

NO. A10-2173

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State of Minnesota  
**In Supreme Court**

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Oscar Caldas, et al.,

*Appellants,*

vs.

Affordable Granite & Stone, Inc.,

*Respondent,*

Dean Soltis,

*Defendant.*

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**RESPONDENT'S BRIEF AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

- I. Do Appellants State a Cause of Action Under the Minnesota Payment of Wages Act, Minn. Stat. §§ 181.13-.14, Where Appellants Have Been Paid Fully Under Their Employment Contracts and They Instead Want to Contest That They Have Been Paid the Wrong Wage Since the Beginning of Their Employment Based on a Different Contract?**

The Court of Appeals did not reach this issue, having concluded that Appellants' third-party beneficiary contract claim failed. (R. Add. 4)

Apposite Authorities:

- (1) Minn. Stat. §§ 181.13-.14 (2010).
- (2) *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117 (Minn. 2007).
- (3) *Tynan v. KSTP*, 247 Minn. 168, 77 N.W.2d 200 (1956).

- II. Are Appellant Employees Third-Party Beneficiaries to the Contract between Their Employer and the City of Minneapolis where the Contract Incorporates Multiple City Ordinances and Requires the Employer to Obey the Law?**

The Court of Appeals found that Appellants were not third-party beneficiaries under either the duty-owed or the intent-to-benefit test. (R. Add. 3)

Apposite Authorities:

- (1) *Univ. Rsch. Assn. Inc. v. Coutu*, 450 U.S. 754, 101 S. Ct. 1451 (1981).
- (2) *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135 (Minn. 1984).
- (3) *Duluth Lumber & Plywood Co. v. Delta Dev. Inc.*, 281 N.W.2d 377 (Minn. 1979).
- (4) Restatement (Second) of Contracts § 302 (1979).

**III. Are Appellants Entitled to an Equitable Remedy Where Respondent did not Knowingly Receive Something of Value to Which it was not Entitled and Where the Balance of the Equities does not Weigh in Favor of Appellants?**

The Court of Appeals held that the district court did abuse its discretion when it balanced the equities and found that Appellants were not entitled to succeed on an unjust enrichment claim. (R. Add. 4-5)

- (1) *SCI Minn. Funeral Servs., Inc. v. Washburn McReavy Funeral Corp.*, 759 N.W.2d 855 (Minn. 2011)
- (2) *Servicemaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302 (Minn. 1996).
- (3) *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490 (Minn. 1981).

## STATEMENT OF THE CASE AND FACTS

Respondent Affordable Granite and Stone did not breach its contract with the City of Minneapolis and has fully paid its workers, including Appellants. (*See* App. 174)<sup>1</sup> The case before this Court, however, focuses on whether Appellants have a right to sue under the causes of action they have pled.

### **A. The Contract between AGS and the City.**

In early 2007, the City of Minneapolis (“The City”) selected certain companies, including Respondent Affordable Granite and Stone (“AGS”), to submit proposals to perform work on the Minneapolis Convention Center (“MCC”). (App. 2753.) AGS provided a response to the City’s request for proposal in July 2007. (App. 2536-45.) In October 2007, the City selected AGS to provide terrazzo repair, polishing, and related work. (App. 153.) AGS was selected because it alone among the contractors proposed a process for polishing and repairing, rather than replacing, the existing flooring. (App. 525-526; 2921-922.)

In December of 2007 the City entered into a contract with AGS. (*See* App. 43-57.) Appellants, former employees of AGS, are not parties to that contract. (*Id.*) The purpose of the contract was to arrange for the repair and polishing of terrazzo flooring, repairs to granite wainscoting, repairs to restroom floor and wall tile, and polishing of the Convention Center exhibition hall flooring. (App. 45.) The contract between AGS and

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<sup>1</sup> All references are to Appellants’ Addendum and Appendix unless specifically stated otherwise.

the City laid out in detail the City's expectations of the work to be done. (*See* App. 43-57.)

The Contract contains a section titled "Special City Conditions" that requires AGS to comply with a number of city ordinances. (App. 53.) The prevailing wage ordinance is not mentioned in that section. The contract also contains a section titled "Interpretation of Agreement." (App. 55.) This section contains a provision requiring the contractor to "comply with all applicable Federal, State, and local laws and regulations governing funds provided under this Agreement." (App. 55.) The district court found that the prevailing wage ordinance was incorporated into this section of the contract. (Add. 38) The district court also found that the prevailing wage ordinance was also incorporated into Section I of the agreement, which incorporates the contractor's proposal by reference. (*Id.*)

The City's prevailing wage ordinance provides specific enforcement procedures if the City receives complaints that the contractor is not following the terms of the ordinance. Under Mpls. Ord., Ch. 24, Art. IV, the City may request payroll records; withhold payments to the contractor; require an audit of the contractor's books; terminate the right to proceed with the work; prosecute the work to completion and hold the contractor liable for damages sustained by termination of work; place the contractor on a suspended or disbarment list; and refuse to award future contracts to the contractor. Minneapolis. Ordinance, Ch. 24, Art. IV, 24.240-24.260.

**B. AGS Properly Set Wages.**

After it was awarded the contract, AGS set the wage for the “floor technician” position that would perform most of the work. The description for the position did not match any available wage classifications. (App. 2924-25.) As a result, AGS worked with a local union to determine how to classify the “floor technician” position. (App. 762; 2625, 2632.) Appellants claim that they should have been paid nearly \$45.00 per hour, but admit that AGS paid them the same as or more than they had earned on similar projects in the past. (*See, e.g.*, App. 2380, 2384; 2407-09; 1092, 1095.)

Certain parts of the MCC project required experienced terrazzo workers and involved construction work rather than professional services. That construction was handled by a union contractor. (App. 2625, 2635; 2470, 2474-75; 2477, 2486-87, 2490.) In addition, several of the Appellants performed complicated terrazzo work and AGS paid them for it. (App. 647, 671-72; 1218, 1221.) Those Appellants have acknowledged that they were “fully compensated” for their work. (App. 471, 492.)

Significantly, the Appellants who were deposed testified that they do not have the experience necessary to be considered “terrazzo mechanics” or “terrazzo finishers.” For example, Appellant Brian Booker, one of the Appellants who has admitted that he was “fully compensated” by AGS, testified about his lack of terrazzo flooring experience. A terrazzo mechanic or finisher must spend 8,000 hours completing an apprenticeship program. (App. 2329-30; 2380, 2390; 2775-76.) Such a program includes spending 250 hours preparing subsurfaces for terrazzo. (App. 2380, 2391.) Booker has no such experience, and does not even know what a subsurface is: “If you explain it to me, I

know.” (App. 2380, 2392; *see also* App. 2393-94.) A “terrazzo finisher” must also spend 200 hours installing seamless floors. (App. 2330.) Booker has never done that:

Q: . . . Have you ever installed a seamless floor?

A: No.

(App. 2380, 2396.) One who earns the wage of a terrazzo finisher and has completed the apprenticeship program must also have spent 150 hours applying stone aggregate. (App. 2330.) While he seeks the compensation of an experienced terrazzo finisher, Booker is not sure what stone aggregate is:

Q: And do you know how to apply stone aggregate?

A: Yes.

Q: And tell me what’s that -- what is stone aggregate?

A: I think it’s -- I’m not really for sure what that is.

(App. 2380, 2397.) Incidentally, Booker also testified that, in the alternative, he should have been paid as much as a tile layer, although he did not actually lay tile (“I didn’t lay no tile”) or as a cement mason, even though he did not lay cement either (“No, I didn’t”). (App. 2380, 2398, 2401-02.)

Booker’s admissions are hardly unique among the Appellants who were deposed. Terrazzo finishers must have experience cleaning and grouting terrazzo and applying stone aggregate. (App. 2330.) Appellant Patrick Lee has never done any of those things. (App. 2426, 2445-46.) Nor has he prepared a subsurface for terrazzo. (App. 2426, 2434-35.) Terrazzo finishers must also spend hundreds of hours learning how to work with mortar and polyester. (App. 2330.) Appellant Sean Murphy has no such experience.

(App. 2368, 2374-76.) Nor has he ever installed a seamless floor. (App. 2374.) Appellants Nick Edman and Don Carter also did not perform terrazzo mechanic or terrazzo finisher work. (See App. 2407, 2416-2419; 2599, 2603-2609.)

**C. The City of Minneapolis Investigates.**

Despite union involvement in the wages set and paid by AGS, several unions complained to the Minneapolis Department of Civil Rights that AGS was not paying the prevailing wage on the MCC job. The City conducted a six-month-long investigation from April to September 2008. (App. 2582-2587.) The investigation culminated on September 12, 2008, with a letter to all interested parties from Michael Jordan, former director of the City's Department of Civil Rights. (App. 2597.) This letter states, in part, "[a]fter analyzing the facts and the overall situation, in my judgment, [AGS] was, in fact, paying the laborers in question an appropriate wage for the work that was being done and that there was no violation of the prevailing wage standards." (*Id.*) The Jordan letter is the last official word that AGS heard from the City.

Internal City documents indicate that, after the City received additional union complaints, Hennepin County got involved. Hennepin County conducted an investigation, which concluded with a letter, dated November 7, 2008, drafted by Kelly Francis, the prevailing wage specialist of the Hennepin County Attorney's Office. (App. 2920-2926.) This letter also determined that AGS had paid "a fair and adequate wage":

[AGS's] additional workers appear to be performing a function that is substantially different than that of the Terrazzo Workers. These employees are utilizing heavy equipment to grind and polish the terrazzo flooring, but are not "repairing" the flooring in a fashion that requires the skill and training of a Terrazzo worker. These additional personnel are utilizing

equipment owned by the Convention Center in addition to that equipment belonging to [AGS] and the floor is to be maintained by Convention Center staff after completion. In light of this, it would not be accurate to classify these employees as Terrazzo workers and require that they earn a substantially higher rate of pay for far less skilled work.

...

Based on the information collected and reviewed during the Department's investigation, it appears that these additional employees have received a fair and adequate wage for the work that was performed. [AGS] attempted to apply an appropriate prevailing wage rate by contacting the SEIU and adopting the wage rate included in their collective bargaining agreement for high end janitorial services, including the limited repair of wall cracks and the use of some heavy equipment. Given the circumstances of this project and the nature of the work performed, this appears to be the most reasonable classification and the wage rate paid to the largest number of workers in the locality, the "prevailing wage rate."

(App. 2924-2924.) This "final determination" was never sent out to the parties because, according to Jordan, "There was no reason to." (App. 2919.) This evaluation did not change the conclusions contained in Jordan's letter dated September 12, 2008. In short, both the City and Hennepin County determined that AGS was not in violation of the Minneapolis ordinance.

One additional union complained in late November 2008. (App. 2933.) On the advice of Hennepin County, the City decided to hold back the final payment to AGS under the contract "until the dispute is settled." (*Id.*)

Well over a year later, on February 4, 2010, Johnnie Burns, Manager of the Contracts Compliance Unit of the Minneapolis Department of Civil Rights, sent a letter to Appellants' counsel stating that the City supports Appellants' efforts to recover additional wages. (Add. 10.) This letter, which Appellants repeatedly cite, was apparently drafted with the assistance of Appellants' counsel in anticipation of the current

litigation. (App. 2839.) Mr. Burns admitted in his deposition that he had not conducted a thorough investigation, or even read Jordan's September 12, 2008 letter, before writing this letter. (App. 2829-830; 2833; *see also* App. 309.) The City never sent the February 4, 2010 letter to AGS. (App. 2834-835.)

After attending the depositions of Jordan and Burns in this matter, City of Minneapolis Attorney Frank Reed called AGS's trial counsel and stated that the City had "no basis" to withhold funds from AGS and that the City was in the process of making the full and final payment to AGS. (App. 2794; App. 313.)

**D. The District Court grants Summary Judgment to AGS and the Court of Appeals Affirms.**

Despite the multiple determinations by the City that Appellants have not been underpaid, Appellants sued AGS and owner Dean Soltis in his personal and official capacities in Hennepin County District Court alleging four causes of action: breach of contract to which Appellants were third-party beneficiaries; failure to remit unpaid wages under the Minnesota Payment of Wages Act; Unjust Enrichment; and a violation of the Minnesota Fair Labor Standards Act.

After the close of discovery, both sides moved for summary judgment. The district court, the Honorable George F. McGunnigle, first considered whether Appellants had any rights under the City's contract with AGS. (R. Add. 10-14.) Applying well-established law, Judge McGunnigle concluded that, based upon the undisputed facts, Appellants had no such rights and their breach of contract claim failed. (*Id.*) Having reached that conclusion, the district court necessarily found that Appellants' claims under

the Minnesota Payment of Wages Act failed. (R. Add. 14-15 (“With no viable claim for breach of contract, Plaintiffs do not have an independent basis establishing their right to additional wages.”)) Likewise, Appellants claim for unjust enrichment failed because, among other things, the prevailing wage ordinance does not include a private right of action and equity does not require Appellants to be paid as experienced terrazzo mechanics when they never “underwent extensive training to obtain their employment with AGS.” (R. Add. 15-17.) The district court also granted summary judgment in favor of AGS on the Fair Labor Standards Act claim. (R. Add. 12.)

The court of appeals affirmed the district court’s holdings in a unanimous, unpublished decision.<sup>2</sup> (R. Add. 1-5.) The court of appeals agreed that Appellants were not third-party beneficiaries to the contract. (R. Add. 2-4.) As a result, the court did not reach Appellants’ claims under the Minnesota Payment of Wages Act. (R. Add. 4 n.4.) The court also held that Appellants could not bring a claim in equity because they had unclean hands. (R. Add. 4-5.)

Appellants now bring their claims before this Court on a grant of further review. AGS respectfully asks that this Court affirm the holdings of the court of appeals.

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<sup>2</sup> On appeal, Appellants did not challenge the district court’s decision on the FLSA claim. Appellants also appealed the findings relating only as to AGS, and did not challenge the district court’s grant of dismissal and summary judgment to Dean Soltis in his individual and official capacities. These claims are therefore not before this Court.

## STANDARD OF REVIEW

On appeal from summary judgment, an appellate court asks two questions: “(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The Court reviews both questions de novo. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 77 (Minn. 2002). A fact is material “if its resolution will affect the outcome of a case.” *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). No genuine issue for trial exists where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1977).

This case also involves the interpretation of an unambiguous contract, statutes, and ordinances. All three are reviewed de novo. See *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007) (statutes); *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 5 (Minn. 2008) (ordinances); *Frandsen v. Ford Motor Co.*, 801 N.W.2d 177, 181 (Minn. 2011) (contracts).

Finally, this case involves the review of the district court’s determination not to grant equitable relief. In this case, the district court balanced the equities to determine that unjust enrichment was not available as a remedy for Appellants. Although this is an appeal from summary judgment, this Court has determined that an abuse-of-discretion standard may apply where a district court balances the equities rather than determining an equitable claim as a matter of law. See *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 860 (Minn. 2011).

## ARGUMENT

This is a simple contract case that can be resolved with the application of basic contract principles and straightforward statutory interpretation. Appellants attempt to confuse the issues with unnecessary rhetorical excursions and by selectively ignoring key facts. But the statutes and contracts involved are unambiguous and uncomplicated. When these principles are properly applied, as happened at the district court and court of appeals, AGS is entitled to judgment as a matter of law.

The issue on appeal is whether Appellants can attain the remedy they seek—a review of the prevailing wage rates—through their current claims under the Payment of Wages Act, as third-party beneficiaries to a contract, or through a claim for unjust enrichment. The law is clear that none of these claims provides a legal basis through which Appellants can raise their prevailing wage dispute.

Appellants' case is based on a fundamental fallacy: Appellants and their amici repeatedly assert that if Appellants are not given a private right of action to pursue their prevailing wage claims, then there will be no way to enforce the prevailing wage requirement in contracts and Appellants will be without a remedy. Those assertions are simply untrue. The prevailing wage remedy that Appellants and their amici seek is provided by municipal ordinances detailing enforcement mechanisms for the prevailing wage requirement. Courts across the nation — at the federal, state, and municipal level — have held that the existence of an administrative scheme for enforcement of prevailing wage laws is an adequate and exclusive remedy, regardless of whether it is enforced. If

Appellants desire an additional remedy, the solution is not to be found in the courts — the solution lies with the legislature.

For these reasons, Respondent AGS respectfully requests that this Court affirm the court of appeals.

**I. APPELLANTS' CLAIMS UNDER THE PAYMENT OF WAGES ACT FAIL AS A MATTER OF LAW WHERE APPELLANTS HAVE NO LEGAL BASIS ON WHICH TO CLAIM THEY HAVE UNPAID WAGES THAT WERE ACTUALLY EARNED.**

The Payment of Wages Act (“the Act”), Minn. Stat. §§ 181.13-.14 (2010), guarantees that departing employees can easily recover their final paychecks based upon the compensation to which both the employer and the employee agreed. The Payment of Wages Act does not, however, provide a means through which separated employees may protest that they have been paid the wrong wage from the beginning of their employment. Yet that is precisely what Appellants seek to do in this litigation. Appellants’ arguments defy the plain meaning of the Act, this Court’s prior interpretations of the Act, and public policy.

**A. The Plain Meaning of the Act requires that a Demand for Wages be defined by a Contract of Employment.**

The Payment of Wages Act states, in pertinent part:

When any employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee.

Minn. Stat. § 181.13(a) (2010). The employee may collect wages “at the rate agreed upon in the contract of employment.” *Id.* (emphasis added). Because the Act is punitive in nature, it is narrowly construed. *Lee v. Fresenius Med. Care*, 741 N.W.2d 117, 125 (Minn. 2007).

The Payment of Wages Act does not create a substantive right to payment upon demand, but is strictly a timing statute. *Id.* Thus the substantive right to payment must come from elsewhere. The plain language of the statute defines this source as “the contract of employment.” Minn. Stat. § 181.13(a). Other references to the contract of employment in the Act include the assumption that there is a “usual place of payment,” § 181.13(b), that the employment was specified as by “the day, hour, week, month, or piece or by commissions,” § 181.13(a), and that there is a “regularly scheduled payday,” and a “final day of employment” § 181.14, subd. 1.

In this case, AGS hired its employees to work at a specific hourly rate, and that contract between AGS and Appellants governs AGS’ obligations under the Payment of Wages Act. While this contract was not written, a *de facto* contract existed under which Appellants knew when to show up for work, what work to perform, when to take breaks, when to leave, when they would get paid, and how much they would get paid. (*See* R. Add. 17 (finding a *de facto* wage rate.)) Appellants received the \$16.28 per hour wage rate approved by the City and the SEIU. Appellants do not dispute that they were fully paid under the contract of employment they had with AGS, and they have abandoned any overtime claim. (*See Supra* n. 2; R. Add. 17-18.)

Appellants claim that they are third-party beneficiaries to the contract between AGS and the City of Minneapolis and that, as third party beneficiaries, they should have been paid an even higher wage rate. This contract is not the contract of employment between AGS and its employees and has no relevance to the Payment of Wages Act.

Appellants' arguments are not consistent with the plain language of the Act. Wages demanded under the Act are to be paid "at the rate agreed upon in the contract of employment." Minn. Stat. § 181.13(a). Appellants have already been paid all wages due and owing under their oral employment contracts. They should not be permitted to seek a higher wage under the contract between AGS and the City and the prevailing wage ordinance, because these are not Appellants' "contract[s] of employment." *Id.*

This Court's prior interpretation of the Act requires a contractual source that specifically defines the amount of wage to be paid. Sound policy reasons support this requirement. An employer needs certainty regarding the debts that it owes. Appellants' reading of Minn. Stat. § 181.13 would allow employees who, having accepted a given wage rate for several years, to leave the company and subsequently demand a different wage rate, payable from the beginning of their employment. If the employer contests the new wage demand, the employer risks a statutory penalty and (conveniently) payment of the employee's attorney's fees.

The legislature could not have intended that sort of economic chaos when it enacted the Act. Minn. Stat. § 181.13 creates a remedy for employees seeking a final paycheck or an easily defined payment under an employment contract. The remedy

Appellants seek is not provided by the plain terms of, or the policy behind, the Minnesota Payment of Wages Act.

**B. Controlling Precedent demonstrates that the Act does not provide the Remedy Appellants seek.**

Appellants know that AGS does not owe any additional wages under Appellants' employment contracts. They have, therefore, tried to recover under a different contract—the construction contract between AGS and the City. Even assuming, *arguendo*, that Appellants are third-party beneficiaries—an idea which the district court and the court of appeals previously rejected—recovery through the Payment of Wages Act as third-party beneficiaries to a contract is not practical in this case. Such recovery is also not consistent with prior case law on the Act.

This Court's decision in *Lee v. Fresenius Medical Care* grounds discussion of the Act in this case. In *Lee*, a former employee of Fresenius, who had been involuntarily terminated for employee misconduct, sought to recover accrued vacation pay under the terms of her employee handbook. 741 N.W. 2d at 120-22. This Court held (1) that the employee handbook was an employment contract, *id.* at 123; (2) that vacation pay was “wages” for purposes of Minn. Stat. § 181.13, *id.* at 124-25; (3) and that the terms of the employment contract governed when the “wages” were “actually earned,” *id.* at 125-26. Because the employee handbook provided that employees terminated for misconduct would not be compensated for unused vacation time, this Court concluded that the demanded vacation pay was not “actually earned” and, therefore, was not recoverable under Minn. Stat. § 181.13. *Id.* at 127-28.

The parties do not substantially dispute that prevailing wages are “wages” for purposes of Minn. Stat. § 181.13. *See* Minn. Stat. § 177.23, subd. 4 (2010) (defining “wage” as “compensation due to an employee by reason of employment”). Rather, AGS contends that Appellants have asserted no legal basis, such as a contract, through which they can define the wages they claim. Without such a legal basis, there can be no question of fact to put before a jury, as Appellants assert.

In place of their own oral contracts of employment, Appellants seek to substitute a different contract—the contract between AGS and the City. Appellants also argue that they should recover because the prevailing wage is made “mandatory” by the prevailing wage ordinance and the contract between AGS and the City. Both arguments fail.

***1. Appellants cannot recover under the Payment of Wages Act as hypothetical third-party beneficiaries to the contract between AGS and the City.***

Neither the contract between AGS and the City or the prevailing wage ordinance defines the work of each individual Appellant with enough detail to determine what work each Appellant performed and the corresponding prevailing wage. This detail is required for a claim under Minn. Stat. § 181.13.

In *Lee*, for example, the employee handbook defined, in specific terms, how many days of vacation pay accrued, at what rate, and when and how those days would be paid. *Lee*, 741 N.W.2d at 126. Similarly, in *Tynan v. KSTP*, 247 Minn. 168, 77 N.W.2d 200 (1956), appellant’s collective bargaining agreement defined that he was to be paid \$95 per week for each vacation week, and it defined that 14 days of vacation accrued if appellant worked six months after October of each year, and a full 21 days accrued for

working a full year. *Id.* at 203-04. The Court made similarly detailed findings about the recovery due to the claimant in *Hruska v. Chandler Ass., Inc.*, 372 N.W.2d 709 (Minn. 1985). In *Hruska*, the Court construed the contract at length, even considering whether to admit parol evidence, to determine the terms and rate at which claimant was to be paid. *See Hruska*, 372 N.W.2d at 713, 716-17.

In distinct contrast to these cases, the contract between the City and AGS and the prevailing wage ordinance simply do not contain the detail required to determine what Appellants' "wages" were and under what conditions they would have been "actually earned." The prevailing wage certificate requires that "Laborers and mechanics shall be paid according to the Contracts for Public Works Ordinance, Minneapolis Code of Ordinances, Chapter 24, Section 24.200 through 24.260." The Certificate also refers readers to the federal website containing current prevailing wage rates for use in Hennepin County.<sup>3</sup> The ordinance similarly requires that wage rates be determined according to the "federal Davis-Bacon and related acts." Mpls. Ord., Ch. 24, Art. IV, § 24.220.

It would be inconsistent with *Lee's* narrow reading of the Act, 741 N.W.2d at 126, to require employers to remit vague and undefined wages within 24 hours of an employee's demand, and to be penalized for not doing so.<sup>4</sup> The contract between AGS

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<sup>3</sup> A list of the wages in effect at the time of the Convention Center project may be found at App. 2685-2709.

<sup>4</sup> The demands in this case, for example, were all identically worded: "This letter is a demand for prompt payment of all wages that you owe me for work I performed for [AGS] that was covered by prevailing wage laws and requirements. I have worked on

and the City, and the prevailing wage ordinance, do not contain enough detail to determine when an individual's employment began and ended, the terms of employment, what work each person performed, and correspondingly, what each individual is owed. In other words, there is not sufficient detail to determine whether the claimed wages were "actually earned," much less enough detail to contradict the oral employment contract between Appellants and AGS.

*2. Appellants cannot recover under the Act by claiming that the wages are "mandatory."*

Appellants' claim for recovery under the Act relies entirely on a distinction Appellants have created between "mandatory" and "discretionary" wages. Wages, by definition, are mandatory — employers must compensate employees for time worked. *See* Minn. Stat. § 177.23, subd. 4 (2010) (defining "wage" as "compensation due to an employee by reason of employment").

Here, Appellants claim that the contract between AGS and the City, and the prevailing wage ordinance, make payment of the prevailing wage "mandatory," and therefore the wages were "actually earned" under § 181.13. That definition defies logic: wages cannot be actually earned until employees have worked the required hours or fulfilled other requirements. As just discussed, neither the third-party contract nor the ordinance give the employees in this case any requirements they need to fulfill to "earn" the wages.

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prevailing wage projects for your company but wasn't paid the required prevailing wages." (App. 750-761.) None of them stated the amount allegedly owed.

Logic aside, Appellants' theory that mandatory wages are the equivalent of "actually earned" wages stems from a misapplication of the court of appeals' decision in *Kvidera v. Rotation Eng'g and Mfg. Co.*, 705 N.W.2d 416 (Minn. Ct. App. 2005). (See App. Br. at 17.) In *Kvidera*, the court of appeals determined that a bonus was a "wage" under § 181.13 because a bonus was part of a negotiated compensation plan. 705 N.W.2d at 422-23. If the right to a bonus vests under the terms of the employment contract, payment of the bonus is "nondiscretionary," by definition, under the terms of the contract. *Id.* at 423. When a bonus is "nondiscretionary," as opposed to gratuitous, it is a "wage" that is "actually earned" under the terms of § 181.13. *Id.*

Even if this Court were bound by the holding in *Kvidera*, the description of the bonus as "nondiscretionary" is incidental to the focus of that court's analysis. It defines the term "wage" more than it defines the term "actually earned." The underlying contract in *Kvidera*, which made the payment of wages mandatory, remains the center of the inquiry.

AGS agrees that it was required to pay its employees the prevailing wage. But Minn. Stat. § 181.13 does not provide a vehicle through which Appellants can contest their contractual rate of payment. See *Lee*, 741 N.W.2d at 125, 129 (stating that § 181.13 does not create a substantive right and that creation of such a right is the province of the legislature).

**II. UNDER WELL-ESTABLISHED PRINCIPLES OF CONTRACT LAW, APPELLANTS ARE NOT THIRD-PARTY BENEFICIARIES TO THE CONTRACT BETWEEN AGS AND THE CITY.**

Strangers to a contract generally do not have rights under the contract. *Hickman v. Safeco Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005). An exception to this rule “exists if the third party is an intended beneficiary of the contract.” *Id.*

Appellants claim that they are third-party beneficiaries to the contract between AGS and the City (the “Contract”) because the Contract incorporates the prevailing wage certificate by reference.<sup>5</sup> But the mere fact that the Contract incorporates the prevailing wage ordinance does not make Appellants intended beneficiaries of the Contract. If that were true, the fact that the Contract requires AGS to “comply with all applicable Federal, State, and local laws and regulations governing funds provided under this Agreement,” could create an entire class of unanticipated third-party beneficiaries.<sup>6</sup> (*See App. 55.*)

This Court adopted the intended-beneficiary test set out in Restatement (Second) of Contracts § 302 (1979) in *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). Restatement Section 302 states:

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<sup>5</sup> Prevailing Wage Cert. found at App. 41. The district court found that the certificate was incorporated by reference into the contract in Sections I and XV. Add 48. The locus for this incorporation seems to be the reference to the Contractor’s “proposal” in Section I and the requirement that the Contractor comply with all federal, state, and local laws in Section XV. *See Contract at App. 43-57.*

<sup>6</sup> The prohibition on billboard advertising with City funds, for example, does not mean that—in a scenario where AGS used City funds to advertise and bumped a competitor from a billboard spot—the competitor would have a right to sue under the Contract. (*See App. 54.*)

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
  - (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
  - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
  
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) Contracts § 302. In other words, “if recognition of third-party beneficiary rights is ‘appropriate’ and *either* the duty owed *or* the intent to benefit test is met, the third party can recover as an ‘intended beneficiary.’” *Cretex*, 342 N.W.2d at 139. The distinction between “intended” and “incidental” beneficiaries is important here: simply because payment of the prevailing wage may benefit Appellants does not mean that they are “intended” beneficiaries. *See, e.g., Chard Realty, Inc., v. City of Shakopee*, 392 N.W.2d 716, 720 (Minn. Ct. App. 1986) (finding that contract benefited developer by reducing cost of his assessments, but that he was incidental, not intended, beneficiary), *review denied* (Minn. Nov. 19, 1986).

Appellants are not third-party beneficiaries of the contract because they cannot satisfy either of the tests required of an intended beneficiary, and because recognition of a right of performance is not appropriate to effectuate the intent of the parties to the Contract.

**A. Appellants do not satisfy the “duty owed” test.**

The duty-owed test is satisfied where “performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary.” Restatement (Second) Contracts § 302(1)(a). Appellants do not make a claim under the duty-owed test because they do not claim that the City owes them money. Such a claim would clearly fail.

**B. Appellants do not satisfy the “intent to benefit” test.**

The intent to benefit test is met where “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” Restatement (Second) of Contracts § 302(1)(b). “Where the intention of the parties is clear from the face of a contract, construction of the contract is a question of law.” *Hickman*, 695 N.W.2d at 369.

The contract must be read “in light of all the circumstances.” *Cretex*, 342 N.W.2d at 140; *see also Hickman*, 695 N.W.2d at 370-71 (discussing possible circumstances for consideration). Courts look to the language of the contract, the particular facts of the case, to whom performance is rendered, and whether the contract is public or private. 342 N.W.2d at 139-40. In general, the intent of a contract may be ascertained, “not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis,” in which words and phrases are understood in accordance with the purpose of the contract as a whole. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003) (citation omitted).

The face of the contract and the surrounding circumstances establish that Appellants are not intended beneficiaries of the Contract between AGS and the City of Minneapolis.

*1. The terms of the Contract do not make Appellants intended beneficiaries.*

First, the terms of the Contract indicate that its purpose is to define the scope of services to be provided by AGS to the City. Section II, titled “Purpose,” states specifically that “The City requires repairs to and polishing of approximately 130,000 square feet of terrazzo flooring at the MCC. . . . The City wishes to enter into this Agreement with the Contractor whereby the Contractor will provide the Scope of Services indicated in Section III of this Agreement.” (App. 45.) The remainder of the agreement sets out the scope of services, warranties, representations, and conditions to which the parties agree. (App. 45-57.)

With respect to employees, the Contractor warrants that its employees will undergo orientation relating to the layout and emergency procedures at the MCC (App 47); that it has appropriate workers’ compensation insurance (App. 49); that all employees are employees of the Contractor and not of the City (App. 51); the Contractor will not discriminate against any employee in violation of City ordinance, the ADA, or the MHRA (App. 53-54); and, if applicable, employees will be paid under the City’s living wage ordinance or equal benefits ordinance (App. 54-55). These are standard terms that protect the City from liability and insure that the Contract is legal and enforceable under local law.

These warranties do not change the scope or purpose of the agreement. Although the employees benefit where the Contractor has appropriate insurance and is required not to discriminate, the purpose of the Contract and these warranties is to define the scope and expectations of the work AGS will perform for the City. Similarly, the incorporation of the prevailing wage ordinance does not change the purpose or scope of the contract. The prevailing wage ordinance, like the other ordinances in the Contract, is a term the City is required to include to make the contract legal and enforceable. The prevailing wage ordinance is not the focus, intent, or purpose of the Contract.

In addition, performance of the Contract is to be rendered directly to the City and payment was to go directly to AGS. The Contract does not give any indication that performance to a third party is considered.

**2. *The terms of the ordinance benefit the public, not Appellants.***

Instead of focusing on the circumstances surrounding the entire Contract, Appellants and their Amici ask this Court to focus solely on the language of the prevailing wage certificate and the prevailing wage ordinance, to the exclusion of all else. (See Br. at 30) Appellants do not explain how examination of a single clause, incorporated by reference, can demonstrate the intent of the entire contract. Nevertheless, even this inquiry does not demonstrate an intent to benefit Appellants.

Contrary to Appellants' contentions, prevailing wage ordinances are created for the benefit of the public as a whole, not for the benefit of particular individuals. For example, the U.S. Supreme Court has determined that the Davis-Bacon Act, on which the Minneapolis ordinance relies, was "designed to protect local wage standards by

preventing contractors from basing their bids on wages lower than those prevailing in the area.” *Univ. Research Assn. Inc. v. Coutu*, 450 U.S. 754, 773, 101 S. Ct. 1451, 1463 (1981) (citation omitted).<sup>7</sup> It was also designed “so that the contractor may know definitely in advance of submitting his bid what his approximate labor costs will be.” *Id.* at 776, 101 S. Ct. at 1464. A similar concept is recognized by the Minnesota prevailing wage requirement, which states its public interest purpose outright: “It is in the public interest . . . that persons working on public works be compensated according to the real value of the services they perform . . . .” Minn. Stat. § 177.41 (2010) (emphasis added).

The plain language of the ordinance indicates an intent to benefit the City and its residents, not individual laborers. The relevant ordinance, entitled “Prevailing wage required,” states:

All invitations or requests for proposals and all contracts entered into where, pursuant to ordinance or statute, a formal written contract or performance bond is required to which the city is a party, for constructions, alteration and/or repair, including painting, decorating, sodding and landscaping of public buildings, or similar public works of the city and which requires or involves the employment of mechanics and/or laborers 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 if fully set forth herein and all contractors and subcontractors shall fully comply with such provisions regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and his employees.

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

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<sup>7</sup> *Coutu* discusses the origin of the Davis-Bacon Act, and its prevailing wage standard, at length. The Act originated in the 1930s, and was originally designed to protect local “honest” contractors from itinerant contractors who would move into an area for one project, undercut local wages, and then leave. *See Coutu*, 450 U.S. at 774, 101 S. Ct. at 1463.

At its most basic, the subject, verb, and object of the ordinance are, “All invitations or requests . . . and all contracts . . . shall contain a provision.” *See* Minn. Stat. § 645.08(1) (“[W]ords and phrases are construed according to the rules of grammar.”) The focus of the ordinance, therefore, is not on the prevailing wage requirement, but on ensuring that City contracts include the federal labor standards and prevailing wage language. *See generally United States v. Capeletti Bros., Inc.*, 621 F.2d 1309, 1314 (5th Cir. 1980) (stating of the Davis-Bacon Act that “the duty created by the statutory language is imposed upon federal agencies to ensure that certain provisions are included in federal contracts. Once this duty is performed, the statutory obligation is satisfied.”).

Furthermore, when interpreting statutes, or in this case ordinances, courts read and construe the ordinance as a whole “and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Considering the surrounding ordinances, it becomes even clearer that the concern of Chapter 24, Article IV, of the Minneapolis City Ordinances is the relationship between the City and its contractors. The City gives itself the right to reject bids, inspect payroll records, terminate work, withhold contract payments, and place the contractor on a suspended or disbarment list. *See* Mpls. Ord., Ch. 24, Art. IV, §§ 24.230-24.260. The focus is not on employees, but on the City’s right and ability to enforce its own rules.<sup>8</sup>

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<sup>8</sup> The City’s protest in its amicus brief that Appellants may be left without a remedy unless this Court finds them to be third party beneficiaries of the Contract rings particularly hollow in light of the City’s power to enforce its own ordinances.

As the City points out in its amicus brief, the ordinances also require the City to include in any contract a “special provision for the payment of the laborers, employees and those furnishing materials.” *Id.* at § 24.200. The contractor is required to post a bond to guarantee these payments. *Id.* at § 24.210. Contrary to the City’s contention, however, these provisions are not intended for the benefit of the laborers. Instead, these provisions directly protect the interests of the City. Minn. Stat. § 574.29 (2010) requires all public bodies to obtain and approve valid payment bonds or securities for public works contracts. If the City had failed to include the bond and payment requirements in the Contract, the City could be held liable, under Minn. Stat. § 574.29, for any loss to all persons furnishing labor and materials resulting from the City’s failure to get such a bond, including loss from the Contractor’s negligence.

Finally, courts presume that “the legislature intends to favor the public interest as against any private interest.” *See* Minn. Stat. § 645.17(5); *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384, 388 (Minn. 1999) (concluding that physicians’ private right of access to hospital review organization’s information did not outweigh public interest in confidential review process). Mechanics and laborers may benefit from payment of the prevailing wage, but they are incidental beneficiaries. The residents of Minneapolis are the primary beneficiaries of their City’s ability to enforce its laws, keep wage rates high, and attract quality workers and contractors for public works.<sup>9</sup> Granting a private right of action to enforce the Contract would disrupt the City’s administrative plan; the courts,

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<sup>9</sup> The Brief of Amicus Curiae Fair Contracting Foundation seems to agree with the premise that the prevailing wage benefits the public.

and not the City, would determine which wage rates apply, thereby disrupting contractors' trust that the City can and will enforce its own contracts.

**3. *The public nature of the contract does not make Appellants intended beneficiaries.***

In *Cretex*, speaking specifically of sureties and performance bonds, this Court stated: "Another circumstance to be considered in ascertaining the intent of the parties is whether the suretyship contract is for a private or public construction project." 342 N.W.2d at 140. Because the Contract at issue here is a City contract, it is also a public contract. *See* Minn. Stat. § 15.71, subd. 2 (2010) (defining public contract as a purchase or sale by a public agency of public improvements or services). But the public nature of the Contract does not affect the intent of the parties.

The *Cretex* court cited *Duluth Lumber and Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377 (Minn. 1979), as a case demonstrating the difference a public contract may make. 324 N.W.2d at 140. In *Duluth Lumber*, the general contractor entered into a construction agreement with the Housing Authority of the Fond du Lac Indian Reservation for construction of housing using HUD funding. 281 N.W.2d at 379. The contract contained detailed provisions through which the federal government and the Housing Authority were to verify that the general contractor paid the subcontractors and materialmen before making payments to the general contractor. *Id.* These provisions were not followed, and when the work was finished, the general contractor took the final payment and disappeared without paying Duluth Lumber for materials. *Id.* at 380.

The *Duluth Lumber* court recognized that “an owner is not liable for work or materials furnished a contractor when he is not a party to the contract between the contractor and the materialmen.” *Id.* at 384. But the Court made an exception because *Duluth Lumber* could demonstrate an “exceptional basis upon which to impose liability on the Housing Authority.” *Id.* Generally speaking, materialmen can place liens on the owner’s property when their bills are unpaid. Because the owner’s property was on an Indian reservation, no liens could be placed. The Court held that where the owner of a building is not vulnerable to liens, a term in the contract that the contractor will pay for all bills and materials cannot be inferred to be for the benefit of the owner, and must be inferred to be for the benefit of the materialmen. *Id.* at 384-85.

This case is distinguishable from *Duluth Lumber*. The prevailing wage is a creation of statute—there is no common law right or remedy to receive the prevailing wage similar to the materialman’s right to place a lien.<sup>10</sup> Thus Appellants are not being deprived of a common-law right that they would otherwise have. The statutory rights of enforcement the City granted to itself are the sole remedy. *See Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn. 2007) (explaining that courts are cautious about creating statutory causes of action that do not exist at common law where the legislature has not provided for them).

In addition, the prevailing wage requirement, by definition, only appears in public contracts. There is therefore no “exceptional basis” to infer that the terms of the Contract

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<sup>10</sup> Appellants’ claim that they are being deprived of a common-law right is therefore misplaced. *See Br.* at 32.

mean anything other than their plain language suggests: the Contract is made between AGS and the City for the benefit of the City and the public.

**4. Case law from other jurisdictions does not support Appellants' third-party beneficiary claims.**

The question of whether Appellants may recover as third-party beneficiaries to the Contract between AGS and the City is closely related to the question of whether there is a private right of action under the prevailing wage ordinance or the Davis-Bacon Act. *See, e.g., Coutu*, 450 U.S. at 769 n.19 (wherein the Supreme Court conflates the two); *Peatross v. Global Assoc.*, 849 F. Supp. 746, 749 (D. Haw. 1994) (holding that the Davis-Bacon Act does not create “a private right of action to enforce a contract that [contains] Davis-Bacon Act specifications”); *Miccoli v. Ray Comm., Inc.*, No. 99-3825, 2000 WL 1006937 \*3 (E.D. Pa. 2000) (“[C]onclud[ing] that plaintiff’s [third-party beneficiary] claim, no matter how creative the choice of nomenclature, is in reality a private claim for back wages under the Davis-Bacon Act.”).

A majority of courts have found that there is no private right of action under the Davis-Bacon Act. *See, e.g., Operating Eng’rs Health & Welfare Trust Fund v. JWJ Contr. Co.*, 135 F.3d 671, 676 (9th Cir. 1998); *Weber v. Heat Control Co.*, 728 F.2d 599, 599 (3d Cir. 1984); *Capeletti Bros.*, 621 F.2d at 1314; *Andrews v. First Student, Inc.*, No. 10-11053, 2011 WL 3794046 (D. Mass. 2011); *United States v. TLT Constr. Corp.*, 138 F. Supp. 2d 237, 240 (D.R.I. 2001); *Livingston v. Shore Slurry Seal, Inc.*, 98 F. Supp. 2d 594, 597 (D.N.J. 2000); *Peatross* 849 F. Supp. at 749.

In the widely-followed fifth-circuit decision, *United States v. Capeletti Brothers*, for example, the court first determined that the Davis-Bacon Act was not included in contracts for the benefit of workers. 621 F.2d at 1314. The court then applied the *Cort* factors to determine whether the legislature intended a private right of action under the Davis-Bacon Act. *Id.* The court determined that even though it might provide a useful supplement to the existing administrative remedy to allow individual lawsuits, “it is not . . . our task or our privilege to make policy.” *Id.* at 1317. “In our view, neither the language, the history, nor the structure of the statute supports the implication of a private right of action.” *Id.*

Appellants have cited some exceptions, all of which are distinguishable. The case on which Appellants primarily rely, *Favel v. Am. Renovation and Constr. Co.*, 59 P.3d 412 (Mont. 2002), is not pertinent here. In *Favel* the employees pursued extensive administrative remedies, and every decision made by the relevant administrator favored them. 59 P.3d at 422, 427. Most importantly, the *Favel* court “limited” its decision “to the named Petitioners/Appellants.” *Id.* at 426. Even in Montana, the *Favel* decision does not imply third-party beneficiary status to all workers under public contracts. *See Herrmann v. Wolf Point Sch. Dist.*, 84 P.3d 20, 23 (Mont. 2003) (holding that the concepts in *Favel* may provide guidance but that it was not controlling where the facts and issues were different).

Here, the facts and issues are substantially different from those in *Favel*. To the extent there have been any administrative determinations, they have been in favor of AGS. The City initially withheld funds here, but instead of distributing it to the workers

as happened in *Favel*, the City eventually disbursed the funds to AGS. In other words, the administrative determinations in this case did not support Appellants, as was the case in *Favel*<sup>11</sup>

California and New York have also determined that workers may recover as third-party beneficiaries to contracts that contain prevailing wage requirements. In New York, this determination was made as a matter of unique state law; New York has a history of recognizing that contracts incorporating laws and ordinances create a contractual obligation that may be enforced by private action. *See Cox v. Nap Constr. Co., Inc.*, 891 N.E.2d 271, 275 (N.Y. 2008). No similar trend exists in Minnesota. California, by contrast, decided without analysis that the prevailing wage requirement benefits workers and therefore they are third-party beneficiaries to the contract. *See Tippet v. Terich*, 44 Cal. Rptr. 2d 862, 872 (Cal. Ct. App. 1995), overruled on other grounds in *Cortez v. Purolator Air Filtration Prods. Co.*, 96 Cal. Rptr. 2d 518 (Cal. Ct. App. 2000). The U.S. Supreme Court has rejected California's method: "[T]he fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation." *Coutu*, 450 U.S. at 771.

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<sup>11</sup> Technically, Appellants have not pursued any administrative remedies, since none of Appellants ever complained to the City about their wages. The complaints always came from non-involved unions.

**C. It is not appropriate to recognize a “right to performance” of the contract in Appellants.**

Even if this Court holds that Appellants pass the intent-to-benefit test, third-party-beneficiary status may only be found where “recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.” Restatement (Second) Contracts § 302(a). This element is not extensively discussed in *Cretex* or similar third-party beneficiary cases, but it is relevant here.

Granting Appellants the ability to enforce the prevailing wage ordinance as third party beneficiaries to the Contract between AGS and the City would effectively create a private right of action under the prevailing wage ordinance. That would be contrary to the longstanding practice of this Court.

“Principles of judicial restraint” preclude courts from creating a new statutory cause of action that does not exist at common law where the legislature has not provided for civil liability by the express or implied terms in the statute. *Bruegger v. Faribault Cnty. Sheriff's Dept.*, 497 N.W.2d 260, 262 (Minn. 1993). Here, the terms of the city ordinance provide extensive terms for City enforcement but no indication — express, implied, or otherwise — that the City meant for employees to be able to bring civil actions to challenge their wage rates. As discussed above, a majority of courts have

found that there is no private right of action under the Davis-Bacon Act.<sup>12</sup> *See Supra* Part II.B.4.

In addition, this Court has previously recognized that implying a private remedy where the legislative scheme includes a specialized administrative remedy would be inconsistent with the legislative scheme. *Morris v. Am. Fam. Mut. Ins. Co.*, 386 N.W.2d 233, 236-38 (Minn. 1986). In *Morris*, this Court held that recognizing a right of action under the Unfair Claims Practices Act through which an insured could sue his insurer to enforce insurance regulations would “enable a private person to share the enforcement duties of the Commissioner of Commerce and the Attorney General.” *Id.* at 236. The Court recognized that the Commissioner had more claims than it could process, but nevertheless determined that the statutory scheme was “ill designed for a private cause of action.”<sup>13</sup> *Id.* at 237

Similarly, the ordinance in question here is “ill designed for a private cause of action.” The City’s contract-compliance office is in the best position to enforce the prevailing wage ordinance. As happened here, city compliance officers can visit the job site while the project is still in progress to observe what type of work is being done. And

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<sup>12</sup> It is true that the Miller Act provides a vehicle for some employees to bring prevailing wage claims in certain situations, but only after those employees, much like the employees in *Favel*, have undergone extensive administrative procedures. *See* 40 U.S.C. 3144(a)(2) (explaining that underpaid laborers only have right to civil action under Miller Act after Comptroller General determines that there has been underpayment, withholds payments, and determines that the withheld payment is not sufficient to pay laborer).

<sup>13</sup> The legislature enacted a statute granting insureds a first-party right of action for bad faith against insurers in 2008. *See* Minn. Stat. § 604.18. This example reinforces the idea that the legislature will add private causes of action where appropriate.

the City is more familiar with the wage rates and job classifications it requires contractors to use than a court would be. These are the sort of specialized and detailed determinations that are regularly left to administrative agencies. Bringing wage rate claims to the courts, after the job is finished and the work is completed, would be inefficient, and would greatly increase the burden on the already burdened courts.

Finally, “[t]he well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves.” 6 McQuillin Mun. Corp. § 22:1 (3d ed). Because the City does not have the legislative power to create a private cause of action, the Court should refrain from creating such a right. *Bruegger*, 497 N.W.2d at 262. This is particularly the case because the prevailing wage ordinance created a right that did not exist at common law.

**D. Conclusion.**

Appellants cannot establish that they are third-party beneficiaries under the duty-owed or the intent-to-benefit test. Further, recognition of a right to performance of the contract in Appellants would thwart the existing legislative scheme. Therefore, AGS respectfully asks this Court to affirm the holding of the Court of Appeals.

### III. THE BALANCE OF THE EQUITIES DOES NOT SUPPORT APPELLANTS' CLAIMS FOR UNJUST ENRICHMENT.

Unjust enrichment is generally not available as a remedy where, as here, the parties' relationship is governed by a valid oral contract between AGS and the employees, or where equitable relief would circumvent an existing legislative enactment. *See U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981) (denying claim for unjust enrichment on both grounds). Nor does an unjust enrichment claim arise simply because one party benefits from the efforts of others. *First Nat'l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981).

Appellants were paid the same as or more per hour on the MCC project than they received on other similar projects. (*See, e.g.*, App. 2380, 2384; 2407-09; 1092, 1095.) Indeed, the Appellants who were deposed admitted that they did not have the skill or experience to work as terrazzo finishers and several Appellants further admitted that they have already been "fully compensated." (*See* App. 2368, 2374-75; 2380, 2392-98, 2401-02; 2407, 2416-19; 2426, 2434-35, 2445-46; 2599, 2603-09; *see also* App. 471, 492.) As has already been shown, Appellants have no legal basis for their claims for a higher wage. Therefore, Appellants' unjust enrichment claim fails because there is nothing unjust about the compensation Appellants received.

Accordingly, the district court balanced the equities and held that "[e]quity does not support a right of recovery in this case." (Add. 55) Where, as here, the district court balanced the equities rather than deciding the unjust enrichment claim as a matter of law,

an abuse of discretion standard may be appropriate. *See SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 860 (Minn. 2011).

The district court, for example, held that Appellants unjust enrichment claim could not succeed because

by affording [Appellants] 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 and concomitant right of recovery. As previously discussed, in enacting the Ordinance and setting forth a remedy for noncompliance, the City did not provide for a private right of action or right of recovery by underpaid employees. The Court should not second guess that legislative determination under the guise of equity.

(Add. 56 (citing cases.)) The district court also noted that Appellants did not present any evidence that they expected a higher wage until their “demands” were sent to AGS months after their work ended, and that the wage Appellants seek is not consistent with their training or skill level. (R. Add. 15-17.)

The court of appeals based its affirmance on the district court’s finding that Appellants did not present any evidence that they expected a higher wage until after their employment ended. (R. Add. 5.) The court of appeals labeled this delayed demand laches; the district court called it “a windfall rather than a fulfillment of the parties’ expectations.” (R. Add. 5; 15) Contrary to Appellants’ contentions, the court of appeals decision has nothing to do with filing suit or the statute of limitations. The decision referred only to the time the employees took to inform their employer that they disputed their wages. Whatever the label, the principle is the same: AGS thought it was paying the proper wage under its Contract with the City and under its contracts with its employees.

It would be inequitable to create a remedy outside the existing legislative structure without evidence that either employer or employees expected payment of a different wage during the performance of the Contract.

Finally, to succeed on an unjust enrichment claim, Appellants must demonstrate that AGS received a benefit which it in good conscience should not retain. *Servicemaster of St. Cloud v. GAB Bus. Servs. Inc.*, 544 N.W.2d 302, 306 (Minn. 1996). Appellants cannot demonstrate this, as a matter of law, because the only determination AGS ever received from the City was the September 12, 2008, letter from Jordan stating that AGS was complying with its prevailing wage requirements. Where AGS made good faith efforts to pay the correct wage, complied with the City's investigation, and relied on the City's determination that it was paying the correct wage, there can be no ground for Appellants' unjust enrichment claim.

### CONCLUSION

For all of the above reasons, Respondent Affordable Granite and Stone respectfully requests that this Court affirm the Court of Appeals in all respects.

Dated: 10-03-2011

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**CERTIFICATE**

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing memorandum of law in Times New Roman, a proportional 13-point font, on 8 ½ by 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The resulting principal brief contains 10,261 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

Dated: 10-3-2011

David M. Wilk  
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