
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 CONSTRUCTION INDUSTRY ASSOCIATIONS
AS AMICI CURIAE**

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IDENTITY AND INTEREST OF AMICI CURIAE

This brief is submitted on behalf of seven construction industry trade associations¹ (“Industry Associations”) representing hundreds of construction companies who regularly bid and perform work on public and private projects in the State of Minnesota. As a result, the Industry Associations are often subject to the same or similar prevailing wage laws as are at issue in this case. Each of the Industry Associations is identified briefly below.

Sheet Metal, Air Conditioning & Roofing Contractors Association, Inc. (“SMARCA”) represents 225 member and contributing HVAC, mechanical, and roofing contractors in Minnesota and North Dakota. SMARCA contractors are engaged in residential, commercial and industrial construction, repair and maintenance.

Minnesota Mechanical Contractors Association (“MMCA”), with 150 member firms, is a trade association of contractors that install and service heating, cooling, and plumbing equipment in homes, hospitals, office buildings, refineries, and other facilities.

Carpentry Contractors Association (“CCA”) is a similar association of more than 40 members that perform carpentry work in the residential, commercial, and industrial arenas.

Minnesota Drywall and Plaster Association (“MDPA”) has more than 20 member contractors who work in the residential and commercial construction markets.

¹ The undersigned certifies the following pursuant to Rule 129 of the Minnesota Rules of Civil Appellate Procedure: (1) this brief was drafted by counsel for the amici curiae Industry Associations; (2) no other party’s counsel authored this brief in whole or in part; and (3) no entity, other than the Industry Associations, their members, or their counsel, made any monetary contributions to the preparation or submission of the brief.

Minnesota Painting and Wallcovering Employers Association (“MPWEA”) is an association of more than 20 member contractors that perform painting and wallcovering services in the residential, commercial, and industrial markets.

Minnesota Environmental Contractors Association (“MECA”) has nine member contractors that perform asbestos abatement in residential, commercial, and industrial markets.

Thermal Insulation Contractors Association (“TICA”) is an association of nine members who provide mechanical and thermal insulation services in homes, schools, commercial buildings, refineries, and other industrial settings within the State of Minnesota.

The Industry Associations’ members regularly bid on projects subject to various prevailing wage laws. As discussed in detail below, the Industry Associations wish to provide their informed views on the public interest at issue in this case: how and why all contractors subject to prevailing wage laws should comply with those laws, pay the appropriate wages and benefits, and be held accountable when they fail to so comply.

STATEMENT OF FACTS

As amici curiae, Industry Associations adopt and rely upon the statement of facts in Appellants’ brief.

SUMMARY OF ARGUMENT

The district court and court of appeals determined that Appellants – employees who should have been paid the legally-required prevailing wage by their employer – were unable to enforce the prevailing wage provisions of the contract between AGS and the

City of Minneapolis (“City”) under either third-party beneficiary or unjust enrichment theories. This conclusion is contrary to well-established Minnesota law and the law of other states. Indeed, affirming the lower courts’ decisions would leave Minnesota an outlier among the states that have considered this issue.

With respect to Appellants’ third-party beneficiary claim, the district court and court of appeals erred by concluding that Affordable Granite and Stone’s (“AGS”) contract with the City did not demonstrate an intent to benefit Appellants. The courts also erred in concluding that it was “inappropriate” to allow employees to enforce a contractual provision of which they were intended beneficiaries. Again, this conclusion is contrary to decisions of every other court to consider the issue. The parties’ intent to benefit Appellants is demonstrated by the fact that Appellant were referenced in the contract, and performance of the prevailing wage provision was, by the terms of the contract, to be rendered directly to Appellants. The motivation of AGS in signing a contract containing this provision is irrelevant. As courts in other states have recognized, the fact the contract required AGS to pay the prevailing wage to Appellants is enough to render them third-party beneficiaries. Further, as every other court to consider the issue has recognized, it is appropriate to permit employees who are third-party beneficiaries to enforce contractual wage provisions in their favor. Such enforcement is also vital as a matter of policy.

The district court and court of appeals erred further when they concluded that the employees could not assert a claim for unjust enrichment. By considering only the perceived equities on the side of AGS and ignoring AGS’s misconduct, the district

court's decision is inconsistent with this Court's articulation of the unjust enrichment doctrine. The court of appeals compounded the error by concluding, contrary to the law and the facts in the record, that the employees were guilty of laches and had "unclean hands." The court of appeals did not appreciate that it is inequitable to expect laborers in the construction industry to recognize that they are being paid too little, and take action that would jeopardize their continued employment. The district court also erred when it equated unjust enrichment exclusively with the expectations of the Appellants, and second-guessed the legislative judgment that prevailing wages are appropriate and equitable. Finally, the conclusion of the district court leaves Appellants with a right, but without a remedy, contrary to well-established principles of equity.

If the erroneous decisions of the court of appeals and district court are allowed to stand, AGS will suffer no damage or penalty for violating prevailing wage laws. Moreover, contractors like AGS who violate prevailing wage laws without penalty will be rewarded with lower costs and higher profits to the detriment of law-abiding contractors who comply with the law. Accordingly, all other contractors will be forced to choose between abiding by the law or violating it to remain competitive. Requiring that choice is contrary to the public interest.

DISCUSSION

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT APPELLANTS ARE NOT THIRD-PARTY BENEFICIARIES OF THE CONTRACT AT ISSUE

A third party may enforce a contractual provision in his favor when (1) the contract manifests an “intent to benefit” the third party and (2) enforcing the contract is appropriate to effect the intent of the parties. *See Cretex Cos., Inc. v. Construction Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). Whether a third party may enforce a contractual provision is a question of law, reviewed de novo. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

A. The terms of the convention center contract indicate an intent to benefit Appellants

The district court concluded that the first element of the third-party beneficiary analysis was not present because the contract between the City and AGS did not indicate an intent to benefit Appellants. The district court reached this conclusion even though the contract required AGS to pay prevailing wage to third parties – i.e., the Appellants.

Where performance is rendered to the third party who attempts to enforce the contract, the third party is an intended beneficiary. *See Buchman Plumbing Co. v. Regents of the Univ. of Minn.*, 298 Minn. 328, 335, 215 N.W.2d 479, 484 (1974) (“If, by the terms of the contract, performance is directly rendered to a third party, he is intended by the promisee to be benefited. Otherwise, if the performance is directly rendered to the promisee, the third party who also may be benefited is an incidental beneficiary with no right of action.”); *see also* 13 Richard A. Lord, *Williston on Contracts* § 37.7 (2011

update). Here, AGS, the promisor, was by the terms of its contract with the City required to render performance—i.e., pay the prevailing wage—directly to Appellants.

The district court nevertheless concluded that “the prevailing wage certificate does not satisfy the intent to benefit test because that part of the contract simply manifests the parties’ intent to comply with the law.” This is a distinction without a difference. There is no legally relevant difference between compliance with the prevailing wage ordinance and payment of the prevailing wage. Intent to do one constitutes intent to do the other.

For the purpose of third-party beneficiary analysis, it is irrelevant whether the parties to a contract intended to benefit a third party because they were legally obligated to do so, or because they were moved to do so by benevolent impulses. *See, e.g., Beverly v. Macy*, 702 F.2d 931, 941 (11th Cir. 1983) (citing 4 Corbin, *Contracts* § 781) (“the economic motivation of the parties is not dispositive; rather, the intention of the parties disclosed by the writing and surrounding circumstances known to the parties, and not their motive, determines the rights of the third-party beneficiary.” (quotations omitted)). Accordingly, under the third-party beneficiary doctrine, it does not matter whether AGS and the City were motivated by benevolence towards AGS employees or by their obligations under the prevailing wage ordinance. All that matters is whether performance of the contract necessarily required AGS to pay the Appellants prevailing wage, and it is undisputed that the contract required exactly that.

B. Other jurisdictions have concluded that prevailing wage provisions in contracts satisfy the “intent to benefit” factor of third-party beneficiary analysis

Nor is Minnesota alone in determining that a contract is intended to benefit a third party in this same context. Indeed, several other states have specifically concluded that, when parties incorporate a provision requiring adherence to prevailing wage laws into their contracts, the parties intend to benefit employees covered by those prevailing wage laws, unless a contrary intention is clear from other language in the contract. *See, e.g., Favel v. American Renovation and Const. Co.*, 59 P.3d 412, 432 (Mont. 2002) (“because the terms of the Act were incorporated by the parties as a term of their contract, those terms were as enforceable in a court of law as any other contract term.”); *Tomei v. Corix Utilities (U.S.) Inc.*, No. 07-CV-11928-(DPW), 2009 WL 2982775, at *19 (D. Mass. 2009); *State ex. rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 37 (Mo. 2008) (en banc). *Cf. Indiana Gaming Co., L.P. v. Blevens*, 724 N.E.2d 274, 278 (Ind. Ct. App. 2000) (concluding that, although employees are usually third-party beneficiaries of contractual provisions in their favor, express contractual language to the contrary precludes third-party beneficiary enforcement).

C. Third-party beneficiary enforcement was not only appropriate, but essential to effectuate the intent of the law and the contract

The district court concluded that Appellants failed to meet the second element of the third-party beneficiary analysis – appropriateness. It appears that the district court’s

conclusion rested primarily² on its judgment that “as a policy matter, affording third-party contractual rights to Plaintiffs is not ‘appropriate’ because it would effectively create a private right of enforcement wherever a governmental contract invokes a law intended to benefit third parties.”

The district court’s policy analysis was flawed in several respects because there is no reason to believe that a private right of enforcement is in any way inappropriate. First, had the City wished to deny third-party beneficiaries a right to enforce the contract, it could easily have done so by placing explicit language to that effect in their contract with AGS. *See In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 499 (Minn. 1995). The fact that the City has not done so supports the conclusion that third-party beneficiary enforcement is appropriate.

Second, all other states to consider the issue have recognized that employees can recover an unpaid prevailing wage as third-party beneficiaries where the contract reflects an intent to benefit employees. A California appellate court explained it most succinctly as follows:

We find it fairly self-evident that the prevailing wage law was enacted to benefit employees as a class by requiring the payment of prevailing wages on public works. Since employees working on the public works projects are the intended beneficiaries of this provision, they are third party beneficiaries of the contract between the public agency and the contractor.

² The district court also concluded that, because the City did not provide a private right of action, affording a private right of action under the guise of contract law would not effectuate the city’s intent. But as Appellants have pointed out, the City could not have provided a private right of action in any case, and its failure to do so is not probative of its intention.

Tippett v. Terich, 37 Cal.App.4th 1517, 1533, 44 Cal.Rptr.2d 862 (1995) *abrogated on other grounds*, *Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 7067 (Cal. Ct. App. 1995) (citations omitted).

Each other state that has considered the issue has reached the same conclusion – unless the contract contains specific language disclaiming an intent to benefit third-parties, intended beneficiaries may enforce the contract. *See, e.g., Rogers v. Speros Const. Co. Inc.*, 580 P.2d 750, 754 (Ariz. Ct. App. 1978) (“the general contractor may be liable to underpaid employees of a subcontractor as third-party beneficiaries of the construction contract”); *Tomei*, 2009 WL 2982775, at *19 (concluding under Massachusetts law that in the absence of language preventing third-party beneficiary enforcement, employees could bring an action against their employer for failure to pay prevailing wages); *State ex. rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 37 (Mo. 2008) (en banc) (“Plaintiffs are third-party beneficiaries of this contract, because the contract expresses the intent to benefit them as workers who fall under the prevailing wage law.”); *Ramos v. SimplexGrinnell LP*, ___ F. Supp. 2d ___, No. 07–CV–981 (SMG), 2011 WL 2471584, at *10-15 (E.D.N.Y. 2011) (“In any event, it is clear that New York law requires public works contracts like those at issue here to include prevailing wage provisions. It is equally clear that plaintiffs and the putative class are the intended third-party beneficiaries of these prevailing wage provisions”); *Connell v. Wayne Builders Corp.*, No. 95APE07-897, 1996 WL 39646, at *4 (Ohio Ct. App. 10 Dist. Jan. 30, 1996); *Troise V. Extel Communications, Inc.*, 784 A.2d 748 (N.J.Super.A.D. 2001) (“The Act specifically requires the inclusion of the prevailing

wage in any contract for public work above a threshold amount, and because the purpose of the Act is to protect employees on public projects, the employees are third-party beneficiaries of this statutorily mandated contractual provision.” (citations omitted)); *Indiana State Bldg. and Const. Trades Council v. Warsaw Community School Corp.*, 493 N.E.2d 800, 805 (Ind. Ct. App. 1986) (“It is generally recognized that employees of public contractors may sue as third party beneficiaries for wages on a contract between the contractor and the public.”). *Cf. Badiie v. Brighton Area Schools*, 695 N.W.2d 521, 369 (Mich. Ct. App. 2005) (holding that employees are not third-party beneficiaries on the basis of an express contractual provision providing that the contract was not intended to benefit them).

There are good reasons these courts have reached a consensus that it is appropriate to allow employees to enforce contractual provisions as third-party beneficiaries. Although there are a variety of federal, state, and local prevailing wage laws, the prevailing wage system – in general – requires that workers on government-funded construction projects receive a minimum hourly rate, plus benefits, tied to specific geographic areas and the specific trade or occupation at issue. *See, e.g.*, 40 U.S.C. 3141 *et seq.* (Davis-Bacon Act); Minn. Stat. §§ 177.41-44 (Minnesota prevailing wage statute); Minneapolis Code of Ordinances § 24.220.

If some contractors are allowed to circumvent the prevailing wage system, they will be rewarded in several significant respects. If a contractor believes it can “get away” with not paying its workers a prevailing wage, it would be able to underbid other contractors attempting to get the same work, resulting in more projects and more revenue.

And because the non-compliant contractors' labor costs will be lower, its profits will increase. On the other hand, contractors who follow the rules will be penalized with fewer contracts and lower profits. This is contrary to the intent and spirit of the prevailing wage laws, which assume and enforce a level playing field for the benefit of all. *See, e.g.,* Hamid Azari-Rad et al, *The Economics of Prevailing Wage Laws* 4 (2005) (“This is a view of competition where the playing field is level, and the worst employer does not chase out all of the better, safer, fairer employers.”).

The prevailing wage system should be enforced so as to prevent such behavior from being rewarded. The other jurisdictions to have considered this specific issue agree. *See, e.g., Lusardi Construction Co. v. Aubry*, 824 P.2d 643, 648 (Cal. 1992). In *Lusardi*, the California Supreme Court noted and relied on the policy of “protect[ing] employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” *Id.*; *see also Lake County Contractors Development Ass’n, Inc. v. North Shore Sanitary Dist. of Lake County*, 555 N.E.2d 445, 45 (Ill. Ct. App. 1990) (interpreting a prevailing wage ordinance so as to eliminate competitive advantage to contractors forcing longer work hours); *Action Elec. Contractors Co., Inc. v. Goldin*, 474 N.E.2d 601 (N.Y. 1984) (interpreting prevailing wage law to eliminate unfair advantage on the part of contractors not required to pay prevailing wage).

Allowing those who are directly benefitted by prevailing wage ordinances (i.e. the Appellants) to participate in their enforcement is an effective way to ensure uniform enforcement. As one commentator has said, “there may be an argument favoring private

enforcement of a governmental policy. Those most affected by a policy might have the greatest interest in seeing that it is carried out, and the most efficient way to enforce the policy might be through private lawsuits.” See Howard O. Hunter, *Modern Law of Contracts* § 20:15 (2011 update). Where other methods of vindicating the policy implicated are absent, this policy is even stronger. *Id.* (“A strong attraction to third-party beneficiary rules lies in situations involving public contracts or publicly-imposed requirements on contracting parties [where] there may not be an established basis to seek relief for the claim . . .”).

In short, the decisions of the district court and the court of appeals were contrary to the decisions of this Court interpreting the third-party beneficiary doctrine, and will render Minnesota an outlier among the states to consider the application of the doctrine to enforcement of the prevailing wage laws. Moreover, contractors who abide by prevailing wage requirements on public contracts rely on the enforcement of these requirements as to all other contractors. If the decisions below are not reversed, it will seriously hamper fair and open bidding for public contracts in the state of Minnesota.

II. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT AGS WAS NOT UNJUSTLY ENRICHED

A. Standard of Review

This Court has said that the right to recover for unjust enrichment “is governed by principles of equity.” *Lundstrom Constr. Co. v. Dygert*, 254 Minn. 224, 231, 94 N.W.2d 527, 533 (Minn. 1959). A district court’s determinations on the application of equitable relief after summary judgment are reviewed de novo. See *SCI Minnesota Funeral*

Services, Inc. v. Washburn Mc-Reavy Funeral Corp, 795 N.W.2d 855, 860-61 (Minn. 2011). The court of appeals appears to have concluded that the district court's unjust enrichment determination should have been reviewed for abuse of discretion. This conclusion is inconsistent with this Court's recent decision in *SCI*, 795 N.W.2d at 860-61.

B. The court of appeals mistakenly concluded that Appellants had "unclean hands" and were guilty of laches

The court of appeals concluded that Appellants could not succeed on an unjust enrichment claim because they did not bring their unjust enrichment claim with "clean hands." *Caldas v. Affordable Granite & Stone, Inc.*, No. A10-2173, 2011 WL 1938307, at *4 (Minn. App. May 23, 2011). In *Hruska v. Chandler Associates, Inc.*, 372 N.W.2d 709, 715 (Minn. 1985), this Court articulated the "inequitable conduct" necessary to constitute unclean hands. This Court said: "The plaintiff may be denied relief where his conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others." *Id.* (citing *Johnson v. Freberg*, 178 Minn. 594, 597-98, 228 N.W. 159, 160 (1929)). Neither the district court nor the court of appeals cited any fact which would tend to support a conclusion that Appellants have "unclean hands" which would prevent them from asserting an equitable claim.

The court of appeals also concluded that the Appellants were guilty of laches. "Laches is an equitable doctrine which applies to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced

by the delay.” *Clark v. Reddick*, 791 N.W.2d 292, 294 (Minn. 2010) (quoting *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002)); *see also Aronovitch v. Levy*, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953).

As a general principle, this Court recognizes that “[a] party is not guilty of laches until he discovers the mistake, or until he is chargeable with knowledge of facts from which, in the exercise of proper diligence, he ought to have discovered it.” *Lindquist v. Gibbs*, 122 Minn. 205, 208, 142 N.W. 156, 158 (1913). The district court made no finding, and the court of appeals cited no facts, which would support an inference that Appellants waited an unreasonable amount of time to assert their prevailing wage claim. Without an adequate factual predicate, the court of appeals erred in making what was essentially a policy conclusion – i.e., that individual laborers somehow prejudiced their employers by not giving them immediate notice that they had violated prevailing wage laws. The assumptions behind the court’s new policy are unwarranted.

First, the district or appellate court effectively found that the laborers knew they were being underpaid but did nothing to stop the violation. Under the prevailing wage act, it is the contractor’s statutory duty to properly pay prevailing wages, not the employees’ duty to make sure that it happens. The appellate court’s analysis inverts the statutory duty and puts it on the laborer to know the law, the proper wage applicable to him, and make an immediate objection. As a practical matter, laborers often only find out that they have been paid under the wrong labor category after the fact from some third party – e.g., a union or workers association representative, another laborer from another similar project, or a state or municipal prevailing wage audit. The court of

appeals had no factual basis to conclude that the laborers in this case knew, or in general do know, that they were being underpaid but intentionally kept working with no objection. Indeed, even assuming for the sake of argument that laborers *do* know that they are being underpaid, it is unrealistic and unfair to expect the laborers to object to the contractor's intentional violation of the law and risk being fired and replaced with a more "compliant" employee. Any equitable "clean hands" or "laches" analysis cannot conclude that employees must jeopardize their continued employment by complaining that their wages were inadequate. It is inherently inequitable to expect employees – particularly laborers in the construction industry during the current economic climate – to appreciate their statutory rights, recognize that they are being paid according to the wrong wage category, and take action that almost certainly would jeopardize their continued employment.

C. **The district court erred when it concluded that AGS was not unjustly enriched.**

The district court erroneously concluded that AGS was not unjustly enriched by its conduct in this case. To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant "in equity and good conscience" should pay. *ServiceMaster of St. Cloud v. GAB Business Services, Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (citing *Klass v. Twin City Fed. Sav. and Loan Ass'n*, 291 Minn. 68, 71, 190 N.W.2d 493, 494-95 (1971)). "[U]njust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in

the sense that the term ‘unjustly’ could mean illegally or unlawfully.” *Servicemaster*, 544 N.W.2d at 306 (citing *First Nat’l Bank v. Ramier*, 311 N.W.2d 502 (Minn. 1981)).

Unjust enrichment, as articulated by Minnesota courts, focuses on the behavior of the defendant – i.e., the party alleged to be unjustly enriched. *See, e.g., First Nat’l*, 311 N.W.2d 502; *Brand v. Williams*, 29 Minn. 238, 239, 13 N.W. 42, 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.”).

For reasons that are not entirely clear, the district court in this case apparently did not consider whether AGS was unjustly enriched. Instead, it focused almost exclusively on Appellants’ conduct. Accordingly, the district court failed even to consider the fact that AGS gained a large financial benefit by ignoring its statutory and contractual obligations. Violation of the prevailing wage ordinance is precisely the sort of “illegal[] or unlawful[]” conduct contemplated by this court’s unjust enrichment doctrine. *Servicemaster*, 544 N.W.2d at 307. But the district court failed to examine this conduct, and weigh it against the perceived equities on the side of AGS.

Moreover, even the equitable factors which the district court did examine should not have led to a conclusion that the equities favored AGS. The district court relied on three rationales to support its decision. Each is discussed below.

1. Expectations of Appellants

The district court concluded that “there is no evidence that Plaintiffs expected to be paid at a higher wage rate.”³ (Emphasis added). The fact that Appellants did not know that they were being cheated from their statutory rights does change the conclusion that AGS was unjustly benefiting from Appellants’ ignorance. While it is true that Minnesota law recognizes that expectations may be a factor in establishing the injustice of another’s enrichment, it is not exclusive, and factors other than the reliance interest of an aggrieved party may establish the injustice necessary to establish unjust enrichment. In this case, injustice is established by AGS’ conscious disregard of the of the prevailing wage contracting system, and the fact that they gained both a contract and a windfall from lower wage costs as a result. AGS promised to conform to the law, obtained business by their promise, and then failed to pay what they promised to pay. This establishes the “illegal[] and unlawful[]” conduct necessary to maintain a claim for unjust enrichment, regardless of the expectations of the Appellants. *Servicemaster*, 544 N.W.2d at 307.

Moreover, to the extent that expectations of the employees are a relevant consideration in whether AGS was unjustly enriched, there is evidence that the

³ In the cases cited by the district court, the injustice supporting the unjust enrichment claim arose from the actions that defeated the legitimate expectations of the parties. See *Garrey v. Nelson*, 185 Minn. 487, 490, 242 N.W. 12, 13 (Minn. 1932); *Holman v. CPT Corp.*, 457 N.W.2d 740, 744 (Minn. App. 1990); *Twin City Const. Co. of Fargo, N.D. v. ITT Indus. Credit Co.*, 358 N.W.2d 716, 719 (Minn. App. 1984). These cases do not establish that defeating reasonable expectations is necessary to establish injustice. Even if they did, laborers have a legitimate and reasonable expectation that they will be paid according to the prevailing wage laws.

employees did expect to be paid the prevailing wage. Specifically, Appellants have presented deposition testimony from one of the Appellants that work at the convention center would be compensated at a higher rate than previous work. (ADD14).

2. Subversion of the Legislative Scheme

The district court also concluded that “by affording Plaintiff an equitable remedy, the Court would be subverting the legislative scheme underlying the Prevailing Wage Ordinance by grafting onto that scheme a private right of action.” Few other states have considered the use of unjust enrichment to enforce payment of prevailing wages. This appears to be because most other states to consider the issue allow employees who are harmed by violations of prevailing wage laws to pursue a third-party beneficiary claim. *See, e.g., Tomei*, 2009 WL 2982775, at *21 (“Tomei has a triable breach of contract claim under the latter of these contracts, obviating the need for a claim in quantum meruit or unjust enrichment.”).

Nevertheless, at least three courts have considered the use of unjust enrichment in the context of prevailing wage laws. *See Andrews v. First Student, Inc.*, No. 10–11053–RGS, 2011 WL 3794046, * 5 (D. Mass. 2011) (denying motion to dismiss on plaintiffs’ unjust enrichment claim alleging that defendant was unjustly enriched through its intentional failure to disclose its awareness of the legal duty of municipalities to update public wage rate); *U.S. ex rel. Wall v. Circle Const., LLC*, 700 F. Supp. 2d 926, 939 (M.D. Tenn. 2010) (concluding that “Circle C was unjustly enriched by its receipt of contractual payments from the United States for electrical work that it was not paid in compliance with its contract’s wage requirements. . . To allow Circle C to retain the

United States' payments for the electrical work at set rates would be inequitable.”); *Jara v. Strong Steel Door, Inc.*, 58 A.D.3d 600, 602 (N.Y.A.D. 2 Dept. 2009) (“Nor is Strong Steel Door entitled to summary judgment dismissing Huerta’s alternative claims for equitable relief under theories of unjust enrichment and quantum meruit.”). The fact that other states permit recovery under a third-party beneficiary theory suggests a consensus that it is appropriate to supplement the legislative scheme with other means of recovery.

3. Upper Echelon of Minnesota Wage Earners

The district court concluded that “equity does not support a right of recovery because Plaintiffs are seeking an hourly wage rate that would translate, without any overtime pay, to an annual salary of \$92,164.80.” The district court’s finding relies on the questionable assumption that Appellants can find full-time, year-round terrazzo work. But more importantly, whenever a prevailing wage law is at issue, the policy decision has already been made by the appropriate legislative body that the amount that Appellants seek is a fair and equitable wage. The district court’s finding that it would be inequitable for Appellants to actually receive this wage is flatly inconsistent with the legislative judgment that such a wage is appropriate. The district court violated the separation of powers by usurping legislative judgments as to appropriate wage rates under the banner of equity.

D. Unjust enrichment is an appropriate remedy where other remedies fail.

This Court has said that “equity functions as a supplement to the rest of the law where its remedies are inadequate to do complete justice.” *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 329 (Minn. 2004) (quotation marks omitted); *see*

also *United States Fire Ins. Co. v. Minnesota State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981). If the prevailing wage ordinance cannot be enforced through a private right of action or through an action by Appellants as third-party beneficiaries, it is the role of equity to prevent AGS from taking advantage of the lack of any enforcement mechanism to unjustly enrich itself. *See, e.g., Universities Research Ass'n v. Coutu*, 450 U.S. 754, 774, n.25 (1981).

Without the intervention of equity, not only will the Appellants be deprived of the wages to which they are entitled, but a contractor who has successfully circumvented the prevailing wage laws for its own benefit will incur no penalties for doing so. This will have serious consequences for all Minnesota contractors. As outlined above, it is vital to an open, competitive contracting system that all contractors be forced to comply with the same rules. *See Modern Continental Const. Co., Inc. v. City of Lowell*, 465 N.E.2d 1173, 1179-1180 (Mass. 1984) (“the purpose of competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an open and honest procedure for competition for public contracts.”).

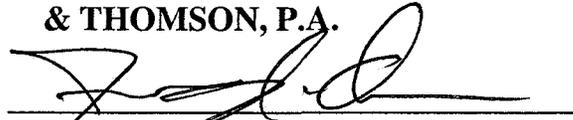
CONCLUSION

The Industry Associations believe there has to be an effective remedy for the wrong at issue in this case – not just to create a level playing field, but to ensure the statutory right created is able to be enforced. The legislature has declared that there be prevailing wage laws for the benefit of the laborer. If the laborer cannot enforce the law, then the right intended to be granted will not be enforced, most effectively illustrated by what happened in this case. Prohibiting the person most likely to enforce a law passed by

the legislature – in this case the laborer – effectively undercuts the legislative mandate and makes the statute ineffectual. Accordingly, for all of the reasons discussed above, the Industry Associations respectfully support Appellants’ request that this Court reverse the summary judgment entered by the district court and remand for further consideration.

Respectfully submitted,

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Dated: September 22, 2011

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The brief was prepared using Microsoft Word 2007, utilizes 13 point type, a Times New Roman font, and contains 5,220 words.

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