006) (included herein at _____).....3

G. Roach, “How Restitution and Unjust Enrichment
Can Improve Your Corporate Claim,” 26 Rev. Litig. 265, 268 (2007)..... 15

Peter Philips, Kansas and Prevailing Wage Legislation,
University of Utah, (Feb. 1998).....6

STATEMENT OF OBJECTIVITY

Neither counsel for Petitioners nor counsel for Respondent participated in the preparation, submission nor financing of this brief.

INTRODUCTION OF *AMICUS CURIAE*

The Fair Contracting Foundation of Minnesota (FCF) monitors public construction projects on behalf of industry participants and taxpayers. Our goal is to assist contractors, governmental agencies and employees primarily in prevailing wage compliance in order to carry out the public policy behind such laws. We accomplish this through education, investigations and notification to the contracting agency. The FCF urges the Court to reverse the Court of Appeals' decision and remand the case in order to preserve decades of overarching public policy in Minnesota.

Wage laws, by their very nature, are rooted in public policy. If employers are permitted to evade these laws, the corrosive effects ripple far beyond any single employee-employer relationship into areas of commerce and community interest that legislative bodies intended to protect. Prevailing wage laws, such as the Minneapolis Ordinance, represent the pinnacle of what public policy in this area purports to protect. Prevailing wage laws exist to secure the highest quality of labor reasonably available with the expenditure of public dollars on government construction projects.

The Appellate Court's summary foreclosure of the employees' right of recovery, whether through law, contract or equity, does far more damage than to simply deny certain workers the mandated wages for their skilled labor. It discourages honest business competition in Minnesota. Honest building contractors cannot successfully bid on public contracts if specific, legally mandated wage rates are not enforced. In turn, lack of enforcement of prevailing wages encourages unscrupulous contractors to submit fraudulently low bids on public contracts, ones that can only prove profitable if the contractor can later recoup anticipated losses by paying illegally low wages. The lower court's ruling, therefore, jeopardizes the sanctity of a fair bidding process on all government construction projects in Minnesota.

The market participants do not stand alone in the uncertainty cast by the Appellate Court's decision. Government efforts to foster efficient market practices that make for quality construction projects are also hampered. Under the pending Appellate Court opinion, the governing agencies who must contract for the best value reasonably available on public works projects could be denied the most practical safeguard against contract violations: the underpaid worker's right to redress. With dwindling resources and a need to ensure contract compliance, the government could be stuck with the low level of labor quality a contractor can round up for less than prevailing wage. Absent access to legal recourse by the underpaid worker, the taxpayer's resulting product is that of the cheapest labor available. That is, of course, unless the government's scarce resources can be

marshaled to protect and uphold what the workers are denied through the summary judgment decision now under appeal.

Local economic development is also harmed by a denial of employees' right to wage recovery. Prevailing wage laws exemplify and perpetuate good economic development. "It encourages the development of a high-skill, high-wage economy that provides decent health and pension benefits and economic security to workers. It discourages construction companies from competing based on driving down wages and cheapening the quality of construction, i.e., from a 'race to the bottom'." Fiscal Policy Institute, The Economic Development Benefits of Prevailing Wage (May 2006).

Therefore, the damage to the bidding system, the industry contractors, the contracting government and the local economies can be reasonably anticipated without a reversal of the Appellate Court's decision. A decision that appears to be based on a misunderstanding that the worker is the only one who stands as the prevailing wage law's most direct, intended and integral beneficiary.

A summary dismissal of the Petitioners' right to redress not only cheats those employees out of what is legally theirs, but also thwarts the public policies that prevailing wage laws seek to uphold and advance. Furthermore, it rewards the dishonest contractor who is unjustly enriched under a public contract. The Appellate Court's Opinion gives safe harbor to any business entity that can secure public contracts through low bids and yet proceeds to violate legally mandated

wage requirements that many governmental entities and individual workers could not detect or enforce on their own.

The FCF seeks reversal of the Court of Appeals' decision to avoid these and other disruptions to the public contracting industry and local economies.

STATEMENT OF THE CASE AND FACTS

The Respondent in this case underbid a number of reputable construction firms based on representations to a public body that it would abide by the terms and conditions of the contract. In particular, Respondent certified that it would pay its employees the prevailing wage rate for skilled terrazzo work by submitting a signed and notarized Prevailing Wage Certificate. Compl. Ex. B. After receiving the contract award, however, Respondent misclassified its employees as "janitors" and paid them at far lower rates than they were entitled to under the contract. By doing so, Respondent cheated its competitors, its employees and the taxpayers of the City of Minneapolis.

Beyond that noted above, FCF concurs with the Petitioners statement of the case and facts.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT PETITIONERS ARE NOT THE INTENDED BENEFICIARIES OF THE CITY'S PREVAILING WAGE POLICY.

Petitioners are third-party beneficiaries if it can be shown that there was an intent by the contracting parties to confer a benefit on them. Cretex Cos. v. Constr. Leaders, Inc. 342 N.W. 2d 135, 139 (Minn. 1984). In other words, did the City of Minneapolis and Respondent, when entering into the contract for renovations to the Convention Center, intend for Petitioners to benefit from the terms of that agreement, including the Prevailing Wage Certificate.

Courts are to determine such intent based on the “obvious purpose” of the contract. Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W. 2d 320, 324 (Minn. 2003) (quotation omitted). This includes looking to “the circumstances at the time of contracting, and to the context of the contract as a whole . . .” Oscar Caldas, et. al., v. Affordable Granite & Stone Inc., No. A10-2713 (Minn. Ct. App. May 23, 2011) at 6. (internal citation omitted). That context certainly includes the City of Minneapolis’ prevailing wage ordinance and the policy reasons behind that ordinance and other prevailing wage laws and policies. Mpls. Ord., Ch. 24, Art. IV, § 24.220, Minn. Stat. §177.41-44, 40 U.S.C. §§ 3141, et seq.

A. Legislative History and Public Policy

Prevailing wage policies throughout the nation have been enacted to raise the standard of living for laborers and mechanics within state, federal and local jurisdictions for over 100 years. The country's first prevailing wage law was passed as early as 1891 in the state of Kansas, in connection with a series of labor and business reforms.

“Confronted with falling wage rates and longer working days, the Republican government of Kansas embraced a series of reforms including child labor laws, compulsory schooling, convict labor laws, the eight-hour day and prevailing wages . . . Kansas legislators did not want businesses to prove profitable simply because people were working longer for less, and younger with less skills.” Peter Philips, *Kansas and Prevailing Wage Legislation*, University of Utah (Feb. 1998) at 7.

A number of states passed similar prevailing wage laws prior to the adoption of the Federal Davis-Bacon Act in 1931. Before 1931, contractors had to take into consideration only two federal statutes that might affect their labor costs, one that mandated an 8-hour workday, and one that required contractors to post a labor and materials bond. 1 Davis-Bacon and Wage-Rate Statutes 21 (1970). The Davis-Bacon Act was “designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” House Committee on Education and Labor, *Legislative History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962) (Legislative History)*.

The Davis-Bacon Act was passed in large measure to address the widespread unemployment and deflating wages facing the country in the midst of

the Great Depression. Bleak economic conditions had given rise to an oversupply of labor and increased the importance of federal building programs, since private construction was limited. See, Elisburg, Wage Protection Under the Davis-Bacon Act, 28 Lab.L.J. 323, 324 (1977); S.Rep.No.1445, 71st Cong., 3d Sess., 1 (1931).

The proposed legislation was supported by both labor organizations and construction contractors as a means of preventing the exploitation of migrant laborers desperate for work and willing to take on jobs for practically nothing.

The Association of General Contractors of America, in a letter to President Hoover on the merits of the bill, repeatedly expressed concerns over labor conditions, going so far as to state that contracting agencies have a “moral obligation” to work with contractors to prevent the exploitation of labor. Letter from the Associated General Contractors of America Inc. to President Hoover, Feb. 8, 1931 ¹

Minnesota’s legislature echoed these same policy statements when it created its own prevailing wage laws. The intent is clear in stating:

It is in the public interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works be compensated according to the real

¹ The Association’s primary objection to the bill was that the prevailing wage rates were not established in advance, which would lead to uncertainty and cost increases. “[T]he rates of wages to be paid should be stated in the advertisement for bids so that all prospective contractors will be informed as to the rate that they must pay so that they may intelligently compute their costs. No intelligent estimate of cost of labor can be made without this information . . .” The Court of Appeals’ ruling in the instant case will create a similar environment, in which honest contractors are forced to chose between computing costs based on the known prevailing wage rate and remaining competitive against disreputable contractors that disregard prevailing wage rates and estimate costs based on any measure they see fit.

value of the services they perform. It is therefore the policy of this state that wages of laborers, workers, and mechanics on projects financed in whole or part by state funds should be comparable to wages paid for similar work in the community as a whole. Minn. Stat. § 177.41 (emphasis added).

These strong economic policies are not only applicable to federal and state construction projects. As of 2007, Minnesota had prevailing wage ordinances, resolutions and policies in 22 counties, cities and school districts. See, e.g., Anoka Co. Res. #90-94 (1990); Chisago Co. Res. #050119-3 (2005); Dakota Co. Res. #95-55 (1995); St. Paul Admin. Code #82-07; Anoka-Hennepin Ind. School Dist. #11 Prevailing Wage Policy (1992); St. Paul Pub. School Policy 715.00 (1995); City of Coon Rapids Chp. 12-600 (2007). These governmental subdivisions have enacted prevailing wage policies that advance the interests of their local economies and secure the best quality work available for their public projects just as Minneapolis has done through its Prevailing Wage Ordinance.

The City's prevailing wage ordinance was originally passed in 1960 and then amended in 1983. Committee minutes on the amended ordinance indicate that the City intended to follow federal standards. Standing Committee on Transportation and Property Services, Committee Meeting Minutes, Nov. 3, 1983 at 6-7. The ordinance, as amended, requires contractors to pay the prevailing wage rates established for Davis-Bacon contracts and incorporates regulations promulgated in connection with the Davis Bacon Act. Mpls. Ord., Ch. 24, Art. IV, § 24.220. By passing this ordinance, the City simply joined the federal

government in acting to preserve local wage rates and quality construction within the City.

Furthermore, in 2004 the City's newly-created department of Community Planning and Economic Development (CPED) similarly elected to apply prevailing wage requirements to CPED development projects. In doing so, CPED noted, "Payment of 'Prevailing Wages' supports the City goal of job growth and economic development." Request for City Council Committee Action from the Department of Community Planning & Economic Development, June 8, 2004 at 3. In particular, CPED stated that;

"Payment of 'prevailing wages' by general contractors will enable the laborers and mechanics to earn not just the 'living wage' required to afford basic necessities such as shelter, food, transportation, and clothing, but may enable prevailing wage recipients to purchase additional consumer goods and services and education by both workers and within their households." *Id* at 3.

CPED's claims clearly indicate that the City of Minneapolis intended for laborers and mechanics to benefit from the prevailing wage provisions in City contracts. The City of Minneapolis has maintained and even extended their prevailing wage policy, including prevailing wage requirements in both its traditional and development contracts, to ensure that laborers and mechanics employed on city-funded projects would earn the prevailing wage rates. There can be no clearer statement that the City of Minneapolis intended for Petitioners, who were in fact laborers and mechanics on a city-funded project, to benefit from the terms of its agreement with the Respondent.

B. Intended Beneficiaries v. Incidental Beneficiaries

Third-party beneficiaries may be either intended or incidental, but only intended beneficiaries may recover under a contract. *Cretex*, 342 N.W. 2d at 139. A beneficiary is considered an intended beneficiary when “circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” *Id.* at 139. The Court of Appeals incorrectly classifies Petitioners as incidental beneficiaries, despite the clear intent of the City of Minneapolis to confer a benefit on laborers and mechanics working on city-funded projects.

Prevailing wage policies can have far-reaching effects, and indirectly confer benefits on persons far removed from the contracting parties and the employees who perform the actual construction work. This is noted by the City’s CPED department in electing to adopt the City’s prevailing wage requirements;

“The additional spending and enhanced educational opportunities can have a ‘multiplier effect’ and increase secondary employment in not only the City but throughout the metropolitan area and the State.” Request for City Council Committee Action from the Department of Community Planning & Economic Development, June 8, 2004 at 3.

In other words, laborers and mechanics with enhanced spending power can lead to increases in sales revenue for local merchants and increases in tax revenues, which can in turn result in improved educational facilities, a more engaged citizenry and so on. Clearly such secondary and tertiary beneficiaries would have no claim under the contract due to the incidental and uncertain nature of such benefits. A local shop owner or elementary school student could not claim that higher sales or bigger classrooms were part of the “obvious purpose” of a contract for terrazzo

repair to the Minneapolis Convention Center. *Motorsports*, 666 N.W. 2d at 324.

In the instant case, however, laborers and mechanics were an essential element of the convention center repair contract, and explicitly identified as direct recipients of the prevailing wage.

“Specifically, it is agreed that payment of wages to employees or agents of the Contractor or any Subcontractor shall be no less than the amounts set forth in the current U.S. Department of Labor, General Wage Decision for the State of Minnesota, Hennepin County. Compl. Ex. B.

As such, Petitioners should have been classified as intended, rather than incidental beneficiaries.

It is notable that the United States Supreme Court recognized as early as 1954 that employees on Davis-Bacon covered projects are the intended beneficiaries of prevailing wage provisions. *U.S. v. Binghampton Constr. Co.*, 347 U.S. 171, 176-177 (1954). While the Minneapolis convention center project is not a Davis-Bacon covered project, the Minneapolis Prevailing Wage Ordinance expressly incorporates the Davis-Bacon Act and accompanying regulations and underlying policies, indicating that the City intended for the provisions and interpretations of that act to apply on city-funded prevailing wage projects. Other states that have ruled on this very question have similarly concluded that workers on prevailing wage projects are intended, rather than incidental, beneficiaries of prevailing wage contracts. *Favel v. Amer. Renovation & Constr. Co.*, 59 P.3d 412, 427 (Mont. 2002); *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.*, 125 Cal.Rptr.2d 804, 812, 814 (Cal. App. 3rd Dist. 2002);

Pesantez v. Boyle Env'tl. Servs. Inc., 251 A.D.2d 11, 12 (N.Y. App. Div. 1998);

Hayden v. Ogle County, 463 N.E.2d 124, 128 (Ill. 1984).

The Court of Appeals states that the contracting parties never mentioned Petitioners, despite the fact that the Prevailing Wage Certificate clearly mentions 'laborers and mechanics' working on the project. The Court of Appeals brushes this aside by suggesting that the Prevailing Wage Certificate is simply a statement that the City intends to comply with the law, the Prevailing Wage Ordinance. In doing so the Court of Appeals is basically stating that since the law requires that prevailing wage be paid on city contracts, the prevailing wage provisions in those very contracts are not substantive requirements, but simply recitations of the law. Such a reading, if endorsed by the Court, would jeopardize the stability of prevailing wage provisions in government contracts, and any contractual provisions based upon underlying law. Contractual provisions requiring contractors to comply with ADA requirements or OSHA requirements could be read to be nothing more than a recitation that the contracting agency intends to comply with the underlying law, rather than an actual requirement to build handicap ramps or to ensure that employees have access to safety goggles and hardhats. This sort of ruling would dangerously change contracting parties' risks and expectations by wholly disregarding the negotiated terms of contracting parties.

II. AFFORDABLE GRANITE & STONE'S DENIAL OF PREVAILING WAGES UNJUSTLY ENRICHED THE RESPONDENT, REGARDLESS OF INDIVIDUAL EXPECTATIONS.

Prevailing wage standards are established based on predominant wages paid for certain classifications of skilled work performed in a geographic region. These wage standards are determined through the Davis-Bacon Act. The wage standards are also explicitly mandated in the Minneapolis Prevailing Wage Ordinance. Moreover, these same wage standards are expressly referenced and incorporated into the very contract that gives rise to this construction project. The Respondent was legally and contractually bound to pay its workers prevailing wages, but these wages were denied to the employees and instead illegally pocketed by the Respondent.

For the unjust enrichment doctrine to provide relief “[i]t must be shown that a party was unjustly enriched in the sense that the term ‘unjustly’ could mean illegally or unlawfully.” Holman v. CPT Corp., 457 N.W.2d 740, 743 (Minn. Ct. App. 1990) (*citing* First Nat’l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 504 (Minn. 1981)). It is hard to imagine a more obvious unjust enrichment than when a public contractor charges the taxpayers for construction services and then keeps the money it had previously agreed to pay its own workers. Yet, the District Court’s Order dismisses Petitioners’ recovery, in part, because it saw “no evidence that Plaintiffs *expected* to be paid at a higher wage rate.” Order and Memor. granting summ. jdgmt. p. 10. (emphasis added). This rationale undermines the

purpose of all prevailing wage laws by replacing the applicable wage standards on public projects with the *expectations* of workers who may not know their rights. In fact, this reliance on worker expectations actually accelerates the “race to the bottom” by encouraging contractors to keep their construction crews in the dark with respect to required wage standards, work conditions and other worker rights. If successful in this concealment, the contractors can reap a larger profit margin at the expense of its underpaid workers.

The Appellate Court opinion adopts the lower court’s logic by stating, “appellants accepted the lower wage and continued to work for AGS.” *Caldas*, No. A10-2713 (Minn. Ct. App. May 23, 2011) at 9. This does not alter the prevailing wage standards established in the law, the ordinance or the contract. In fact, it does nothing to lower the legally-established wage rates that were unjustly retained by Affordable Granite & Stone. If the Appellate Court’s reasoning stands, contractors could defeat employees’ prevailing wage claims by finding desperate, uninformed workers willing to accept the **offered** wages rather than the **prevailing** wages. This outcome is the antithesis of prevailing wage laws and policies.

III. EMPLOYEES WHO PERFORM PREVAILING WAGE WORK AND COMPLETE THE CONSTRUCTION PROJECT BEFORE RESORTING TO THE COURTS SHOULD NOT BE DENIED JUSTICE DUE TO UNCLEAN HANDS.

Restitution under the unjust enrichment doctrine is a type of remedy that historically developed to address the gaps of the common law and the rules of equity. See, Douglas Laycock, “The Scope and Significance of Restitution,” 67 Tex. L. Rev. 1277, 1278 (1989). “The spirit behind the law of unjust enrichment is to apply the law ‘outside of the box’ and fill in the cracks where common civil law and statutes fail to achieve ‘justice.’” G. Roach, “How Restitution and Unjust Enrichment Can Improve Your Corporate Claim,” 26 Rev. Litig. 265, 268 (2007).

As thoroughly presented in the Petitioners’ brief, the Respondent Contractor violated the contract requirements, shorted the taxpayer and denied the employees the established prevailing wages. Yet, the Appellate Court excuses this unlawful enrichment, by concluding that the employees were at fault for continuing to work under the Contractor’s breach. In doing so, the Appellate Court contends that the Petitioners’ timely wage claim is somehow brought with “unclean hands.” The Petitioners may have been uninformed with respect to their rights or even ill-equipped to confront the Respondent on a sensitive and confusing wage issue, but there is no evidence to show they had “unclean hands” in this matter.

By attempting to shift blame to the workers, the Appellate Court ignored the wisdom of a labor law maxim that requires employees to “work now, grieve

later.” It also encourages work stoppages and litigation *before* construction projects are finished lest the employee, under the Court’s rational, would have worked at his own peril and acquiesced to the unlawful wages. Such reasoning also naively implies that the workers can make mid-project wage corrections despite an employer’s refusal to pay lawful wages. If Affordable Granite & Stone disputed the prevailing wage claims throughout protracted litigation that brings them to the Minnesota Supreme Court, it is inconceivable that a small group of employees could make a persuasive argument that would have “preserved” their rights while completing the work. In reality, those workers would likely have been released from employment and replaced with workers who would be complicit in the prevailing wage violations.

We respectfully request the Court to recognize that workers who are denied prevailing wages under the mandates of law and contract, and who later resort to the Court for redress, do not proceed with unclean hands. Instead, they have equitable claims that prevent unjust enrichment and satisfy the goals of the prevailing wage policy.

CONCLUSION

For the foregoing reasons, and in accordance with prevailing wage policies that benefit local commerce, economic standards, the taxpayer and the employees, the Fair Contracting Foundation respectfully requests the reversal of summary judgment for Affordable Granite & Stone and a remand of the case consistent with Minnesota's legal precedent and policy interests.

Dated: September 21, 2011

Fair Contracting Foundation of Minnesota



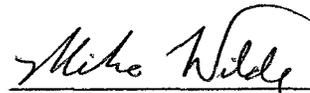
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CERTIFICATION

This brief complies with the word count limitations of Rule 132.01, subdivision 3 and the typeface requirements of Rule 132.01, subdivision 1. This brief was prepared using a proportional typeface in 13-point font with Microsoft Word for Macintosh, version 2011. In reliance on the word count feature of this word processing software, the undersigned certifies that this brief contains 3,917 words.

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