

Appellate File No.: A102173

STATE OF MINNESOTA  
IN SUPREME COURT

Oscar Caldas, et al.,

Appellants,

v.

Affordable Granite & Stone, Inc.,

Respondent.

BRIEF OF AMICUS CURIAE  
CITY OF MINNEAPOLIS

CITY OF MINNEAPOLIS  
Susan L. Segal (#137157)  
City Attorney  
Peter W. Ginder (#35099)  
Deputy City Attorney  
350 South 5th Street, Room 210  
Minneapolis, MN 55415  
(612) 673-2478

*Attorneys for Amicus Curiae City of  
Minneapolis*

COUNTY OF HENNEPIN  
Martin D. Munic (#16043X)  
Daniel D. Kaczor (#391284)  
2000A Government Center  
300 South Sixth Street  
Minneapolis, MN 55487  
(612) 348-5334

*Attorneys for Amicus Curiae Hennepin  
County*

MILLER, O'BRIEN, CUMMINS PLLP  
Brendan D. Cummins (#246236)  
Justin D. Cummins (#276248)  
One Financial Plaza  
120 South Sixth Street, Suite 2400  
Minneapolis, MN 55402  
(612) 333-5831

*Attorneys for Appellants*

LARSON, KING LLP  
David M. Wilk (#0222860)  
Jennifer L. Young (#0389950)  
2800 Wells Fargo Place  
30 East Seventh Street  
St. Paul, MN 55101

*Attorneys for Respondent*

FABYANSKE, WESTRA, HART &  
THOMSON

Dean B. Thomson (#0141045)  
Jesse R. Orman (#0310244)  
800 LaSalle Avenue, Suite 1900  
Minneapolis, MN 55042  
(612) 359-7600

*Attorneys for Amicus Curiae Carpentry  
Contractors Association, Minnesota  
Drywall and Plaster Association,  
Minnesota Environmental Contractors  
Association, Minnesota Mechanical  
Contractors Association, Minnesota  
Painting and Wallcovering Employers  
Association, the Sheet Metal, Air  
Conditioning & Roofing Contractors  
Association, Inc., and the Thermal  
Insulation Contractors Association*

STATE OF MINNESOTA

Lori Swanson (#0254812)  
Alan Gilbert (#0285614)  
Kelly S. Kemp (#0220280)  
445 Minnesota Street, Suite 1100  
St. Paul, MN 55101  
(651) 757-1450

*Attorneys for Amicus Curiae State of  
Minnesota*

Mike Wilde (#0250995)  
Kelly Francis (#0386690)  
411 Main Street, Suite 211  
St. Paul, MN 55102  
(651)-797-2726

*Attorneys for Amicus Curiae Fair  
Contracting Foundation of Minnesota*

DORENE SARNOSKI LAW OFFICE

Dorene R. Sarnoski (#212933)  
332 Washington Avenue North  
402 Union Plaza  
Minneapolis, MN 55402  
(612) 359-0050

CULBERTH & LIENEMAN LLP

Leslie L. Lienemann (#230194)  
1050 UBS Plaza  
444 Cedar Street  
St. Paul, MN 55101  
(651) 290-9300

LAW FIRM OF STEVEN L. SMITH

Steven L. Smith (#190445)  
700 Lumber Exchange Building  
10 South Fifth Street  
Minneapolis, MN 55402  
(612) 305-4355

*Attorneys for Amicus Curiae Minnesota  
Chapter of the National Employment  
Lawyers Association*

## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	ii
Introduction .....	1
Argument .....	2
I.    Standard of Review .....	2
II.   Petitioners, as employees of Affordable Granite & Stone, Inc., were intended beneficiaries of the City’s contractual requirement that employees of Affordable Granite must be paid prevailing wage .....	3
III.  Federal courts uniformly acknowledge that workers are the intended beneficiaries of the requirements in the Davis-Bacon Act .....	5
IV.  State courts recognize implied private causes of action under the Davis-Bacon Act .....	7
Conclusion .....	9

## TABLE OF AUTHORITIES

### CASES

<i>Building and Const. Trades Dept., AFL-CIO v. Reich</i> , 40 F.3d 1275 (D.C.Cir.1994) .....	8
<i>Caldas, et al. v. Affordable Granite &amp; Stone, Inc.</i> , 2011 WL 1938307 (Minn. App.) at p. 2 .....	3
<i>Cox v. NAP Construction Company, Inc.</i> , 891 N.E.2d 871 (N.Y. 2008) .....	7
<i>Cretext Cos., Inc., v. Constr. Leaders, Inc.</i> , 342 N.W.2d 135 (Minn. 1984) .....	3, 4
<i>Favel v. Amer. Renovation &amp; Const. Co.</i> , 59 P.3d 412 (Mont. 2002), cert. denied 538 U.S. 1000 (2003) .....	7, 8
<i>McDaniel v. Univ of Chicago</i> , 548 F.2d 689, 694 (7th Cir. 1977) .....	6
<i>Motor Sports Racing Plus, Inc. v. Artic Cat Sales, Inc.</i> , 666 N.W.2d 320 (Minn. 2003) .....	5
<i>Riverview Muir Duran, LLC v. JADT Dev. Group, LLC</i> , 790 N.W.2d 167 (Minn. 2010) .....	2
<i>Road Sprinkler Fitters Local Union No. 669 v. G&amp;G Fire Sprinklers, Inc.</i> , 125 Cal. Rptr. 2d 804 (Cal. App. 3rd Dist. 2002) .....	8
<i>SCI Minnesota Funeral Services, Inc. v. Washburn/McReavy Funeral Corporation</i> , 795 N.W.2d 855 (Minn. 2011) .....	2
<i>Thompkins v. Fuller</i> , 667 P.2d 944 (Mont. 1983) .....	8
<i>U.S. v. Binghamton Construction Co.</i> , 347 U.S. 171 (1954) .....	5
<i>U.S. for Benefit &amp; on Behalf of Glynn v. Capeletti Bros., Inc.</i> , 621 F.2d 1309 (5th Cir. 1980) .....	6

*Universities Research Ass'n, Inc. v. Coutu*,  
450 U.S. 754 (1981) .....5

*Walsh v. Schlect*,  
429 U.S. 401 (1977) .....5

**OTHER AUTHORITIES**

M.C.O. § 24.200 .....4

M.C.O. § 24.210 .....4

M.C.O. § 24.220 .....4

Minnesota Code of Ordinances, Chapter 24,  
Section 24.200 through 24.260 ..... 1, 3

## INTRODUCTION

Amicus Curiae City of Minneapolis (“City”) adopts Appellants’ Statement of the Legal Issues and Statement of the Case.<sup>1</sup> In June, 2007, the City issued a Request for Proposal (“RFP”) seeking proposals from outside contractors to repair and restore the “terrazzo flooring, granite wainscoating, restroom floor and wall tile, and exhibition hall concrete flooring” at the Minneapolis Convention Center.<sup>2</sup> The RFP contained a checklist of required documents (“checklist”) to be included with each proposal and provided that failure to provide the required documents “may result in disqualification from the proposal process.” The last item on the checklist was a prevailing wage certificate. The last paragraph of the prevailing wage certificate provided that if the bid was accepted, that any work done under a contract with the City was to be done in conformity with the provisions of the Minnesota Code of Ordinances, Chapter 24, Section 24.200 through 24.260. The prevailing wage certificate specifically provided that “payment of wages to employees or agents of the Contractor or any Subcontractor shall be no less than the amount set forth in the current U.S. Department of Labor, General Wage Decision for the State of Minnesota, Hennepin County.”

---

<sup>1</sup> The undersigned counsel authored this brief in its entirety, and no person or entity other than Amicus Curiae City of Minneapolis has made a monetary contribution to the preparation and submission of this brief.

<sup>2</sup> All facts in this section are taken from the undisputed facts contained in the District Court’s Order and Memorandum Granting Summary Judgment in favor of Defendants, filed October 12, 2010, contained in Addendum of Appellants at pp. 47-48 (hereinafter App. Add. \_\_\_\_).

On July 27, 2007, Respondent Affordable Granite and Stone, Inc., (hereinafter “AGS”) filed a Submittal Request for Proposal with the City. Along with the Submittal Request for Proposal AGS submitted a prevailing wage certificate. Subsequently, the City chose AGS to perform work at the Convention Center. On December 17, 2007, the City and AGS entered into a contract captioned “Agreement to Provide Terrazzo Repair, Polishing, and Floor Finishing, Concrete Floor Repair, Granite Wainscoating Repair and Bathroom Tile Repair.” The contract expressly incorporated by reference AGS’s Submittal Request for Proposal which included the prevailing wage certificate that was signed by AGS’s president. The prevailing wage certificate explicitly incorporated the City prevailing wage ordinance.

The City requested leave to file a brief to be heard on the issue of whether employees can recover unpaid prevailing wages as beneficiaries of a public contract that requires their employee to pay the prevailing wage. As discussed below, the City’s prevailing wage ordinance reflects its legislative determination that any of its public contracts are intended for the benefit of workers subject to that contract.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

Amicus City of Minneapolis supports Appellants’ challenge of the District Court’s conclusions. In the instant case, the District Court based its rulings on motions for summary judgment. The Supreme Court reviews legal decisions on summary judgment under a *de novo* standard. *Riverview Muir Duran, LLC v. JADT Dev. Group, LLC*, 790

N.W.2d 167, 170 (Minn. 2010); *SCI Minnesota Funeral Services, Inc. v. Washburn/McReavy Funeral Corporation*, 795 N.W.2d 855, 861 (Minn. 2011).

**II. PETITIONERS, AS EMPLOYEES OF AFFORDABLE GRANITE & STONE, INC., WERE INTENDED BENEFICIARIES OF THE CITY'S CONTRACTUAL REQUIREMENT THAT EMPLOYEES OF AFFORDABLE GRANITE MUST BE PAID PREVAILING WAGE.**

In declining to find that Petitioners were entitled to third-party beneficiary status, both the District Court and the Court of Appeals took an unreasonably narrow interpretation of the applicable test under Minnesota law. It is undisputed that the contract between AGS and the City incorporated a Prevailing Wage Certificate (“PWC”), which provided that “Laborers and Mechanics shall be paid according to the Contracts for Public Works Ordinance [PWO] Minneapolis Code of Ordinances, Chapter 24, Section 24.200 through 24.260”. *Caldas, et al. v. Affordable Granite & Stone, Inc.*, 2011 WL 1938307 (Minn. App.) at p. 2. The Public Works Ordinance is the City’s Prevailing Wage Ordinance. As the Court of Appeals correctly stated, the third-party beneficiaries may be either intended beneficiaries or incidental beneficiaries but that only an intended beneficiary may recover under a contract. *Id.* citing *Cretex Cos., Inc., v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). Further an intended beneficiary must meet either the “duty-owed” test or the “intended-beneficiary” test. *Id.* The intent to benefit test requires that circumstances indicate that the promise intends to give the beneficiary of the promised performance. *Caldas, et al. v. Affordable Granite & Stone, Inc.*, at 3.



In holding that Petitioners do not meet the intent to benefit test, the Court of Appeals failed to consider the PWO in its entirety. The PWO provides that in any contract to be let by the City, “such contract shall contain a special provision for the payment of the laborers, employees and those furnishing materials for such work or improvement ...” M.C.O. § 24.200 (emphasis added) (App. Add. 17). In addition, the PWO requires that parties to the contract shall execute a payment bond. M.C.O. § 24.210 (App. Add. 17) (“contractor shall with said contract execute a bond with sureties to be approved by the officers signing and countersigning said contract in the sum fixed, conditioned for the payment of the laborers and employees employed”). The PWO also requires that the contract “shall contain a provision stating that all federal labor standards and prevailing wage provisions applicable to federal contracts in accordance with the federal Davis-Bacon and related acts are applicable to this contract as is fully set forth herein ...”. M.C.O. § 24.220. (App. Add. 18).

Unlike the contract and performance bond that were at issue in *Cretext*, it is clear that the contract in the instant case, as well as governing Minneapolis Code of Ordinance language, contemplates that the petitioners are intended third-party beneficiaries of the contract between AGS and the City. In fact, the PWO reflects a legislative determination that any public contract contain a “special provision” for the benefit of workers.

As noted in *Cretext*, another significant circumstance that needs to be considered in the intent-to-benefit test is whether the contract is for a private or public construction project. *Cretext v. Constr. Leaders*, 342 N.W.2d at 140. There the court stated that there “would seem to be no reason for the contracting parties to intend to confer a benefit on

materialmen who can protect their own interest by filing liens against the property.” *Id.* In this case, workers who do not receive the prevailing wage could be left without a remedy, such as the ability to file a lien, if they are not viewed as intended beneficiaries of the contract between the City and Affordable Granite. Therefore it is “appropriate” to recognize the workers on public contract in these circumstances, as intended beneficiaries.

As a matter of both common sense and public policy, it is clear that the intent of the Prevailing Wage Ordinance was to benefit petitioners and other employees who were supposed to receive the prevailing wage. This interpretation is buttressed by the fact that the public contract specifically incorporated the PWO and the “special provision” for the payment of laborers. This view is further supported by the requirement that the contractor provide a payment bond. In its holding, the Court of Appeals ignored this clear expression of public policy as well as the “obvious purpose” of the contract, which has long been recognized by the Minnesota Supreme Court. See e.g. *Motor Sports Racing Plus, Inc. v. Artic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003).

### **III. FEDERAL COURTS UNIFORMLY ACKNOWLEDGE THAT WORKERS ARE THE INTENDED BENEFICIARIES OF THE REQUIREMENTS IN THE DAVIS-BACON ACT.**

In *Universities Research Ass'n, Inc. v. Coutu*, the United States Supreme Court, although it declined to recognize an implied cause of action under the Davis-Bacon Act, cited two of its earlier decisions for the proposition that workers were the intended beneficiaries of the Act. 450 U.S. 754, 771-73 (1981) (citing *U.S. v. Binghamton Construction Co.*, 347 U.S. 171, 177-78 (1954); *Walsh v. Schlect*, 429 U.S. 401, 411

(1977)). Furthermore, the court detailed the legislative history of the Davis-Bacon Act as follows:

The 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 \*774 Cong., 2d Sess., 1 (Comm. Print 1962) (Legislative History) . . .

*Id.* at 773-74.

Another leading case that did not find a federal implied private cause of action created by the Davis-Bacon Act, nonetheless specifically noted workers as its intended beneficiaries. *U.S. for Benefit & on Behalf of Glynn v. Capeletti Bros., Inc.*, 621 F.2d 1309, 1314 (5th Cir. 1980) (“Although laborers and mechanics are clearly the intended beneficiaries of the Davis-Bacon Act, section 1 does not confer a federal right directly on the benefited class.”).

In *McDaniel v. Univ of Chicago*, the Seventh Circuit found an implied cause of action for laborers under the Davis-Bacon Act. 548 F.2d 689, 694 (7th Cir. 1977). There, the court also analyzed the legislative history of the Act to explain that the workers were its intended beneficiaries. *Id.* at 693. (“Almost from the inception of Federal construction activity Congress recognized the necessity for providing basic wage protection to local laborers and mechanics employed on the construction.”).

In this case, the City’s PWO, specifically provided that the contract between AGS and the City contain a provision that all federal labor standards and prevailing wage provisions applicable to federal contracts in accordance with the federal Davis-Bacon and related acts are applicable to the instant contract. By requiring compliance with the

Davis-Bacon Act, the PWO impliedly recognizes, as the federal courts have that workers were the intended beneficiaries of the Davis-Bacon Act as well as the PWO.

#### **IV. STATE COURTS RECOGNIZE IMPLIED PRIVATE CAUSES OF ACTION UNDER THE DAVIS BACON ACT.**

Although courts have recognized that there is no implied federal private right of action under the Davis Bacon Act for workers who are paid less than the wages those statutes generally require, that does not mean that workers' state claims are legally insufficient. *Cox v. NAP Construction Company, Inc.*, 891 N.E.2d 871 (N.Y. 2008). Stated differently, to say that Congress, in enacting the Davis Bacon Act, did not intend to create a federal right of action is not to say that Congress intended to prohibit or preempt state claims. *Id.* at 604, (concluding state remedies are not barred by federal law).

State courts in other jurisdictions have found that employees working on publicly funded projects can pursue breach of contract claims against contractors as third party beneficiaries to recover the prevailing wage. Thus, for example, in *Favel v. Amer. Renovation & Const. Co.*, 59 P.3d 412 (Mont. 2002), cert. denied 538 U.S. 1000 (2003), the Montana Supreme Court found that employees on public funded projects can recover the unpaid prevailing wage as third party beneficiaries. The Montana court stated that “[w]orkers, as third party beneficiaries to the Contracts between [the government and the employer] may bring or pursue a state claim to enforce the terms of the Contract.” *Id.* at 426. In reaching this decision, the Montana Supreme Court relied on the Montana constitutional guarantee that aggrieved parties have court access. *Id.* Similarly,

Minnesota has a constitutional provision that requires that aggrieved parties receive legal redress. Minn. Const., Art. I, Section 8 (“every person is entitled to a certain remedy in the loss for all injuries ...”).

As noted in *Favel v. Am. Renovation & Const. Co* “[n]umerous courts have held that the Act [Davis-Bacon] was designed specifically to protect the interests of laborers.” 59 P.3d 412, 418 (2002). (citing *Binghamton Construction Co.*, 347 U.S. at 177-78. (the Davis-Bacon Act “was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.”); *Thompkins v. Fuller*, 667 P.2d 944 (Mont. 1983); *Building and Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275 (D.C.Cir.1994)).

Other courts have also held that employees can recover prevailing wages through a contract claim as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages. *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, 125 Cal. Rptr. 2d 804, 812 (Cal. App. 3rd Dist. 2002). Minnesota should join other states in recognizing that employees are intended beneficiaries of public contracts that provide for prevailing wages.

## CONCLUSION

At summary judgment the district court erroneously determined that Appellants were not intended beneficiaries of the contract between the City and AGS. Because the facts here are undisputed, the City respectfully urges the Supreme Court to reverse the district court's ruling and find that Appellants were intended beneficiaries of the agreement to provide terrazzo finishing services to the City of Minneapolis.

Dated:

9/21/11

SUSAN L. SEGAL

City Attorney

By



PETER W. GINDER

Attorney Reg. No. 35099

Deputy City Attorney

350 South 5th Street, Room 210

Minneapolis, MN 55415

(612) 673-2478

*Attorneys for Amicus Curiae City of  
Minneapolis*