

NO. A10-2173

State of Minnesota
In Supreme Court

Oscar Caldas, et al.,

Appellants,

vs.

Affordable Granite & Stone, Inc.,

Respondent,

Dean Soltis,

Defendant.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. THE STATE OF MINNESOTA AND MINNESOTA SUPREME COURT PRECEDENT CONFIRM THAT THE MINNESOTA PAYMENT OF WAGES ACT PROVIDES AN INDEPENDENT CAUSE OF ACTION TO RECOVER EARNED BUT UNPAID WAGES1

A. The Response Brief Ignores The Long-Standing Intent And Application Of The Minnesota Payment Of Wages Act To Permit A Private Right Of Action For Recovery Of Wages1

B. The Response Brief Ignores The Payment Of Wages Act’s Compensatory And Safe-Harbor Provisions, Codified Canons Of Construction, And Minnesota Supreme Court Precedent While Raising A Baseless Oral-Contract Argument For The First Time On Appeal2

C. While Asserting “Ignorance” As A Defense, The Response Brief Ignores The Admissions That Affordable Granite & Stone Knew The Company Had To Pay The Prevailing Wage For Terrazzo Mechanics And Other Undisputed Facts That Contradict The Company’s Position7

II. THE CITY OF MINNEAPOLIS CONFIRMS THAT APPELLANTS ARE INTENDED BENEFICIARIES OF THE CITY’S CONTRACT, AND THE LAW ENFORCEMENT AUTHORITIES AND MINNESOTA COMPANIES AGREE APPELLANTS’ CONTRACT CLAIMS SHOULD PROCEED.....9

A. The Response Brief Ignores The Clear Intent Of The Minneapolis Convention Center Contract As Well As The United States Supreme Court Precedent Incorporated Into That Contract..... 11

B. The Response Brief Ignores The Broad Consensus Among Minnesota Law Enforcement Authorities And Minnesota Businesses That Appellants’ Third-Party Beneficiary Action Is Appropriate And Necessary To Preserve The Rule Of Law And Market Efficiencies 12

C. The Response Brief Erroneously Challenges The Established Prevailing Wage Rate To Which Affordable Granite & Stone Agreed When Entering Into The Minneapolis Convention Center Contract, Mischaracterizing The Record And Appellants’ Claims In The Process 15

D. The Response Brief Misapplies The Minnesota Supreme Court Precedent Allowing Third-Party Beneficiary Claims On Public Construction Projects And The Precedent Of Other State Supreme Courts Allowing Such Claims In Prevailing Wage Cases Specifically..... 16

III. THE CITY OF MINNEAPOLIS CONFIRMS THAT APPELLANTS’ UNJUST ENRICHMENT CLAIMS ARE CONSISTENT WITH THE CITY’S LEGISLATIVE SCHEME, AND COURTS HAVE HELD THAT THE PREVAILING WAGE CAN BE RECOVERED VIA SUCH CLAIMS 19

A. The Response Brief Ignores The Manifest Legislative Intent Of The Minneapolis Prevailing Wage Ordinance And The Broad Consensus Among Law Enforcement Authorities And Minnesota Businesses That Appellants’ Unjust Enrichment Claims Should Proceed..... 19

B. The Response Brief Ignores Precedent Which Confirms That Employees Like Appellants Can Recover The Prevailing Wage Through Unjust Enrichment Claims 20

C. The Response Brief Misstates The Law On The Unclean Hands Defense And The Undisputed Facts That Further Bolster Appellants’ Unjust Enrichment Claims..... 21

CONCLUSION 23

TABLE OF AUTHORITIES

	<u>Page</u>
Minnesota Cases	
<u>AAA Striping Servs. Co. v. Minn. Dep't of Transp.</u> , 681 N.W.2d 706 (Minn. Ct. App. 2004)	12
<u>Anderson v. Medtronic, Inc.</u> , 382 N.W.2d 512 (Minn. 1986)	6
<u>Brown v. Tonka Corp.</u> , 519 N.W.2d 474 (Minn. Ct. App. 1994)	7
<u>Cretex Cos., Inc. v. Constr. Leaders, Inc.</u> , 342 N.W.2d 135 (Minn. 1984)	16
<u>Duluth Lumber & Plywood Co. v. Delta Dev., Inc.</u> , 281 N.W.2d 377 (Minn. 1979)	10, 16, 17
<u>Frieler v. Carlson Mktg. Grp.</u> , 751 N.W.2d 558 (Minn. 2008)	2
<u>Gethsemane Lutheran Church v. Zacho</u> , 104 N.W.2d 645 (Minn. 1960)	14, 15
<u>Harris v. North Star Amusement Co.</u> , 259 N.W. 16 (Minn. 1935)	2
<u>Hickman v. Safeco Ins. Co. of Am.</u> , 695 N.W.2d 365 (Minn. 2005)	10
<u>Hruska v. Chandler Assoc., Inc.</u> , 372 N.W.2d 709 (Minn. 1985)	8, 21
<u>Kohout v. Shakopee Foundry Co.</u> , 162 N.W.2d 237 (Minn. 1968)	7, 22
<u>Kvidera v. Rotation Eng'g and Mfg. Co.</u> , 705 N.W.2d 416 (Minn. Ct. App. 2005)	8
<u>Lee v. Fresenius Med. Care, Inc.</u> , 741 N.W.2d 117 (Minn. 2007)	2, 3, 6, 8

Lucas v. Medical Arts Bldg. Co.,
291 N.W. 892 (Minn. 1940).....17

Matter of Labor Law Violation of Chafoulias Management,
572 N.W.2d 326 (Minn. Ct. App. 1998).....5

O’Kronglis v. Broberg,
456 N.W.2d 468 (Minn. Ct. App. 1990).....7

SCI Minnesota Funeral Servs., Inc. v. Washburn McReavy Funeral Corp.,
795 N.W.2d 855 (Minn. 2011).....19

Servicemaster of St. Cloud v. Gab Bus. Servs., Inc.,
544 N.W.2d 302 (Minn. 1996).....21

State v. Sorenson,
441 N.W.2d 455 (Minn. 1989).....3

Taylor v. LSI Corp.,
796 N.W.2d 153 (Minn. 2011).....2, 6

Tynan v. KSTP,
77 N.W.2d 200 (Minn. 1956).....8

Valspar Refinish, Inc. v. Gaylord's, Inc.,
764 N.W.2d 359 (Minn. 2009).....14, 15

Other State Cases

Fasse v. Lower Heating & Air Conditioning, Inc.,
736 P.2d 930 (Kan. 1987)18

Favel v. Amer. Renovation & Const. Co.,
59 P.3d 412 (Mont. 2002), cert. denied 538 U.S. 1000 (2003).....17

Herrmann v. Wolf Point Sch. Dist.,
84 P.3d 20 (Mont. 2003)18

State ex. Rel. Evans v. Brown Builders Elec. Co.,
254 S.W.3d 31 (Mo. 2008)17

Federal Cases

Marbury v. Madison,
1 Cranch 137 (1803).....16

Walsh v. Schlecht,
429 U.S. 401 (1977).....11

Minnesota Statutes

Minn. Stat. § 177.27.....4

Minn. Stat. § 177.42.....12

Minn. Stat. § 177.43.....4

Minn. Stat. § 181.13.....5, 6

Minn. Stat. § 181.14.....5, 6

Minn. Stat. § 181.171.....3, 5, 6

Minn. Stat. § 541.07.....22

Minn. Stat. § 645.16.....2, 6

Federal Regulations

29 C.F.R. § 5.5(a).....8

Other Authorities

Mpls. Ord., Ch. 24, Art. IV, § 24.2204

Palisades Urban Renewal Enter., LLP,
ARB Case No. 07-124 (U.S. DOL Admin. Review Board, July 30, 2009)8

I. THE STATE OF MINNESOTA AND MINNESOTA SUPREME COURT PRECEDENT CONFIRM THAT THE MINNESOTA PAYMENT OF WAGES ACT PROVIDES AN INDEPENDENT CAUSE OF ACTION TO RECOVER EARNED BUT UNPAID WAGES

The Response Brief offers only a perfunctory discussion of the Payment of Wages Act, ignoring key statutory provisions and Minnesota Supreme Court precedent as well as misstating the material facts in the process.

A. The Response Brief Ignores The Long-Standing Intent And Application Of The Minnesota Payment Of Wages Act To Permit A Private Right Of Action For Recovery Of Wages

Through its Attorney General, the State of Minnesota submitted a Brief in this case to underscore that the Payment of Wages Act enables former employees like Appellants to recover unpaid wages via private litigation:

For nearly 100 years, the legislature has clearly intended that employees have a simple remedy upon discharge to collect their earned, but unpaid, wages. That is why *Sections 181.13 and 181.171*, and their predecessor statutes, *have provided employees with an independent cause of action to bring claims to recover unpaid wages*. This is consistent with the remedies clause of the Minnesota Constitution.

Amicus curiae Minnesota Attorney General Brief at 5 (emphasis added). In other words, and contrary to the Response Brief's unsupported allegation, Appellants need not be third-party beneficiaries of a contract before Appellants can recover earned but unpaid wages. The Payment of Wages Act, standing alone, provides Appellants with a private right of action to recover those wages. Id.

The Minnesota Supreme Court also has long recognized the propriety of recovering wages through private action pursuant to the Payment of Wages Act. See,

e.g., Harris v. North Star Amusement Co., 259 N.W. 16, 17-18 (Minn. 1935) (upholding the award of unpaid wages under the Payment of Wages Act); see also Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 126 (Minn. 2007) (citation omitted) (reaffirming in a Payment of Wages Act case that hourly wages “represent payment for hours that employees have already worked, and employers must pay these wages in a statutorily-defined time period.”).

The Minnesota Department of Labor & Industry (“MDOLI”), which interprets and enforces the Payment of Wages Act, construes the statutory regime in the same way. Amicus curiae Minnesota Attorney General Brief at 6. MDOLI’s interpretation of the Payment of Wages Act “is entitled to deference and should be upheld” because that statutory construction does not conflict with the “express purpose of the Act and the intention of the legislature.” Frieler v. Carlson Mktg. Grp., 751 N.W.2d 558, 566 (Minn. 2008) (citing Minnesota Supreme Court precedent). The Response Brief’s silence about all of the above is notable.

B. The Response Brief Ignores The Payment Of Wages Act’s Compensatory And Safe-Harbor Provisions, Codified Canons Of Construction, And Minnesota Supreme Court Precedent While Raising A Baseless Oral-Contract Argument For The First Time On Appeal

Reading the Payment of Wages Act as providing an independent cause of action to recover wages adheres to the codified Canons of Construction followed by the Minnesota Supreme Court. See, e.g., Taylor v. LSI Corp., 796 N.W.2d 153, 156 (Minn. 2011); see also Minn. Stat. § 645.16. In particular, construing the Payment of Wages Act accordingly gives effect to all provisions and, furthermore, comports with the plain

language of the statute's compensatory provision: "[a]n employer . . . ***shall also be liable for compensatory damages and other appropriate relief*** including but not limited to injunctive relief." See Minn. Stat. § 181.171, Subd. 1 (emphasis added).

The Response Brief does not even acknowledge the existence of the Payment of Wages Act's compensatory provision, Minn. Stat. § 181.171, which Appellants analyzed extensively in Appellants' Opening Brief at pages 14-16. Nor does the Response Brief consider the Minnesota Supreme Court precedent defining "compensatory damages" that Appellants' Opening Brief discusses at pages 14-15. The Response Brief also does not mention the governing Canons of Construction and related Minnesota Supreme Court precedent analyzed in Appellants' Opening Brief at pages 15-17.

Instead, the Response Brief relies on an argument that Appellants supposedly can only recover wages established by a purported oral contract between the company and Appellants. The first time Affordable Granite & Stone asserted that any such "oral contract" exists is now – before the Minnesota Supreme Court and while providing no factual support.

In a recent and highly analogous Payment of Wages Act case, the Minnesota Supreme Court refused to consider issues like Affordable Granite & Stone's oral-contract rationale because the party did not raise the issues earlier in the litigation. Fresenius, 741 N.W.2d at 130; see also State v. Sorenson, 441 N.W.2d 455, 457 (Minn. 1989) (declining to consider a criminal defendant's constitutional argument raised for the first time on

appeal). Therefore, Affordable Granite & Stone’s newly conceived oral-contract argument should be rejected for that reason alone.

The novel oral-contract rationale, moreover, is essentially an admission that Affordable Granite & Stone deliberately violated the law. Any such “oral contract” in violation of law would be void and unenforceable. In that regard, the governing Minneapolis Prevailing Wage Ordinance unequivocally requires employers like Affordable Granite & Stone to pay the prevailing wage even if the employer has a separate contract with employees to pay a lower wage:

[A]ll contractors . . . ***shall fully comply*** with such [prevailing wage] provisions ***regardless of any contractual relationship which may be alleged to exist between the contractor . . . and his employees.***

See Mpls. Ord., Ch. 24, Art. IV, § 24.220 (emphasis added). The Minneapolis Convention Center Contract expressly incorporated that material term to reinforce the binding nature of the legal duty to pay the prevailing wage here. *APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 18.*

Like the City of Minneapolis, the State of Minnesota obligates employers to pay the prevailing wage on publicly financed projects even when an employer has an agreement with its employees to pay a lower wage. See Minn. Stat. § 177.43, Subd. 5 (making it a separate misdemeanor each day an employer does not pay its employees the prevailing wage applicable to a given project); see also Minn. Stat. § 177.27, Subd. 8 (emphasis added) (“*An agreement between the employee and the employer to work for less than the applicable wage is not a defense* to the [wage] action.”). Minnesota courts

similarly recognize that a separate employment contract to pay less than the legislatively required wage is not enforceable. See, e.g., Matter of Labor Law Violation of Chafoulias Management, 572 N.W.2d 326, 331-32 (Minn. Ct. App. 1998) (affirming the award of damages).

The Response Brief itself further eviscerates the oral-contract argument by repeating the prior admissions that Affordable Granite & Stone had to pay the prevailing wage in this case: “[*the company*] agrees that it was required to pay its employees the prevailing wage.” *Response Brief at 20 (emphasis added)*. In other words, the “contract of employment” establishing the wage rate for purposes of the Payment of Wages Act is the Minneapolis Convention Center Contract and the Prevailing Wage Certificate incorporated therein – not a newly conceived “oral contract” that is asserted for the first time in the Minnesota Supreme Court, that has no evidentiary support, and that contradicts Affordable Granite & Stone’s admissions in the case. See Minn. Stat. § 181.13(a); Minn. Stat. § 181.14, Subd. 2

In any event, the “contract of employment” language repeatedly cited in the Response Brief refers to the formula for calculating the amount of the penalty awarded under the Payment of Wages Act’s penalty provisions, Minn. Stat. § 181.13 and Minn. Stat. § 181.14, not to whether wages were “earned and unpaid” or the amount of compensatory damages awarded under the statute’s compensatory provision, Minn. Stat. § 181.171. Compare Minn. Stat. § 181.13(a) and Minn. Stat. § 181.14, Subd. 2 with Minn. Stat. § 181.171, Subd. 1.

The Response Brief also mistakenly relies on the argument that penal statutes are construed narrowly. As a threshold matter, construing a statute narrowly does not mean ignoring that statute's clear terms, as the Response Brief does by not acknowledging the Payment of Wages Act's compensatory (Minn. Stat. § 181.171, Subd. 1) and safe-harbor (Minn. Stat. § 181.14, Subd. 3) provisions. See, e.g., Taylor, 796 N.W.2d at 156; Minn. Stat. § 645.16. Regardless, the penal-statute rationale is wholly irrelevant to the Payment of Wages Act's compensatory provision, which is the basis for Appellants' recovery of earned but unpaid wages. Specifically, the statutory language and precedent related to the penal-statute argument do not concern the Payment of Wages Act's compensatory provision. See, e.g., Fresenius, 741 N.W.2d at 125-26 (analyzing Minn. Stat. § 181.13); Anderson v. Medtronic, Inc., 382 N.W.2d 512, 516 (Minn. 1986) (analyzing Minn. Stat. § 181.14).

In short, Appellants have sought recovery of earned but unpaid wages under the Payment of Wages Act's compensatory provision – Minn. Stat. § 181.171 – not the statute's penal provisions – Minn. Stat. § 181.13 and Minn. Stat. § 181.14. Appellants only seek to recover penalties under the penal provisions.

Besides ignoring the Payment of Wages Act's compensatory provision, the Response Brief overlooks the statute's safe-harbor section. See Minn. Stat. § 181.14, Subd. 3. In setting forth how an employer can avoid wage liability under the Payment of Wages Act, the safe-harbor provision confirms that employees can recover unpaid wages via private court action under the statute. Id. (establishing that an employer will not be

liable for additional wages in court unless “the employee recovers a greater sum than the amount so tendered” by the employer to settle the unpaid wage claims before a verdict or judgment for the employee).

In addition, the Response Brief does not acknowledge, let alone analyze, Minnesota Supreme Court precedent and analogous appellate rulings set forth in Appellants’ Opening Brief at pages 14, 17, 19-20 to show the Payment of Wages Act authorizes recovery of earned but unpaid wages. See, e.g., Kohout v. Shakopee Foundry Co., 162 N.W.2d 237, 240 (Minn. 1968) (ruling that the employees could recover unpaid wages and statutory penalties); Brown v. Tonka Corp., 519 N.W.2d 474, 478 (Minn. Ct. App. 1994) (affirming summary judgment for the employees on their unpaid wage and statutory penalty claims); O’Kronglis v. Broberg, 456 N.W.2d 468, 470 (Minn. Ct. App. 1990) (holding that “[a]ppellant is entitled to recover a wage penalty as well as an award for unpaid wages.”).

C. While Asserting “Ignorance” As A Defense, The Response Brief Ignores The Admissions That Affordable Granite & Stone Knew The Company Had To Pay The Prevailing Wage For Terrazzo Mechanics And Other Undisputed Facts That Contradict The Company’s Position

Rather than address plain statutory language and settled precedent establishing the violations here, the Response Brief argues that Affordable Granite & Stone need not pay the prevailing wage because the company purportedly did not know what amount of prevailing wage to pay and whether Appellants earned the prevailing wage.

In reality, the sworn testimony of Affordable Granite & Stone’s management and third parties as well as Affordable Granite & Stone’s business records demonstrate

Affordable Granite & Stone knew that Appellants performed terrazzo restoration work on the project in question and, therefore, that the company had to pay Appellants the prevailing wage for Terrazzo Mechanics. *APP. 336-67; APP 368-71; APP. 447, 451; APP. 572, 574, 584, 586-87; APP. 1814-16, 1844-47; APP. 2219-20; ADD 9.*

Although ignored by the Response Brief, the President/CEO of Affordable Granite & Stone reconfirmed in writing at the beginning of the project that the company “will be ***paying the prevailing wage for terrazzo repair. . . .***” *ADD 9 (emphasis added)*. The undisputed record also confirms that Affordable Granite & Stone had access to the prevailing wage schedule stating the prevailing wage for terrazzo work. *ADD 1; ADD. 9.* Regardless, the cases cited in the Response Brief do not justify Affordable Granite & Stone’s “ignorance” defense. Fresenius, 741 N.W.2d at 126; Hruska v. Chandler Assoc., Inc., 372 N.W.2d 709, 713-17 (Minn. 1985); Tynan v. KSTP, 77 N.W.2d 200, 203-04 (Minn. 1956); Kvidera v. Rotation Eng’g and Mfg. Co., 705 N.W.2d 416, 422-23 (Minn. Ct. App. 2005).

Furthermore, the Response Brief ignores the regulations incorporated into the governing Minneapolis Prevailing Wage Ordinance and Minneapolis Convention Center Contract. *APP. 572, 574, 584; APP. 706, 740; ADD. 18.* Those binding regulations require employers to pay the highest applicable prevailing wage unless the employer specifies in its time/pay records when and in what way the employees performed work in a different job classification. See 29 C.F.R. § 5.5(a)(1)(i); Palisades Urban Renewal Enter., LLP, ARB Case No. 07-124, at 8 (U.S. DOL Admin. Review Board, July 30,

2009) (*included herein at APP. 986-94*). Affordable Granite & Stone's time/pay records did not specify when and in what way Appellants allegedly performed work in a different job classification, so Affordable Granite & Stone had to pay the prevailing wage for Terrazzo Mechanics for all time worked. *APP. 787-928; APP. 1918-2218*.

Instead of addressing the undisputed facts and controlling legal authority, the Response Brief falsely alleges that Appellants admitted Affordable Granite & Stone fully compensated them. Even a cursory review of the record, including Appellants' deposition testimony elicited by Affordable Granite & Stone's lawyers, demonstrates that Appellants never so admitted because they have not received the prevailing wage for all of their work on the Minneapolis Convention Center project. *APP. 462, 464-65; APP. 475, 486-87; see also APP. 462, 468-70; APP. 475, 490-91*.

II. THE CITY OF MINNEAPOLIS CONFIRMS THAT APPELLANTS ARE INTENDED BENEFICIARIES OF THE CITY'S CONTRACT, AND THE LAW ENFORCEMENT AUTHORITIES AND MINNESOTA COMPANIES AGREE APPELLANTS' CONTRACT CLAIMS SHOULD PROCEED

The City of Minneapolis – which negotiated and executed the Minneapolis Convention Center Contract with Affordable Granite & Stone – submitted a Brief in this case to reiterate that Appellants are intended beneficiaries of the Contract:

*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.*

Amicus curiae City of Minneapolis Brief at 5 (emphasis added).

As to the legal meaning of the contractual promise under oath to pay the Affordable Granite & Stone’s “employees” the prevailing wage, the Minneapolis Convention Center Contract need not mention Appellants by name to confer third-party beneficiary rights on Appellants. Hickman v. Safeco Ins. Co. of Am., 695 N.W.2d 365, 370-71 (Minn. 2005) (holding that the general reference to borrowers referred to the specific borrower pursuing legal action); Duluth Lumber & Plywood Co. v. Delta Dev., Inc., 281 N.W.2d 377, 385-86 (Minn. 1979) (recognizing that “materialmen” was sufficient to refer to the plaintiff company providing materials for the public construction project).

Beyond disregarding Minnesota Supreme Court precedent, concluding that Appellants are not intended beneficiaries would render illusory Affordable Granite & Stone’s promise under oath to pay the prevailing wage. Such precedent would allow future public contractors to make promises they never intend to fulfill in order to gain an unfair advantage and win contracts they should not win – undercutting the efficiency and legitimacy of the entire contracting system.

As a matter of both law and policy, then, the chief legal officer for the State of Minnesota as well as for the relevant county and municipality – along with nearly 500 Minnesota businesses across the construction industry – agree that Appellants should be permitted to pursue third-party beneficiary claims. Amicus curiae Minnesota Attorney General Brief at 7-8; Amicus curiae Hennepin County Attorney Brief at 9-10; Amicus

curiae City of Minneapolis Brief at 5-8; Amicus curiae Construction Industry Associations Brief at 9-12.

A. The Response Brief Ignores The Clear Intent Of The Minneapolis Convention Center Contract As Well As The United States Supreme Court Precedent Incorporated Into That Contract

As set forth more fully above in Part II, the Minneapolis Convention Center Contract reflects the intent to benefit Appellants materially because, among other reasons, the Contract includes a special provision requiring Affordable Granite & Stone to pay Appellants the prevailing wage. Amicus curiae City of Minneapolis Brief at 4-5. That Appellants are intended beneficiaries of the Minneapolis Convention Center Contract is logical because the City of Minneapolis has made the “*legislative determination that any of its public contracts are intended for the benefit of workers subject to that contract.*” Id. at 2 (emphasis added). Even the Response Brief acknowledges that Affordable Granite & Stone “was required to pay [Appellants] the prevailing wage.” *Response Brief at 20.*

The United States Supreme Court precedent incorporated into the Minneapolis Convention Center Contract further establishes that Appellants are intended beneficiaries of the Contract. See, e.g., Walsh v. Schlecht, 429 U.S. 401, 411 (1977) (citing United States Supreme Court precedent) (reiterating that prevailing wage obligations “protect [the contractor’s] employees from substandard earnings by fixing a floor under wages on Government projects.”).

The Minnesota Legislature also recognizes that the requirement to pay the prevailing wage manifests the intent to benefit the employees on a given project. See Minn. Stat. § 177.42, Subd. 6 (“The prevailing wage rate may not be less than a reasonable and living wage.”); see also AAA Striping Servs. Co. v. Minn. Dep’t of Transp., 681 N.W.2d 706, 710 (Minn. Ct. App. 2004) (citation omitted) (observing that prevailing wage obligations intend for employees to be “paid wages comparable to wages paid for similar work in the community.”).

The Response Brief ignores all of the above legal authority and, instead, argues that Appellants purportedly cannot be intended beneficiaries of the Minneapolis Convention Center Contract because the prevailing wage system benefits the public. That the City of Minneapolis prevailing wage requirement incidentally advances the public interest in a larger sense, by providing incentives for contractors to use highly skilled and experienced employees, is entirely consistent with employees being intended beneficiaries of the prevailing wage requirement on a specific project. Indeed, the City of Minneapolis confirmed precisely that here. Amicus curiae City of Minneapolis Brief at 2, 4-5.

B. The Response Brief Ignores The Broad Consensus Among Minnesota Law Enforcement Authorities And Minnesota Businesses That Appellants’ Third-Party Beneficiary Action Is Appropriate And Necessary To Preserve The Rule Of Law And Market Efficiencies

The Hennepin County Attorney, who has significant expertise in prevailing wage enforcement, explains why Appellants’ third-party beneficiary action is both necessary and appropriate:

[P]revailing wage violations may, and often do, slip through the enforcement cracks. When that happens, the intended beneficiaries of prevailing wage laws, the employees, should have the opportunity through private litigation to recover wages to which they are entitled. If the employees are not given such an opportunity, not only will the employees be harmed, but honest bidders for public contracts will be harmed. . . .

Amicus curiae Hennepin County Attorney Brief at 10; see also Amicus curiae Minnesota Attorney General Brief at 7-8; Amicus curiae City of Minneapolis Brief at 5-8; Amicus curiae Construction Industry Associations Brief at 9-12. Consequently, third-party actions like the one Appellants seek to pursue is essential for ensuring the level playing field in public bidding that law-abiding construction contractors and the public interest require. Id.

The Construction Industry Associations – which represent nearly 500 Minnesota businesses – articulate the stakes in even more emphatic terms:

[C]ontractors 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.*

Amicus curiae Construction Industry Associations Brief at 12 (emphasis added).

Minnesota's construction companies further explain in their submissions why the Court of Appeals and the District Court opinions in this case, if permitted to stand, will undermine the rule of law as well as damage the fair and competitive construction-bidding regime that is vital to the economy:

[C]ontractors 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.

Amicus curiae Construction Industry Associations Brief at 4 (emphasis added).

Such serious and widespread concern, all of which the Response Brief ignores, is to be expected here. Affordable Granite & Stone – after promising under oath and reconfirming in writing that the company will pay the prevailing wage as a condition of obtaining a public construction project – now refuses to pay the contractually required prevailing wage that other contractors factored into their bids. *APP. 516, 519; ADD. 1; ADD. 9.* Remarkably, Affordable Granite & Stone still refuses to pay Appellants the prevailing wage when the company “agrees that it was required to pay its employees the prevailing wage.” *Response Brief at 20.*

The Minnesota Supreme Court has long recognized the importance of protecting the sanctity of contract from such machinations. See, e.g., Gethsemane Lutheran Church v. Zacho, 104 N.W.2d 645, 649 (Minn. 1960) (“[I]n the interest of preserving some reasonable stability in commercial transactions the courts will not set aside contractual obligations, particularly where they are embodied in written contracts. . . .”); see also Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 364-65 (Minn. 2009).

Ignoring this well established Minnesota Supreme Court precedent, the Response Brief now suggests that the prevailing wage obligation in the Minneapolis Convention Center Contract is somehow unenforceable because the Minneapolis Prevailing Wage Ordinance required inclusion of the obligation in the Contract. That makes no sense.

Because the written terms of a given contract must be enforced, the prevailing wage requirement in the Minneapolis Convention Center Contract must be construed as a material and controlling term rather than simply an unthinking reference to applicable law. Valspar, 764 N.W.2d at 364-65; Gethsemane, 104 N.W.2d at 649.

C. The Response Brief Erroneously Challenges The Established Prevailing Wage Rate To Which Affordable Granite & Stone Agreed When Entering Into The Minneapolis Convention Center Contract, Mischaracterizing The Record And Appellants' Claims In The Process

The Response Brief also mounts an improper ex post facto challenge to the applicable prevailing wage rate established by the prevailing wage schedule explicitly incorporated into the Minneapolis Convention Center Contract. *APP. 421-45.*

Affordable Granite & Stone erroneously contends that it can lawfully pay an unauthorized wage rate because Appellants allegedly performed merely janitorial work as Appellants operated a Beaver Tractor, a Bobcat, and 900-pound, propane-powered Eagle Machines to abrade and refinish the Minneapolis Convention Center flooring. *APP. 1218, 1223-25.*

In addition, the Response Brief falsely declares that Appellants' contract claims will interfere with the administrative remedies available under the Minneapolis Prevailing Wage Ordinance. In truth, no administrative remedies exist for Appellants to recover their unpaid wages, and the City of Minneapolis confirms that Appellants' contract claims should be allowed to proceed for that reason. Amicus curiae City of Minneapolis Brief at 5.

The Response Brief's citation on page 31 to cases decided under the Federal Davis-Bacon Act is misplaced as well because Appellants do not assert their contract claims under that Federal statute or otherwise proceed under a theory of an implied right of action under a statute. As explained more fully below in Part II.C., Appellants seek to pursue their claims through an express right of action under Minnesota common law.

D. The Response Brief Misapplies The Minnesota Supreme Court Precedent Allowing Third-Party Beneficiary Claims On Public Construction Projects And The Precedent Of Other State Supreme Courts Allowing Such Claims In Prevailing Wage Cases Specifically

The Minnesota Supreme Court has not addressed third-party beneficiary claims in the prevailing wage context, but it has considered such claims concerning public construction projects in general. In the relevant case, the Minnesota Supreme Court held that the unpaid party could recover as a third-party beneficiary based on the following reasoning:

[I]f construction work is performed on public property that is exempt from a mechanics lien, then promises in the contract concerning payment of materialmen will be deemed to be for the benefit of the materialmen because the public owner does not need protection against a mechanics lien and because of *the injustice which would otherwise be suffered by [those] who have no lien rights.*

Duluth Lumber, 281 N.W.2d at 385-86 (emphasis added). The Minnesota Supreme Court reaffirmed the validity of such reasoning again in Cretex Cos., Inc. v. Constr. Leaders, Inc., 342 N.W.2d 135, 140-41 (Minn. 1984).

The dispositive principle applied by Duluth Lumber and then Cretex finds its origin in the very foundation of American and Minnesota jurisprudence. Marbury v.

Madison, 1 Cranch 137, 147 (1803) (citation omitted) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”); Lucas v. Medical Arts Bldg. Co., 291 N.W. 892, 895 (Minn. 1940) (citing Minnesota Supreme Court precedent and reaffirming that, “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it.”).

The public construction work under the Minneapolis Convention Center Contract was exempt from a mechanics lien, just like the public construction work in Duluth Lumber, so Appellants would be without a remedy if they cannot proceed with their contract claims (or with their Payment of Wages Act or unjust enrichment claims). Amicus curiae City of Minneapolis Brief at 5. If the plaintiff in Duluth Lumber could proceed as a third-party beneficiary, then Appellants should also be able to pursue their contract claims – the Response Brief’s misapplication of Duluth Lumber notwithstanding.

Significantly, every State Supreme Court to reach the issue has held that employees on prevailing wage projects can recover unpaid wages as third-party beneficiaries. State ex. Rel. Evans v. Brown Builders Elec. Co., 254 S.W.3d 31, 37 (Mo. 2008) (citation omitted) (“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.”); Favel v. Amer. Renovation & Const. Co., 59 P.3d 412, 426 (Mont. 2002), cert. denied 538 U.S. 1000 (2003) (“Workers, as third party beneficiaries to the Contracts between [the government and the employer] may bring and pursue a state claim to

enforce the terms of the Contract.”); Fasse v. Lower Heating & Air Conditioning, Inc., 736 P.2d 930, 934 (Kan. 1987) (ruling that, where the contract incorporated the Federal Davis-Bacon Act wage requirements as the Minneapolis Convention Center Contract did, the plaintiffs could recover the prevailing wage because they “were third party beneficiaries under the contract.”).

Courts in every jurisdiction to reach the issue have similarly ruled that employees can recover the prevailing wage as third-party beneficiaries when, like in this case, the contract has no explicit language disclaiming the intent to benefit third parties. Amicus curiae Construction Industry Associations Brief at 9-10.

Rather than address the applicable precedent, the Response Brief mischaracterizes Favel as being limited to the parties involved. In reality, Favel stated as follows “we hold that under the specific facts of this case, Workers, as third party beneficiaries to the Contracts between the [the government and the company], may bring and pursue a state claim to enforce the terms of the Contract.” 59 P.3d at 304-05. As set forth more fully in Appellants’ Opening Brief at pages 35-36, the facts in Favel are highly analogous to the facts here. Indeed, Appellants did not have an administrative remedy to pursue, so the reasoning in Favel should apply with even greater force in Appellants’ action. *APP.* 572, 579-80; *ADD.* 18-20. Significantly, the other case cited by the Response Brief to limit the application of Favel actually undercuts the company’s argument. Herrmann v. Wolf Point Sch. Dist., 84 P.3d 20, 24 (Mont. 2003) (holding that the employees, who were not

involved in Favel, “also stated a claim for breach of contract, presumably under a third party beneficiary theory.”).

III. THE CITY OF MINNEAPOLIS CONFIRMS THAT APPELLANTS’ UNJUST ENRICHMENT CLAIMS ARE CONSISTENT WITH THE CITY’S LEGISLATIVE SCHEME, AND COURTS HAVE HELD THAT THE PREVAILING WAGE CAN BE RECOVERED VIA SUCH CLAIMS

Notwithstanding the contention in the Response Brief, the Court of Appeals’ and District Court’s application of the unjust enrichment doctrine in this case is reviewed de novo. See, e.g., SCI Minnesota Funeral Servs., Inc. v. Washburn McReavy Funeral Corp., 795 N.W.2d 855, 860-61 (Minn. 2011). As explained above in Part I.B., no purported oral contract governs here. Nor does equitable relief here circumvent the Minneapolis Prevailing Wage Ordinance; indeed, such relief would vindicate that legislative enactment, as outlined above in Part II.-II.A. and below in Part III.A.

A. The Response Brief Ignores The Manifest Legislative Intent Of The Minneapolis Prevailing Wage Ordinance And The Broad Consensus Among Law Enforcement Authorities And Minnesota Businesses That Appellants’ Unjust Enrichment Claims Should Proceed

The Response Brief proclaims that the Minneapolis Prevailing Wage Ordinance allegedly precludes Appellants’ unjust enrichment claims because such claims are purportedly inconsistent with the legislative scheme in that employees would be able to recover earned but unpaid wages.

According to the City of Minneapolis, however, “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.” Amicus curiae City of Minneapolis

Brief at 2; see also Amicus curiae City of Minneapolis Brief at 5. In other words, the relevant governmental body already made the policy decision to require employers, such as Affordable Granite & Stone, to pay the prevailing wage to employees, such as Appellants, as intended beneficiaries under the legislative scheme while not providing a specific administrative remedy for those employees. Id. It defies logic to insist that a legislative scheme intended to benefit employees by requiring payment of the prevailing wage to those employees somehow prevents such employees from recovering earned but unpaid wages in court.

Allowing Appellants to pursue their unjust enrichment claims as an alternative to their contract claims will help to protect the integrity of Minnesota's contracting system. For those reasons, relevant law enforcement authorities and Minnesota businesses have submitted Briefs to urge the Minnesota Supreme Court to permit Appellants' unjust enrichment claims to proceed. Amicus curiae Minnesota Attorney General Brief at 9-11; Amicus curiae Hennepin County Attorney Brief at 9-10; Amicus curiae Construction Industry Associations Brief at 12-20. Again, the Response Brief's silence about such compelling considerations is telling.

B. The Response Brief Ignores Precedent Which Confirms That Employees Like Appellants Can Recover The Prevailing Wage Through Unjust Enrichment Claims

Although the Minnesota Supreme Court has not previously reached the issue, other jurisdictions considering the question have held that the prevailing wage can be recovered pursuant to the unjust enrichment doctrine. Amicus curiae Construction

Industry Associations Brief at 18-19. The Response Brief does not acknowledge, much less address, this precedent.

The Minnesota Supreme Court should rule consistent with the other jurisdictions reaching the issue because flouting the public contracting regime – and the Minneapolis Prevailing Wage Ordinance and Minneapolis Convention Center Contract in particular – constitutes precisely the kind of improper conduct that supports a claim for unjust enrichment. Servicemaster of St. Cloud v. Gab Bus. Servs., Inc., 544 N.W.2d 302, 306-07 (Minn. 1996). It warrants repeating that Affordable Granite & Stone refuses to pay Appellants the prevailing wage even as the company “agrees that it was required to pay its employees the prevailing wage.” *Response Brief at 20.*

C. The Response Brief Misstates The Law On The Unclean Hands Defense And The Undisputed Facts That Further Bolster Appellants’ Unjust Enrichment Claims

To have a valid unclean hands defense under Minnesota Supreme Court precedent, a defendant must show that the plaintiffs’ conduct “has been unconscionable by reason of a bad motive, or where the result induced by [the plaintiffs’] conduct will be unconscionable. . . .” Hruska, 372 N.W.2d at 715 (citing Minnesota Supreme Court precedent). Affordable Granite & Stone’s unclean hands defense – asserted for the first time in its Response Brief before the Minnesota Supreme Court – turns on the allegation that Appellants’ conduct was purportedly unconscionable because of the time it took for Appellants to complain about wage underpayment.

There is no evidence of bad motive or unconscionable conduct by Appellants here. In fact, Appellants requested their earned but unpaid wages well within the statute of limitations period applicable to wage claims. Kohout v. Shakopee Foundry Co., 162 N.W.2d 237, 240 (Minn. 1968); Minn. Stat. § 541.07(5). Moreover, the “unclean hands” argument based on the alleged delay in complaining has no merit because Affordable Granite & Stone had actual knowledge of the wage underpayment from the beginning of the project, at which time Affordable Granite & Stone reiterated in writing the prior sworn promise that the company “will be *paying the prevailing wage for terrazzo repair*. . . .” *ADD 9 (emphasis added)*. In addition, several Appellants complained about the wage underpayment during the project, and Affordable Granite & Stone provided those Appellants with part of the back pay owed before the project ended. *APP. 1218, 1221*.

In any event, the Response Brief misstates the clear record in numerous ways related to Appellants’ unjust enrichment claims and, indeed, to Appellants’ contract as well as Payment of Wages Act claims. Contrary to representations in the Response Brief, the undisputed facts establish the following:

- * Appellants expected to be paid the prevailing wage because the President/CEO of Affordable Granite & Stone personally promised Appellants that the company will pay the prevailing wage (*APP. 462, 466; APP. 475, 476-77; APP. 493-94*);
- * Although unfamiliar with some industry nomenclature, Appellants did the work of Terrazzo Mechanics under the Minneapolis Convention Center Project (*APP. 336-67; APP 368-71; APP. 447, 451; APP. 572, 574, 584, 586-87; APP. 1814-16, 1844-47; APP. 2219-20; ADD 9*);

- * While being deposed by Affordable Granite & Stone’s lawyers, Appellants reconfirmed under oath that Affordable Granite & Stone has not fully compensated Appellants (*APP. 462, 464-65; APP. 475, 486-87; see also APP. 462, 468-70; APP. 475, 490-91*);
- * The September 12, 2008 letter was not a final determination by the City of Minneapolis that Affordable Granite & Stone properly paid its employees (*APP. 1807-08, ¶¶ 3-6, Exs. 1-2; APP. 2933*);
- * A rough draft of an incomplete, unsigned, and unsent letter, dated November 7, 2008, was not a determination by Hennepin County that Affordable Granite & Stone properly paid its employees (*APP. 2920-26; 2933*); and
- * Long after court litigation began here, and based on a full consideration of the evidence, the City of Minneapolis issued a final determination on February 4, 2010 that Affordable Granite & Stone did not pay the required prevailing wage – and the company received that determination on or about February 4, 2010 (*ADD. 10*).

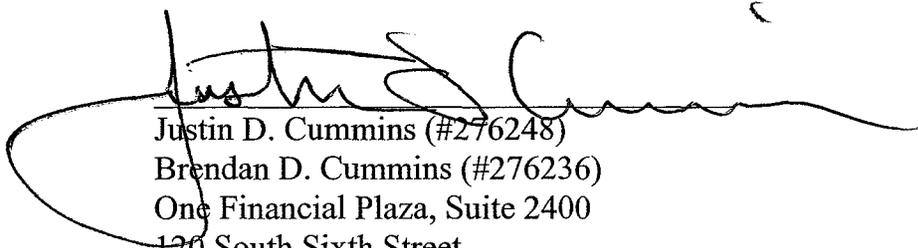
The misleading portrayal of the clear record in these and other respects speaks volumes about the invalidity of Affordable Granite & Stone’s defenses in this case.

CONCLUSION

The Response Brief ignores controlling statutory provisions, settled Minnesota Supreme Court precedent, and other binding legal authority that support Appellants’ claims and defeat Affordable Granite & Stone’s defenses. The Response Brief also either ignores or misstates undisputed facts that bolster Appellants’ claims and contradict Affordable Granite & Stone’s position. For the foregoing reasons, Appellants respectfully request the reversal of summary judgment for Affordable Granite & Stone and the remanding of the case for consideration of Appellants’ Motion for Summary Judgment consistent with the Minnesota Supreme Court’s ruling.

Dated: October 14, 2011

MILLER O'BRIEN CUMMINS, PLLP

A large, stylized handwritten signature in black ink, appearing to read "Justin D. Cummins". The signature is written over the printed name and extends to the right.

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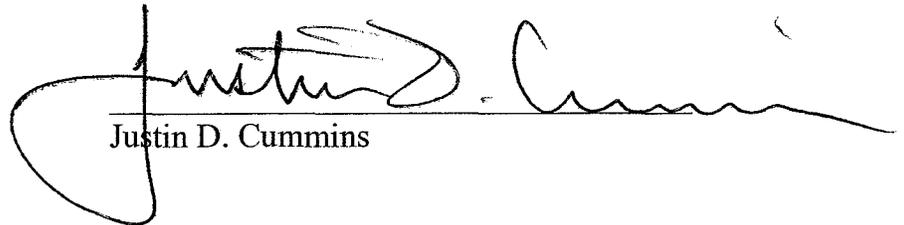
ATTORNEYS FOR APPELLANTS

CERTIFICATE

Pursuant to Minnesota Rule of Appellate Procedure 132.01, Subd. 3, the undersigned set the type of the Reply Brief in Times New Roman, a proportional 13-point font, on 8 1/2 by 11 inch paper with written matter not exceeding 6 1/2 by 9 1/2 inches. The resulting Brief contains 5,924 words, as determined by employing the word counter of the word-processing software, Microsoft 2003, used to prepare the Reply Brief.

Dated: October 14, 2011

MILLER O'BRIEN CUMMINS, PLLP



Justin D. Cummins