

NO. A10-2173

State of Minnesota
In Supreme Court

19

Oscar Caldas, et al.,

Appellants,

vs.

Affordable Granite & Stone, Inc.,

Respondent,

Dean Soltis,

Defendant.

BRIEF OF APPELLANTS

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STATEMENT OF THE LEGAL ISSUES

I. WHETHER THE MINNESOTA PAYMENT OF WAGES ACT AUTHORIZES RECOVERY OF UNPAID WAGES WHEN THOSE WAGES ARE MANDATORY RATHER THAN DISCRETIONARY

The District Court and the Court of Appeals ruled in the negative. *ADD. 55, 63.*

Most Apposite Legal Authority:

Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117 (Minn. 2007);

Kohout v. Shakopee Foundry Co., 162 N.W.2d 237 (Minn. 1968);

Kvidera v. Rotation Engineering and Mrg. Co., 705 N.W.2d 416 (Minn. Ct. App. 2005);

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

Minn. Stat. §§ 181.13-.14, .171;

Minn. Stat. § 645.16; and

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

II. WHETHER EMPLOYEES CAN RECOVER THE UNPAID PREVAILING WAGE AS THIRD-PARTY BENEFICIARIES OF A PUBLIC CONTRACT THAT REQUIRES THE EMPLOYER TO PAY THE PREVAILING WAGE

The District Court and the Court of Appeals ruled in the negative. *ADD. 54, 62.*

Most Apposite Legal Authority:

Nelson v. Productive Alternatives, Inc., 696 N.W.2d 841 (Minn. 2005);

Cretex Cos., Inc. v. Constr. Leaders, Inc., 342 N.W.2d 135 (Minn. 1984);

Gethsemane Lutheran Church v. Zacho, 104 N.W.2d 645 (Minn. 1960);

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

Minn. Stat. § 177.42; and

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

III. WHETHER RESPONDENT UNJUSTLY ENRICHED ITSELF BY PAYING APPELLANTS AS JANITORS FOR DOING TERRAZZO WORK AND, MOREOVER, AT A RATE FAR LESS THAN RESPONDENT PROMISED UNDER OATH, IN WRITING, AND DIRECTLY TO APPELLANTS

The District Court and the Court of Appeals ruled in the negative. *ADD. 57, 63-64.*

Most Apposite Legal Authority:

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

Acton Constr. Co. v. State of Minn., 383 N.W.2d 416 (Minn. Ct. App. 1996);
Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984);
Palisades Urban Renewal Enter., LLP, ARB Case No. 07-124 (U.S. DOL Admin.
Review Board, July 30, 2009); and
29 C.F.R. § 5.5.

STATEMENT OF THE CASE

Appellants filed their wage case against Affordable Granite & Stone, Inc. (“Affordable Granite & Stone”) on June 25, 2009. *APP. 1-58*. In their Complaint, Appellants asserted claims for unpaid wages and statutory penalties under the Minnesota Payment of Wages Act (“Payment of Wages Act”), Minn. Stat. §§ 181.13-.14, .171, and claims under Minnesota common law for breach of contract and, alternatively, for unjust enrichment. *Id.*

In an Order dated November 6, 2009, the District Court denied Affordable Granite & Stone’s motion to dismiss. *ADD. 25-33*. Subsequently, in an Order dated April 19, 2010, the District Court also denied Affordable Granite & Stone’s motion to add the City of Minneapolis as a third-party defendant. *ADD. 34-45*. In the same time period, the District Court allowed Appellants to amend the Complaint twice to add plaintiffs to the case. *APP. 59-102, 109-167*.

Both Appellants and Affordable Granite & Stone moved for summary judgment. *APP. 179-254*. In an Order dated October 12, 2010, the District Court denied Appellants’ motion and granted Affordable Granite & Stone’s motion. *ADD. 46-58*. Judgment was entered in that regard on October 13, 2010. *ADD. 59*.

On December 10, 2010, Appellants filed their Notice of Appeal and the Statement of the Case. *APP. 2940-41*. The Court of Appeals upheld the District Court's ruling in an unpublished opinion filed on May 23, 2011. *ADD. 60-64*.

On June 21, 2011, Appellants filed their Petition for Review of the Decision of the Court of Appeals with the Minnesota Supreme Court. *APP. 2942-47*. County Attorney Freeman and the National Employment Lawyers Association filed, on July 6, 2011, their respective Petitions for Leave to Appear as Amicus Curiae. *APP. 2948-57*. On July 11, 2011, Respondent filed its Response to Appellants' Petition. *APP. 2958-62*.

The Minnesota Supreme Court issued an Order, dated August 16, 2011, granting Appellants' petition for further review of the Court of Appeals' unpublished opinion as well as County Attorney Freeman's and the National Employment Lawyers Association's respective requests to appear as amicus curiae in this case. *ADD. 65-66*.

STATEMENT OF THE FACTS

Affordable Granite & Stone is a granite and stone contractor that repairs and refinishes terrazzo. *APP. 372-73, 375-78; APP. 706-07, 718-20; APP. 1812-13*. Appellants are 13 former employees of Affordable Granite & Stone who performed the terrazzo and related restoration work under the Minneapolis Convention Center Contract at issue in this case. *APP. 336-67; APP. 368-71; APP. 447, 451; APP. 572, 574, 584, 586-87; APP. 1814-16, 1844-47; APP. 2219-20*. Based on Affordable Granite & Stone's promise under oath to pay the prevailing wage to the company's employees, the City of Minneapolis entered into the Minneapolis Convention Center Contract with the company on December 17, 2007 and agreed to pay the company millions of dollars. *ADD. 1*,

which was expressly incorporated into the Contract via APP. 572, 574, 584, 586-87; APP. 706, 740.

The Minneapolis Convention Center Contract comprehensively covered the amount of compensation per hour, i.e. the prevailing wage, to be paid to Appellants and the company's other employees. *APP. 572, 574, 584; APP. 706, 740.* The Minneapolis Prevailing Wage Ordinance also obligated Affordable Granite & Stone to pay the company's employees the prevailing wage. See Mpls. Ord., Ch. 24, Art. IV, § 24.220.

The work under the Minneapolis Convention Center Project commenced in the beginning of April 2008 – at which time Affordable Granite & Stone promised again in writing that the company will pay its employees the prevailing wage. *ADD 9.* Affordable Granite & Stone, however, did not pay Appellants or other employees the prevailing wage under the guise of classifying the company's employees as janitors. *APP. 1918-2218; ADD. 10.* Several Appellants reported the wage underpayment while the project was still underway, and Affordable Granite & Stone paid those Appellants a portion of the prevailing wage owed before the project concluded in January 2009. *APP. 1218, 1221.*

I. APPELLANTS REQUESTED UNPAID WAGES FROM AFFORDABLE GRANITE & STONE AFTER SEPARATING FROM THE COMPANY, AND THE COMPANY STILL HAS NOT PAID THE REQUIRED WAGES

Affordable Granite & Stone admitted that Appellants requested the unpaid wages at issue in this case after separating from the company. *APP. 647, 665.* Affordable

Granite & Stone also acknowledged that the company still has not paid Appellants the wages as requested. *APP. 647, 665-66.*

II. THE WAGES REQUESTED FROM AFFORDABLE GRANITE & STONE WERE EARNED BY, AND ARE STILL OWING TO, APPELLANTS

The pay withheld by Affordable Granite & Stone is the prevailing wage for Appellants' work on the Minneapolis Convention Center as Terrazzo Mechanics. *ADD. 10.* Under the Minneapolis Convention Center Contract with the City of Minneapolis, and as employees of Affordable Granite & Stone, Appellants primarily altered and repaired the terrazzo of the Minneapolis Convention Center. *APP. 543, 545-47; APP. 706-15; APP. 572, 574, 584, 586-87; ADD. 10.*

The following demonstrates Appellants' right to be paid the prevailing wage for the work at issue here:

- * The Minneapolis Prevailing Wage Ordinance (*ADD. 18*);
- * The Prevailing Wage Certificate executed under oath by Affordable Granite & Stone and submitted to the City of Minneapolis (*APP. 706, 740*);
- * The Minneapolis Convention Center Contract entered into by Affordable Granite & Stone with the City of Minneapolis (*APP. 572, 574, 584, 586-87*);
- * Affordable Granite & Stone's subsequent written promise to the City of Minneapolis at the beginning of the publicly funded project on which Appellants worked for Affordable Granite & Stone (*ADD. 9*);
- * The determination by the City of Minneapolis after investigating Appellants' wage underpayment claims (*ADD. 10*); and
- * A ruling by the District Court based on the undisputed record in this case (*ADD. 34, 38*).

III. BY ENTERING INTO A CONTRACT COMPELLING AFFORDABLE GRANITE & STONE TO PAY THE COMPANY'S EMPLOYEES THE PREVAILING WAGE, THE COMPANY AND THE CITY OF MINNEAPOLIS INTENDED TO BENEFIT APPELLANTS

The Minneapolis Convention Center Contract between Affordable Granite & Stone and the City of Minneapolis explicitly incorporated – and mandated compliance with – the Minneapolis Prevailing Wage Ordinance. *APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 18.* The Minneapolis Prevailing Wage Ordinance requires all employees, including Appellants, to be paid the prevailing wage for performing the Minneapolis Convention Center Contract. See Mpls. Ord., Ch. 24, Art. IV, § 24.220. The Minneapolis Prevailing Wage Ordinance – and, therefore, the Minneapolis Convention Center Contract – provides as follows:

Prevailing wage required. All . . . contracts . . . to which the city is a party, for constructions, alteration and/or repair, . . . 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. . . .

Id.

Appellants did not need a separate employment agreement with Affordable Granite & Stone regarding payment of the prevailing wage because the Minneapolis Convention Center Contract comprehensively covered the amount of compensation per hour, i.e. the prevailing wage, to be paid to Appellants and the company's other employees. *APP. 572, 574, 584; APP. 706, 740.* Indeed, both Affordable Granite & Stone and the City of Minneapolis affirmed under oath and in writing that

performance of the Minneapolis Convention Center Contract required payment of the prevailing wage to all employees working on the project. *ADD. 1; ADD. 9; ADD. 10; ADD. 11-12.* In other words, both parties to the Contract confirmed that they intended to confer the benefit of receiving the prevailing wage on Appellants. *Id.*

Consequently, the District Court found that the Minneapolis Convention Center Contract embodied the intent to ensure payment of the prevailing wage to the company's employees like Appellants:

The Prevailing Wage Certificate states that the wages paid for the Project must comply with the Prevailing Wage Ordinance. . . . *** The Prevailing Wage Certificate – signed and notarized by Affordable Granite – was part of the Proposal and was incorporated into the MCC Contract in Sections I and XV.

ADD. 38.

IV. AFFORDABLE GRANITE & STONE BREACHED THE MINNEAPOLIS CONVENTION CENTER CONTRACT BY NOT PAYING THE BARGAINED-FOR, AND AGREED-UPON, WAGE RATE TO APPELLANTS

Affordable Granite & Stone's pay records show Affordable Granite & Stone did not pay Appellants the prevailing wage required by the Minneapolis Convention Center Contract with the City of Minneapolis. *APP. 1918-2218.* Appellants have sustained losses resulting from Affordable Granite & Stone's failure to pay Appellants the contractually required prevailing wage. *ADD. 10.*

V. AFFORDABLE GRANITE & STONE – WHICH IS NOT A JANITORIAL COMPANY – RECEIVED VALUE TO WHICH THE COMPANY WAS NOT ENTITLED WHEN PAYING APPELLANTS AS JANITORS WHILE APPELLANTS PERFORMED TERRAZZO RESTORATION WORK

Affordable Granite & Stone paid Appellants as janitors for their work on the Minneapolis Convention Center even though Affordable Granite & Stone is not a janitorial company and does not provide janitorial services. *APP. 372-73, 375-78; APP. 447, 451; APP. 706-07, 718-20; APP. 1812-13; APP. 1918-2218.*

The record showing Appellants worked under the Minneapolis Convention Center Contract as Terrazzo Mechanics rather than as janitors includes the following:

- * The sworn testimony of Affordable Granite & Stone’s manager who prepared the company’s bid for the Minneapolis Convention Center Contract with the City of Minneapolis (*APP. 2219-20*);
- * The Minneapolis Convention Center Contract between Affordable Granite & Stone and the City of Minneapolis (*APP. 572, 574, 584, 586-87*);
- * The sworn testimony of the Minneapolis Contract Compliance Manager (*APP. 447, 451*);
- * The sworn testimony of, and photographs taken on the jobsite by, Affordable Granite & Stone’s project supervisor (*APP. 336-67*);
- * The video footage of Appellants performing the Minneapolis Convention Center Contract (*APP. 368-71*);
- * Industry standards established by the United States Department of Labor (“DOL”) (*APP. 1814-16, 1844-47*); and
- * The determination issued by the City of Minneapolis after investigating Appellants’ wage underpayment claims (*ADD. 10*).

Tellingly, the Minneapolis Convention Center assigned its own on-site staff to do the janitorial work when Affordable Granite & Stone performed the Minneapolis

Convention Center Contract. *APP. 520, 534; APP. 632, 636* (“[T]he Convention Center custodial staff will maintain the cleanliness of the floor. . . .”).

VI. AFFORDABLE GRANITE & STONE PAID APPELLANTS AT A WAGE RATE FAR LESS THAN WHAT THE COMPANY PROMISED UNDER OATH, IN WRITING, AND TO APPELLANTS DIRECTLY AND MUCH LESS THAN WHAT THE LAW REQUIRED IN ANY EVENT

Before performance of the Minneapolis Convention Center Contract began, Affordable Granite & Stone promised under oath that the company will pay the prevailing wage – and the company then reconfirmed its sworn promise in writing. *ADD. 1; ADD. 9*. At the beginning of the publicly funded project on which Appellants worked, Affordable Granite & Stone assured the City of Minneapolis that the company “will be paying the prevailing wage for terrazzo repair. . . .” *ADD 9*.

Based on the sworn promise and subsequent written representation by Affordable Granite & Stone, the City of Minneapolis paid the company millions of dollars and, more to the point, as if the company were paying Appellants the prevailing wage required by both the Minneapolis Prevailing Wage Ordinance and the Minneapolis Convention Center Contract. *APP. 572, 574, 584, 586-87; ADD. 10*.

Nonetheless, Affordable Granite & Stone paid Appellants a substantially lower wage rate than what the company promised under oath and again in writing to the City of Minneapolis. *APP. 1918-2218; ADD. 1; ADD. 9; ADD. 13-14*. Affordable Granite & Stone also paid Appellants a wage rate significantly less than what the company promised to Appellants directly and than what the law required regardless. *Id.; APP. 572, 574, 584, 586-87; APP. 706, 740; APP. 421-45; APP. 1918-2218*.

Importantly, the governing prevailing wage schedule did not authorize a wage rate coming anywhere close to as low as what Affordable Granite & Stone paid Appellants. *APP. 421-445; APP. 1918-2218; ADD. 10.* In fact, the prevailing wage schedule covering Affordable Granite & Stone and Appellants did not even include a wage rate for janitorial work. *Id.*

Therefore, Affordable Granite & Stone, which is not a janitorial company, received excess money when paying Appellants as janitors rather than the prevailing wage for Terrazzo Mechanics. *APP. 372-73, 375-78; APP. 447, 451; APP. 572, 574, 584, 586-87; APP. 706-07, 718-20, 740; APP. 1812-13; APP. 1918-2218.*

ARGUMENT

I. INTRODUCTION

Affordable Granite & Stone did not pay Appellants the wage rate required both by the Minneapolis Prevailing Wage Ordinance and by the Minneapolis Convention Center Contract executed by Affordable Granite & Stone and the City of Minneapolis. *APP. 421-45; APP. 572, 574, 584, 586-87; APP. 706, 740; APP. 1918-2218; ADD. 10; ADD. 18.* Affordable Granite & Stone did not pay Appellants the requisite prevailing wage despite promising under oath to do so in order to obtain the Contract and despite subsequently reconfirming in writing that the company will pay the legally mandated wage rate. *ADD. 1; ADD. 9.*

Contrary to its sworn and written representations, Affordable Granite & Stone – which is not a janitorial company – paid Appellants as janitors while Appellants worked as Terrazzo Mechanics performing the publicly funded terrazzo restoration work at the

Minneapolis Convention Center. *APP. 336-67; APP. 368-71; APP. 372-73, 375-78; APP. 447, 451; APP. 706-07, 718-20; APP. 1812-13; APP. 1918-2218; APP. 2219-20; ADD. 10.* Affordable Granite & Stone improperly paid Appellants as janitors instead of as Terrazzo Mechanics even though the on-site employees of the Minneapolis Convention Center did the janitorial work at the facility. *Id.; APP. 520, 534; APP. 632, 636.*

The Court of Appeals upheld summary judgment for Affordable Granite & Stone, misapplying and otherwise disregarding Minnesota Supreme Court precedent as well as overlooking the undisputed facts supporting Appellants' wage, contract, and unjust enrichment claims. *ADD. 60-64.* In particular, the Court of Appeals virtually ignored Appellants' claim under the Payment of Wages Act – mentioning it only in a footnote and without discussing the Minnesota Supreme Court precedent established under that statute. *ADD. 63, n.4.*

II. THE MINNESOTA SUPREME COURT REVIEWS THE GRANT OF SUMMARY JUDGMENT IN THIS CASE DE NOVO

On appeal from the grant of summary judgment, the Minnesota Supreme Court will “review de novo whether there are any genuine issues of material fact and whether the [lower court] erred in its application of the law.” *Sykes v. City of Rochester*, 787 N.W.2d 192, 194 (Minn. Ct. App. 2010) (citing Minnesota Supreme Court precedent and ruling that the district court erred in granting summary judgment).

III. THE MINNESOTA PAYMENT OF WAGES ACT AUTHORIZES APPELLANTS' RECOVERY OF UNPAID WAGES FROM RESPONDENT BECAUSE THOSE WAGES WERE MANDATORY RATHER THAN DISCRETIONARY

The Payment of Wages Act is a timing statute, is penal in nature, and authorizes court action to recover unpaid wages, a statutory penalty, and attorney's fees/costs when (1) a person requested unpaid wages from an employer after separation, (2) the employer did not comply within 24 hours of the request, and (3) the wages requested were "actually earned." See Minn. Stat. § 181.13(a); Minn. Stat. § 181.14, Subd. 2; Minn. Stat. § 181.171, Subds. 1-3; 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.").

A. Clear Statutory Language, Codified Canons Of Construction, And Minnesota Supreme Court Precedent Confirm Unpaid Wages That Are Mandatory Rather Than Discretionary Are Recoverable Under The Payment Of Wages Act Because They Are "Actually Earned"

As a timing statute, the Payment of Wages Act establishes a clear legal duty for employers to provide immediately upon request by a former employee earned wages that remain unpaid. See Minn. Stat. § 181.13(a) ("[W]ages . . . are immediately due and payable upon demand of the employee."); Minn. Stat. § 181.14, Subd. 2 ("Wages . . . shall become immediately payable upon the demand of the employee."). An employer that fails to pay the requested wages in compliance with the Payment of Wages Act is in default, making the employer liable for statutory penalties under Minn. Stat. § 181.13 or Minn. Stat. § 181.14.

Not only does the Payment of Wages Act impose a clear legal duty to pay earned wages immediately, the statute also specifies the method of payment. See Minn. Stat. § 181.13(a); Minn. Stat. § 181.14, Subd. 5.

1. The Payment of Wages Act authorizes court action for recovery of wages that are “actually earned”

The Payment of Wages Act also makes clear that former employees can recover earned, but still unpaid, wages through court action pursuant to the statute. In that regard, the Payment of Wages Act contains a provision encouraging employers to settle such wage claims by tendering the amount they believe to be due:

*If the employer disputes the amount of wages or commissions claimed by the employee under the provisions of this section or section 181.13, and the employer makes a legal tender of the amount which the employer in good faith claims to be due, **the employer shall not be liable for any sum greater than the amount so tendered** and interest thereon at the legal rate, **unless, in an action brought in a court** having jurisdiction, **the employee recovers a greater sum than the amount so tendered** with interest thereon; and if, in the suit, the employee fails to recover a greater sum than that so tendered, with interest, the employee shall pay the cost of the suit, otherwise the cost shall be paid by the employer.*

See Minn. Stat. § 181.14, Subd. 3 (emphasis added). Otherwise stated, an employer need not pay requested wages to former employees beyond what the employer believes to be owed unless the employees prove in court that the additional wages requested were “actually earned.” Id. There would be no point to including this provision in the Payment of Wages Act unless employees could recover in court wages that are “actually earned” but remain unpaid.

In a related Section of the Payment of Wages Act, the Minnesota Legislature further codified former employees' right through court action to recover unpaid wages (in addition to obtaining the statutory penalties provided in Minn. Stat. § 181.13(a) and Minn. Stat. §181.14, Subd. 2):

An employer who is found to have violated [sections 181.13 or 181.14] is liable to the aggrieved party for the civil penalties or damages provided for in the section violated. An employer who is found to have violated the above sections 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). That the Payment of Wages Act provides for the award of “compensatory damages and other appropriate relief, including but not limited to injunctive relief” unambiguously states the Minnesota Legislature’s intent for former employees to obtain the full range of remedies through court action under the statute. *Id.*; see also *O’Kronglis*, 456 N.W.2d at 470 (holding that “[a]ppellant is entitled to recover a wage penalty as well as an award for unpaid wages.”).

The Payment of Wages Act does not define “compensatory damages” specifically, but the Minnesota Supreme Court has confirmed that “compensatory damages” means actual damages flowing from the unlawful conduct at issue in the relevant employment case. See, e.g., *Phelps v. Commonwealth Land Title Ins.*, 537 N.W.2d 271, 275 (Minn. 1995) (holding in an employment case that, “[i]n the absence of a statute defining compensatory, it is clear that compensatory damages are generally synonymous with actual damages.”).

More recently, the Minnesota Supreme Court confirmed in another employment case that “compensatory damages” include that which is a typical or natural result of the alleged legal violation prompting court action:

[C]ompensatory damages “consist of both general and special damages. General damages are the natural, necessary and usual result of the wrongful act or occurrence in question. Special damages are those which are the natural but not the necessary and inevitable result of the wrongful act.”

Ray v. Miller Meester Advertising, Inc., 684 N.W.2d 404, 407 (Minn. 2004) (citing Minnesota Supreme Court precedent).

One of the typical and natural results of an employer’s violation of the Payment of Wages Act is the failure to comply with the clearly stated legal duty to pay wages that were “actually earned.” Logically, then, “compensatory damages” under the Payment of Wages Act includes unpaid wages. See, e.g., Ray, 684 N.W.2d at 407; see also 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. *** It is a vain thing to imagine a right without a remedy.”).

Adhering to the Minnesota Supreme Court’s precedent defining “compensatory damages” in employment cases not only comports with common sense under the Payment of Wages Act, it also follows the Canons of Construction codified by the Minnesota Legislature. See, e.g., Minn. Stat. § 645.16. In particular, the Minnesota Legislature mandates as follows regarding interpretation of statutes such as the Payment of Wages Act:

Every law shall be construed, if possible, to give effect to all its provisions. When the words of a law in their application to an existing situation are clear and free from all ambiguity, *the letter of the law shall not be disregarded* under the pretext of pursuing the spirit.

See Minn. Stat. § 645.16 (emphasis added).

Construing “compensatory damages” under the Payment of Wages Act as not including unpaid wages would flout the governing Canons of Construction in at least two respects. First, it would disregard the plain meaning of the unambiguous term “compensatory damages.” See Minn. Stat. § 181.171, Subd. 1. Second, such statutory construction would not give effect to the Payment of Wages Act’s mandate that employers “shall also be liable for compensatory damages and other appropriate relief including but not limited to injunctive relief.” *Id.*; see also Minn. Stat. § 181.14, Subd. 3 (providing that an employer must pay additional wages requested when, through an “action brought in a court having jurisdiction, the employee recovers a greater sum than the amount so tendered [by the employer to settle the wage dispute].”).

The Minnesota Supreme Court has repeatedly rejected efforts to second guess the Minnesota Legislature’s intent when manifested by the unambiguous language of employment statutes like the Payment of Wages Act. See, e.g., *Taylor v. LSI Corp.*, 796 N.W.2d 153, 156 (Minn. 2011) (citing Minnesota Supreme Court precedent and affirming reversal of summary judgment for the employer because “the plain meaning of the statute’s words controls our interpretation of the statute.”); *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc.*, 637 N.W.2d 270, 273 (Minn.

2002) (citing Minnesota Supreme Court precedent and reversing judgment for the employer because “[w]e will not disregard the words of a statute if they are free from ambiguity.”). Consequently, the Payment of Wages Act should be interpreted according to its manifest meaning and permit court action to recover unpaid wages that are “actually earned.”

2. Unpaid wages are “actually earned” for purposes of recovery under the Payment of Wages Act where, as here, the wages are mandatory rather than discretionary

Minnesota courts have consistently permitted the recovery of unpaid wages when an employer fails to pay mandatory, as opposed to discretionary, wages because those wages are “actually earned” for purposes of the Payment of Wages Act. Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 125 (Minn. 2007) (confirming that an employee can recover unpaid wages which are “actually earned”); Kohout v. Shakopee Foundry Co., 162 N.W.2d 237, 240 (Minn. 1968) (ruling that the employees could recover unpaid wages and statutory penalties); Kvidera v. Rotation Engineering and Mrg. Co., 705 N.W.2d 416, 422-23 (Minn. Ct. App. 2005) (emphasis added) (holding that the employer violated the Payment of Wages Act by not paying wages that were “*nondiscretionary*” and therefore were “actually earned”); 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); Holman v. CPT Corp., 457 N.W.2d 740, 743 (Minn. Ct. App. 1990) (reversing summary judgment for the employer on the claims asserted under the Payment of Wages Act).

The Minnesota Supreme Court's decisions under the Payment of Wages Act, Fresenius and Kohout, underscore Appellants' right to recover unpaid wages and statutory penalties. In Fresenius, the Minnesota Supreme Court addressed whether the Payment of Wages Act "creates a substantive right, allowing a terminated employee to use that statute as the basis for a claim for wages, even when the employee's employment contract denies payment for those wages." 741 N.W.2d at 125. The Minnesota Supreme Court decided in the negative, reasoning that the Payment of Wages Act is "a timing statute, mandating not what an employer must pay a discharged employee, but when an employer must pay a discharged employee." Id. (emphasis omitted).

Fresenius held that the employee could not recover unused vacation time because she was discharged for misconduct and, thus, could not satisfy the requirements for receiving unused vacation time under the employee handbook. Id. at 127-28. In other words, the employee's claims failed in Fresenius because the wages in dispute were discretionary rather than mandatory and, therefore, were not "actually earned" within the meaning of the Payment of Wages Act. Id. at 125-28.

Significantly, the Minnesota Supreme Court looked to the relevant contract only to determine whether the unpaid wages were discretionary or mandatory. Id. Fresenius did not consider whether the employee handbook created a private right of action because the Minnesota Supreme Court evidently recognized that the Minnesota Legislature has already provided such a right of action to recover unpaid wages through the Payment of Wages Act. See Minn. Stat. § 181.171, Subd. 1; Minn. Stat. § 645.16; see also Ray, 684 N.W.2d at 407.

In contrast to the disputed wages in Fresenius, as explained more fully below in Part III.B., the wages Appellants seek to recover under the Payment of Wages Act were mandatory rather than discretionary. Two distinct legal sources – each of which would be sufficient in its own right – make the unpaid prevailing wage mandatory and, consequently, “actually earned” for purposes of the Payment of Wages Act in this case:

- (1) The Minneapolis Prevailing Wage Ordinance’s requirement that Affordable Granite & Stone pay its employees the prevailing wage; and
- (2) The Minneapolis Convention Center Contract’s requirement that Affordable Granite & Stone pay its employees the prevailing wage.

APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 18. Thus, unlike in Fresenius, the wages in this case were mandatory and may be recovered under the Payment of Wages Act.

The employees in Kohout had only one legal source, a contract, establishing the unpaid wages were mandatory rather than discretionary. 162 N.W.2d at 238-40. Nonetheless, the Minnesota Supreme Court held that the employees may recover both unpaid wages and statutory penalties. *Id.* at 240. Like the employees in Kohout, as set forth below in Part III.B., Appellants have an independent legal source – in fact, Appellants have two distinct legal sources – establishing that the unpaid wages are mandatory and, thus, “actually earned.”

In sum, that the Payment of Wages Act is a timing statute and is penal in nature simply means the statute imposes a penalty for untimely payment and does not, by itself, create the underlying obligation to pay the wages in dispute. Fresenius, 741 N.W.2d at 125; Kohout, 162 N.W.2d at 240; Kvidera, 705 N.W.2d at 423; Brown, 519 N.W.2d at

478. More to the point, the Payment of Wages Act authorizes recovery of unpaid wages that are required by a separate statute, ordinance, contract, or other legal source because such wages are mandatory and, therefore, “actually earned.” Fresenius, 741 N.W.2d at 125; Kohout, 162 N.W.2d at 240; Kvidera, 705 N.W.2d at 423; Brown, 519 N.W.2d at 478; see also Minn. Stat. § 181.14, Subd. 3; Minn. Stat. § 181.171, Subd. 1; Minn. Stat. § 645.16; Ray, 684 N.W.2d at 407.

Appellants, then, need not have a second private right of action in order to recover unpaid wages and statutory penalties via the private right of action codified in the Payment of Wages Act. Id.

B. The Undisputed Record Establishes That Affordable Granite & Stone Had A Legal Obligation To Pay Appellants The Prevailing Wage, So Appellants’ Unpaid Wages Are “Actually Earned” Within The Meaning Of The Payment Of Wages Act

Affordable Granite & Stone admitted that Appellants, after separation, requested the unpaid prevailing wage for Appellants’ work on the publicly funded restoration project at the Minneapolis Convention Center. *APP.* 647, 665. Affordable Granite & Stone also admitted that the company still has not complied with Appellants’ request for payment of the unpaid prevailing wage for the work Appellants performed. *APP.* 647, 665-66.

The question on appeal under the Payment of Wages Act is whether a reasonable trier of fact could conclude that the unpaid prevailing wage requested by Appellants after separation was mandatory and, consequently, “actually earned.”

As a threshold matter, Minnesota courts have held that whether wages are “actually earned” for purposes of the Payment of Wages Act is “a question of fact which the trial court was not free to decide on summary judgment.” Holman, 457 N.W.2d at 74; see also Lee v. Sperry, 678 F.Supp. 1415, 1419 (D. Minn. 1987) (denying summary judgment for the employer under the Payment of Wages Act because “[d]isputed issues of material fact as to whether the wages were ‘actually earned’ under the statute preclude disposition of this claim on a motion for summary judgment.”).

1. The Minneapolis Prevailing Wage Ordinance required Affordable Granite & Stone to pay Appellants the prevailing wage

The publicly funded restoration project on which Appellants worked for Affordable Granite & Stone involved the alteration and repair of the Minneapolis Convention Center’s terrazzo, concrete, tile, and granite pursuant to the Minneapolis Convention Center Contract with the City of Minneapolis. *APP.* 572, 574-76, 584, 586-87.

Accordingly, the Minneapolis Prevailing Wage Ordinance and related requirement to pay the prevailing wage governed Affordable Granite & Stone on the publicly funded project at issue in this case. See Mpls. Ord., Ch. 24, Art. IV, § 24.220. The Minneapolis Prevailing Wage Ordinance mandates as follows:

Prevailing wage required. All . . . contracts . . . to which the city is a party, for constructions, alteration and/or repair, . . . 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. . . .

See Mpls. Ord., Ch. 24, Art. IV, § 24.220 (emphasis added).

2. The Prevailing Wage Certificate executed under oath by Affordable Granite & Stone for the City of Minneapolis required the company to pay Appellants the prevailing wage upon entering into the Minneapolis Convention Center Contract

To obtain the multi-million dollar Contract for performing the publicly funded restoration work at the Minneapolis Convention Center, Affordable Granite & Stone promised under oath to pay the company's employees – including Appellants – the prevailing wage. *APP. 706, 740.* Affordable Granite & Stone memorialized the company's sworn promise in writing when executing the company's Prevailing Wage Certificate and submitting that legal instrument as part of the bid for the Minneapolis Convention Center Contract. *Id.*

The competing terrazzo company that lost to Affordable Granite & Stone in securing the Minneapolis Convention Center Contract with the City of Minneapolis also confirmed under oath that the Contract required the prevailing wage to be paid. *APP. 516, 519.* Notably, counsel for Affordable Granite & Stone during much of this case has represented the competing terrazzo contractor in labor matters during the relevant time. *APP. 516-17.*

3. The Minneapolis Convention Center Contract entered into by Affordable Granite & Stone with the City of Minneapolis required the company to pay Appellants the prevailing wage

Based on Affordable Granite & Stone's representations under oath that it will pay the prevailing wage, the City of Minneapolis awarded to Affordable Granite & Stone the publicly funded restoration work at the Minneapolis Convention Center. *APP. 572, 574,*

584, 586-87; APP. 706, 740; ADD. 18. Toward that end, the City of Minneapolis and Affordable Granite & Stone entered into the Minneapolis Convention Center Contract compelling the company to pay the company's employees – such as Appellants – the prevailing wage by explicitly incorporating the company's Prevailing Wage Certificate into the Contract. *Id.*

4. Affordable Granite & Stone reconfirmed in writing at the beginning of the Contract with the City of Minneapolis that the company will pay Appellants the prevailing wage

At the beginning of the publicly funded restoration project on which Appellants worked, Affordable Granite & Stone reaffirmed in writing that the company will comply with the legal obligation to pay the prevailing wage. *ADD. 9.* In a letter to the City of Minneapolis, Affordable Granite & Stone reiterated that the company “will be *paying the prevailing wage. . . .*” *Id. (emphasis added).*

5. After investigating Appellants' claims, the City of Minneapolis reconfirmed in writing and under oath that Affordable Granite & Stone had an obligation to pay Appellants the prevailing wage

The City of Minneapolis also restated in writing that Affordable Granite & Stone had a legal duty to pay Appellants the prevailing wage. *ADD. 10.* Subsequently, the City of Minneapolis reconfirmed under oath that Affordable Granite & Stone had an obligation to pay Appellants the prevailing wage. *ADD. 11-12.*

6. The District Court found that Affordable Granite & Stone knew about the company's obligation to pay the prevailing wage in performance of the Minneapolis Convention Center Contract

Affordable Granite & Stone attempted to add the City of Minneapolis as a third-party defendant in this case through a motion on which the City of Minneapolis did not

appear, evidently for lack of resources. In denying Affordable Granite & Stone's motion to add the City of Minneapolis as a third-party defendant, the District Court considered and rejected the factual assertion that Affordable Granite & Stone did not know it had a legal duty to pay the prevailing wage:

This argument fails because the RFP addressed *Affordable Granite's obligation* to comply with the Prevailing Wage Ordinance and included instructions on how to determine appropriate wages. The RFP included a Prevailing Wage Certificate, which contractors bidding on the Project were required to sign, notarize and submit with their bids. The Prevailing Wage Certificate states that the wages paid for the Project must comply with the Prevailing Wage Ordinance. . . . *** The Prevailing Wage Certificate – signed and notarized by Affordable Granite – was part of the Proposal and was incorporated into the MCC Contract in Sections I and XV.

ADD. 38 (emphasis added). In other words, the District Court found that Affordable Granite & Stone had a clear obligation to pay Appellants the prevailing wage. *Id.*

C. Affordable Granite & Stone Violated The Minnesota Payment Of Wages Act By Not Paying Appellants The Wages That Were “Actually Earned” Within 24 Hours Of Appellants’ Demand, So Appellants Can Recover Their Unpaid Wages In This Case

Affordable Granite & Stone conceded that Appellants requested the unpaid prevailing wage at issue in this case after separating from the company. *APP. 647, 665*. Affordable Granite & Stone also acknowledged that the company still has not paid Appellants the unpaid prevailing wage as requested. *APP. 647, 665-66*. Appellants can recover the unpaid prevailing wage pursuant to the Payment of Wages Act because Appellants in no way rely on that statute to establish their right to be paid the prevailing wage. See Minn. Stat. §§ 181.13-.14, .171. As outlined above in Part III.B., Affordable Granite & Stone's testimonial and documentary admissions as well as sworn third-party

testimony and documents demonstrate that Affordable Granite & Stone had a legal obligation to pay Appellants the prevailing wage pursuant to both the Minneapolis Prevailing Wage Ordinance and the Minneapolis Convention Center Contract.

Because the undisputed record establishes that Affordable Granite & Stone's payment of the prevailing wage was mandatory rather than discretionary, Appellants "actually earned" the prevailing wage for purposes of recovering unpaid wages, statutory penalties, and attorney's fees/costs under the Payment of Wages Act. See Minn. Stat. § 181.13(a); Minn. Stat. § 181.14, Subds. 2-3; Minn. Stat. § 181.171, Subds. 1-3; Kohout, 162 N.W.2d at 240 (ruling that the employees could recover unpaid wages and statutory penalties); Kvidera, 705 N.W.2d at 423 (emphasis added) (holding that the pay "was *nondiscretionary and actually earned at the time of [the plaintiff's] discharge.*"); Brown, 519 N.W.2d at 478 (affirming summary judgment for the employees on their unpaid wage and statutory penalty claims); O'Kronglis, 456 N.W.2d at 470 ("Appellant is entitled to recover a wage penalty as well as an award for unpaid wages."); see also Fresenius, 741 N.W.2d at 125-29 (ruling that the discretionary vacation pay was not "actually earned" within the meaning of the Payment of Wages Act).

At a minimum, a reasonable trier of fact could conclude that Appellants "actually earned" the unpaid prevailing wage such that Appellants can recover under the Payment of Wages Act. See, e.g., Holman, 457 N.W.2d at 743 (emphasis added) (ruling that whether wages were "actually earned" within the meaning of the Payment of Wages Act "was a *question of fact which the trial court was not free to decide on summary judgment.*"); see also Sperry, 678 F.Supp. at 1419 (denying summary judgment for the

employer under the Payment of Wages Act because “[d]isputed issues of material fact as to whether the wages were ‘actually earned’ under the statute preclude disposition of this claim on a motion for summary judgment.”).

Summary judgment for Affordable Granite & Stone should be reversed and the case should be remanded:

[S]ummary judgment was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists. In other words a *summary judgment* is proper where there is no issue to be tried but *is wholly erroneous where there is a genuine issue to try.*

Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955) (emphasis added) (citing Minnesota Supreme Court precedent and holding that the district court erred in granting summary judgment for the defendant); see also C.O. v. Doe, 757 N.W.2d 343, 350 (Minn. 2008) (citing Minnesota Supreme Court precedent and reiterating that the Minnesota Supreme Court has “repeatedly stated that where evidence is in conflict, summary judgment is inappropriate.”); In the Matter of the Rate Appeal of Benedictine Health Ctr., 728 N.W.2d 497, 500 n.3 (Minn. 2007) (citing Minnesota Supreme Court precedent and reversing summary judgment because Minnesota courts must take “the view of the evidence most favorable to the nonmoving party. . . .”); Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (reiterating that Minnesota courts “must accept as true the factual allegations made by [non-moving parties].”); Vacura v. Haar’s Equip., Inc., 364 N.W.2d 387, 391 (Minn. 1985) (citing Minnesota Supreme Court precedent and reaffirming that the inquiry on appeal is “whether or not any genuine issues of material fact exist, not how such issues should be resolved.”).

IV. APPELLANTS CAN RECOVER THE UNPAID PREVAILING WAGE AS THIRD-PARTY BENEFICIARIES OF THE PUBLIC CONTRACT REQUIRING RESPONDENT TO PAY THE PREVAILING WAGE

Appellants' contract claims require a showing of the following: (1) the Contract between Affordable Granite & Stone and the City of Minneapolis for the publicly funded restoration work at the Minneapolis Convention Center reflected the parties' intent to benefit Appellants through performance of the Contract and (2) Affordable Granite & Stone breached the Minneapolis Convention Center Contract to the detriment of Appellants. Cretex Cos., Inc. v. Constr. Leaders, Inc., 342 N.W.2d 135, 139 (Minn. 1984).

A. Appellants Were Third-Party Beneficiaries Of The Minneapolis Convention Center Contract Between Affordable Granite & Stone And The City Of Minneapolis

The sanctity of contract under Minnesota Supreme Court precedent compels full enforcement of the Minneapolis Convention Center Contract between Affordable Granite & Stone and the City of Minneapolis. One of the material terms of the Minneapolis Convention Center Contract required Affordable Granite & Stone to pay the prevailing wage to the company's employees, making Appellants intended beneficiaries of the Contract. Appellants did not need a separate employment agreement with Affordable Granite & Stone regarding payment of the prevailing wage because the Minneapolis Convention Center Contract comprehensively covered the amount of compensation per hour, *i.e.* the prevailing wage, to be paid to the company's employees. *APP. 572, 574, 584; APP. 706, 740.*

1. **The Contract between Affordable Granite & Stone and the City of Minneapolis plainly required the company to pay the prevailing wage to Appellants and the company's other employees**

The system of commerce so vital to Minnesota depends on faithful compliance with contractual obligations:

[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, merely because one of the parties claims to have been ignorant of or misunderstood the provisions of the contract.

Gethsemane Lutheran Church v. Zacho, 104 N.W.2d 645, 649 (Minn. 1960) (citing Minnesota Supreme Court precedent and affirming the need to enforce the contract terms at issue); see also Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 364-65 (Minn. 2009) (citing Minnesota Supreme Court precedent and reiterating that the Minnesota Supreme Court has “consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify or limit its effect by a strained construction.”).

Sections I and XV of the Minneapolis Convention Center Contract expressly incorporated the Minneapolis Prevailing Wage Ordinance, which dictates as follows on publicly funded projects like the one at issue here:

Prevailing wage required. All . . . contracts . . . to which the city is a party, for constructions, alteration and/or repair, . . . 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. . . .

ADD. 18 (emphasis added); see also APP. 572, 574, 584; APP. 706, 740.

The Minneapolis Convention Center Contract further memorialized Affordable Granite & Stone's obligation to pay the prevailing wage as follows: "it is agreed that ***payment of wages to employees or agents of the Contractor . . . shall be no less than [the prevailing wage].***" *ADD. 1, which was expressly incorporated into the Contract via APP. 572, 574, 584; APP. 706, 740 (emphasis added).* In addition, the Minneapolis Convention Center Contract between Affordable Granite & Stone and the City of Minneapolis used mandatory language to make clear that the company's lawful performance of the Contract included paying the prevailing wage to Appellants and the company's other employees:

[Employees] shall be paid according to the [Minneapolis Prevailing Wage Ordinance], and the minimum wage rates and fringe benefits paid to the various classes shall be as determined by the Secretary of Labor of the United States for work in the City. *** Failure to comply with this ordinance shall mean the City may, by written notice to the Contractor, terminate the Contractor's right to proceed with work and the Contractor and the Contractor's Sureties shall be liable to the City for any excess cost occasioned to the City for the completion of the work.

ADD. 1 (emphasis added).

Both Affordable Granite & Stone and the City of Minneapolis also affirmed under oath and in writing that performance of the Minneapolis Convention Center Contract required payment of the prevailing wage to all of the company's employees, including Appellants. *ADD. 1; ADD. 9; ADD; 10; ADD. 11-12.*

Logically, the District Court found that the Minneapolis Convention Center Contract mandated payment of the prevailing wage to Appellants and Affordable Granite & Stone's other employees:

The Prevailing Wage Certificate states that the *wages* paid for the Project ***must comply with the Prevailing Wage Ordinance***. . . . *** The Prevailing Wage Certificate – signed and notarized by Affordable Granite – was part of the Proposal and was incorporated into the MCC Contract in Sections I and XV.

ADD. 38 (emphasis added).

2. The Contract between Affordable Granite & Stone and the City of Minneapolis manifested the contracting parties’ intent to benefit Appellants, so Appellants are third-party beneficiaries of the Contract

According to settled Minnesota Supreme Court precedent, the inquiry in third-party beneficiary cases like this is not whether parties to the contract intended to create an enforceable right. See, e.g., Cretex, 342 N.W.2d at 139 (emphasis added) (holding that plaintiffs can recover as third-party beneficiaries “if they can show an *intent* by the contracting parties *to confer* on them *a benefit*.”). Instead, the question is whether the parties to the contract intended for the plaintiffs to receive a benefit through contract performance. Id.

As set forth more fully above in Part III.B.2-.6., Affordable Granite & Stone and the City of Minneapolis contracted to ensure that the company paid its employees the prevailing wage. As a matter of common sense, the obligation to pay the prevailing wage is intended to benefit Appellants and other employees who were actually supposed to receive the prevailing wage. Moreover, the Minneapolis Convention Center Contract and the underlying Minneapolis Prevailing Wage Ordinance expressly incorporated the Federal Davis-Bacon Act, 40 U.S.C. §§ 3141, et seq. and related United States Supreme Court precedent that confirm employees are intended beneficiaries of prevailing wage obligations. *APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 18.*

The United States Supreme Court precedent under the Federal Davis-Bacon Act – which controls the case at bar pursuant to the Minneapolis Convention Center Contract and the Minneapolis Prevailing Wage Ordinance – has long recognized that employees on publicly funded projects are intended beneficiaries of prevailing wage obligations because such requirements “*protect [the contractor’s] employees from substandard earnings* by fixing a floor under wages on Government projects.” Walsh v. Schlecht, 429 U.S. 401, 411 (1977) (citing U.S. v. Binghampton Constr. Co., 347 U.S. 171, 176-77 (1954)) (emphasis added); see also Frank Bros., Inc. v. Wisconsin Dept. of Transp., 409 F.3d 880, 889 (7th Cir. 2005) (same); Vulcan Arbor Hill Corp. v. Reich, 81 F.3d 1110, 1111 (D.C. 1996) (citation omitted) (same); Unity Bank & Trust Co. v. U.S., 756 F.2d 870, 873 (Fed. Cir. 1985) (citation omitted) (reasoning the prevailing wage requirements exist “to protect the employees of government contractors from substandard earnings. . . .”); N. Georgia Bldg. & Const. Trades Council v. Goldschmidt, 621 F.2d 697, 702 (5th Cir. 1980) (same).

The absence of a private right of action under the Minneapolis Prevailing Wage Ordinance does not alter the analysis of whether the parties to the Minneapolis Convention Center Contract intended to benefit employees who were supposed to be the recipients of the prevailing wage. As conceded by Affordable Granite & Stone, the City of Minneapolis does not have legal authority to create a private right of action for recovering the prevailing wage. *APP. 2958, 2962*. The treatise routinely cited by Minnesota courts regarding municipal jurisprudence has summed up the relevant point of law as follows: “[t]he well established general rule is that a municipal corporation cannot

create by ordinance a private right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves.” See E. McQuillin, Municipal Corporations § 22:1 (1998 3d ed.) (collecting cases).

That the Minneapolis Prevailing Wage Ordinance and the Minneapolis Convention Center Contract provide administrative remedies only for the City of Minneapolis also does not preclude Appellants’ right to pursue wage claims under the common law. See, e.g., Nelson v. Productive Alternatives, Inc., 696 N.W.2d 841, 844 (Minn. 2005). In holding that a statutory remedy does not supplant common law remedies, the Minnesota Supreme Court summarized the settled law as follows:

Statutes in derogation of the common law are strictly construed, and the *legislation will not “supplant, impair or restrict equity’s normal function as an aid to complete justice.”* Under this principle, common-law remedies remain viable following statutory enactments if the statute does not expressly abrogate the common-law remedy or if the statute expressly disclaims any intent to do so.

Id. (citing Minnesota Supreme Court precedent) (emphasis added); see also MEANS v. Burlington No. & Santa Fe Railroad Co., 646 N.W.2d 911, 914 (Minn. Ct. App. 2002) (citing Minnesota Supreme Court precedent and ruling that the common law remedy was not abrogated because “a new remedy that is created by statute will be regarded as cumulative to existing common law remedies. And, existing common law remedies are not to be considered abrogated by statute unless that statute clearly expresses an intention to abrogate them.”).

Neither the Minneapolis Prevailing Wage Ordinance nor the Minneapolis Convention Center Contract clearly expresses the intent to create exclusive remedies

therein or otherwise to abrogate common law rights. *APP. 572, 580; ADD. 18- 20.* In fact, Section IX of the Minneapolis Convention Center Contract explicitly reserves the right for additional remedies to be pursued: “[t]he rights or remedies provided for herein shall not limit the City . . . from asserting any other right or remedy allowed by law, equity, or by statute.” *APP. 572, 580.*

In short, the plain meaning of the express contractual language as well as binding United States Supreme Court and Minnesota Supreme Court precedent each confirms that an obvious purpose of the Minneapolis Convention Center Contract was to benefit Appellants and the other employees through payment of the prevailing wage. *ADD. 1, which was expressly incorporated into the Contract via APP. 572, 574, 584; APP. 706, 740.* The Minnesota Supreme Court has consistently emphasized the importance of parties abiding by the “obvious purpose” of contracts. See, e.g., *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003).

3. State courts reaching the issue have held that employees who, like Appellants, worked on publicly funded projects can recover the unpaid prevailing wage as third-party beneficiaries

Although no published decision in Minnesota has addressed third-party beneficiary claims concerning prevailing wage obligations, Minnesota courts have long recognized that prevailing wage requirements intend for employees to be “paid wages comparable to wages paid for similar work in the community.” *AAA Striping Servs. Co. v. Minn. Dep’t of Transp.*, 681 N.W.2d 706, 710 (Minn. Ct. App. 2004) (citation omitted); see also Minn. Stat. § 177.42, Subd. 6 (“The prevailing wage rate may not

be less than a reasonable and living wage.”). In other words, both Minnesota courts and the Minnesota Legislature have essentially acknowledged that employees are beneficiaries of prevailing wage obligations. AAA Striping, 681 N.W.2d at 710; Minn. Stat. § 177.42, Subd. 6.

State courts in other jurisdictions have explicitly ruled that employees working on publicly funded projects can pursue breach-of-contract claims as third-party beneficiaries to recover the prevailing wage. See, e.g., Favel v. Amer. Renovation & Const. Co., 59 P.3d 412, 427 (Mont. 2002), cert. denied 538 U.S. 1000 (2003) (reversing and remanding “to allow the Workers to proceed with their breach of contract action against the defendants.”); Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc., 125 Cal.Rptr.2d 804, 812, 814 (Cal. App. 3rd Dist. 2002) (citations omitted) (emphasis added) (reaffirming “[t]he ***central purpose of the prevailing wage law is to protect and benefit employees*** on public works projects” and holding that an employee can recover the prevailing wage through a contract claim “as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages.”); Pesantez v. Boyle Env'tl. Servs. Inc., 251 A.D.2d 11, 12 (N.Y. App. Div. 1998) (ruling that a class of employees on a prevailing wage project can pursue their unpaid wage claims as third-party beneficiaries of the relevant contract); see also Hayen v. Ogle County, 463 N.E.2d 124, 128 (Ill. 1984) (citation omitted) (emphasis added) (reiterating that prevailing wage requirements aim “to ***assure that people working on public works projects receive a decent wage.***”).

The Montana Supreme Court's decision in Favel, that employees can recover the unpaid prevailing wage as third-party beneficiaries, is highly instructive given the procedural and factual similarities to this case. The employees in Favel actually had administrative remedies, but they did not pursue those remedies to conclusion because of delays by the relevant enforcement agency. 59 P.3d at 420-22. In addition, the contract money withheld from the employer in connection with the employees' wage complaints did not cover the full amount allegedly owed to the employees. Id. at 419. Thus, the Montana Supreme Court held that "*[w]orkers, 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.*" Id. at 426 (emphasis added). In reaching its decision, the Montana Supreme Court reasoned that the State had a longstanding policy and constitutional guarantee of court access for aggrieved parties. Id.

The case against Affordable Granite & Stone is more compelling than that against the employer in Favel. Appellants had no actual administrative remedies under the Minneapolis Convention Center Contract or the Minneapolis Prevailing Wage Ordinance incorporated therein. *APP. 572, 579-80; ADD. 18-20*. Only the City of Minneapolis had such remedies here: terminating the Minneapolis Convention Center Contract, withholding Contract payments to Affordable Granite & Stone, suspending or disbaring the company from future contracting with the City, and seeking damages for the City because of excess project costs. *Id.*

As in Favel, any conceivable administrative remedy in this case would have been futile because the amount of contract payments withheld by the City of Minneapolis was

far less than the amount Affordable Granite & Stone underpaid Appellants. *APP. 1897-1909; ADD. 10*. Pursuant to Minnesota Supreme Court precedent, Appellants need not exhaust such inadequate administrative remedies. See, e.g., *McShane v. City of Faribault*, 292 N.W.2d 253, 256 (Minn. 1980) (citing Minnesota Supreme Court precedent and reiterating, “[w]e have consistently held that administrative remedies need not be pursued if it would be futile to do so.”).

Like Montana, Minnesota has a time-honored policy and a constitutional provision that aggrieved parties receive legal redress. *Lucas*, 291 N.W. at 895 (citing Minnesota Supreme Court precedent and reiterating that, “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. *** It is a vain thing to imagine a right without a remedy.”); MINN. CONST., ART. I, § 8 (“Every person is entitled to a certain remedy in the laws for all injuries. . . .”); see also *Marbury v. Madison*, 1 Cranch 137, 147 (1803) (citation omitted) (establishing judicial review in the United States because “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”). Therefore, the reasoning in *Favel* should apply with equal force here.

B. Affordable Granite & Stone’s Failure To Pay Appellants The Contractually Required Prevailing Wage Supports Appellants’ Breach-Of-Contract Claims

As discussed above in Part IV.A., the plain meaning of the express contractual terms between Affordable Granite & Stone and the City of Minneapolis required the company to pay its employees the prevailing wage in performance of the Minneapolis

Convention Center Contract – that is, the parties intended to benefit Appellants through the Contract.

The Minnesota Supreme Court has long maintained fidelity to the axiomatic precept that bargained-for, and agreed-upon, contract terms shall be treated as sacrosanct. See, e.g., Gethsemane, 104 N.W.2d at 649 (citing Minnesota Supreme Court precedent and reiterating that “in the interest of preserving some reasonable stability in commercial transactions the courts will not set aside contractual obligations. . .”). In fact, Minnesota’s commercial regime depends on the full and faithful enforcement of contractual obligations. Id.; see also Valspar, 764 N.W.2d at 364-65.

Based on the undisputed evidence that Affordable Granite & Stone had a contractual obligation to pay Appellants the prevailing wage, a reasonable trier of fact could find that Appellants are third-party beneficiaries of the Minneapolis Convention Center Contract and, furthermore, that the company breached the Contract by not paying Appellants the prevailing wage required. See, e.g., Twin City Constr. Co. of Fargo v. ITT Indus. Credit Co., 358 N.W.2d 716, 718–19 (Minn. Ct. App. 1984) (holding that the plaintiff was a third-party beneficiary to a contract notwithstanding a disclaimer in the contract setting forth a clear expression of intent not to benefit any third party); see also Doe, 757 N.W.2d at 350; Benedictine Health Ctr., 728 N.W.2d at 500 n.3; Sauter, 70 N.W.2d at 353; Fabio, 504 N.W.2d at 761; Vacura, 364 N.W.2d at 391.

V. RESPONDENT UNJUSTLY ENRICHED ITSELF BY PAYING APPELLANTS AS JANITORS FOR DOING TERRAZZO WORK AND, MOREOVER, AT A RATE FAR LESS THAN RESPONDENT PROMISED UNDER OATH, IN WRITING, AND DIRECTLY TO APPELLANTS

Appellants prevail on their unjust enrichment claims, as an alternative to their contract claims, if (1) Affordable Granite & Stone knowingly received something of value, (2) Affordable Granite & Stone was not entitled to the value received, and (3) the retention of that value by Affordable Granite & Stone was unjust under the circumstances. ServiceMaster of St. Cloud v. Gab Bus. Servs., Inc., 544 N.W.2d 302, 306 (Minn. 1996). Minnesota courts have long held that recovery under a theory of unjust enrichment turns on the following:

[A]n *obligation* raised or imposed by law and is *independent of any real or expressed intent of the parties*. The right to recover is governed by principles of equity.

Acton Constr. Co. v. State of Minn., 383 N.W.2d 416, 417 (Minn. Ct. App. 1996)

(emphasis added) (citing Minnesota Supreme Court precedent and affirming judgment for the plaintiff under an unjust enrichment theory).

A. The Economic Opportunism Of Substantially Underpaying Appellants For Nearly One Year Unjustly Enriched Affordable Granite & Stone

The unjust enrichment doctrine, as a creature of equity, draws on the compelling public policy against inefficiency in commercial affairs. That essential policy finds expression across bodies of law, perhaps best illustrated in tax jurisprudence. See, e.g., David A. Weisbach, "Formalism in the Tax Law," 66 U. Chi. L. Rev. 860, 860-61 (1990) (identifying the equitable doctrines of substance over form and sham transaction as mechanisms to curb market-distorting economic opportunism).

Without the counterbalance of equity, economic opportunism would make business dealings unnecessarily costly by, for example, causing market participants to strain to foresee and address every possibility for manipulating the commercial regime – ultimately deterring the act of contracting itself: “as Justice Story once said, ‘[f]raud is infinite’ given the ‘fertility of man’s invention,’ equity too need[s] to be open-ended, with ex post discretion and an irreducible vagueness. As is familiar in tax law, if you announce a bright line rule, the evasatory behavior begins immediately.” See Henry E. Smith, “Rose’s Human Nature of Property,” 19 William & Mary Bill of Rts. L. J., 1047, 1051 (2011) (citation omitted); see also Gethsemane, 104 N.W.2d at 649 (citing Minnesota Supreme Court precedent and reiterating the importance of “preserving some reasonable stability in commercial transactions. . .”).

1. Affordable Granite & Stone knowingly received value from Appellants’ work as Terrazzo Mechanics under the company’s multi-million dollar Contract with the City Of Minneapolis

The undisputed record shows Appellants performed terrazzo restoration work as employees of Affordable Granite & Stone under the Contract with the City of Minneapolis. The evidence confirming that Appellants worked as Terrazzo Mechanics for Affordable Granite & Stone includes the following:

- * The sworn testimony of Affordable Granite & Stone’s manager who prepared the company’s bid for the Minneapolis Convention Center Contract with the City of Minneapolis (*APP. 2219-20*);
- * The Minneapolis Convention Center Contract between Affordable Granite & Stone and the City of Minneapolis (*APP. 572, 574, 584, 586-87*);
- * The sworn testimony of the Minneapolis Contract Compliance Manager (*APP. 447, 451*);

- * The sworn testimony of, and photographs on the jobsite taken by, Affordable Granite & Stone's project supervisor (*APP. 336-67*);
- * The video footage of Appellants performing the Minneapolis Convention Center Contract (*APP. 368-71*);
- * Industry standards established by the DOL (*APP. 1814-16, 1844-47*); and
- * The determination issued by the City of Minneapolis after investigating Appellants' wage underpayment claims (*ADD. 10*).

2. Affordable Granite & Stone was not entitled to receive the value of the payment for Appellants' work as Terrazzo Mechanics because the company was paying Appellants as janitors

Two separate legal sources establish that Affordable Granite & Stone had no right to be compensated by the City of Minneapolis for doing terrazzo restoration work while paying Appellants as janitors in doing that terrazzo work. First, the Minneapolis Prevailing Wage Ordinance obligated Affordable Granite & Stone to pay its employees the prevailing wage for doing terrazzo restoration work; and second, the Minneapolis Convention Center Contract required Affordable Granite & Stone to do the same. *APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 18.*

Notably, both the Minneapolis Prevailing Wage Ordinance and the Minneapolis Convention Center Contract make clear that Affordable Granite & Stone had to comply with the prevailing wage standards established under the Federal Davis-Bacon Act, 40 U.S.C. § 3142(a), *which apply only to construction work, such as terrazzo repair and restoration, and do not apply to janitorial work. Id.* Accordingly, the prevailing wage schedule applicable to Appellants and Affordable Granite & Stone's other employees set

forth the prevailing wage for Terrazzo Mechanics and did not even have a job classification for janitorial work. *APP. 421-45.*

While recruiting Appellants to perform the Minneapolis Convention Center Contract, Affordable Granite & Stone's President/CEO promised to pay the prevailing wage rather than what the company ended up paying Appellants. *APP. 462, 466; APP. 475, 476-77; APP. 493-94.* After Appellants reported wage underpayment while still performing the Minneapolis Convention Center Contract, Affordable Granite & Stone eventually paid several Appellants the prevailing wage for some of their work – while the publicly funded project was still underway. *APP. 1218, 1221.* It is also noteworthy that Affordable Granite & Stone paid the prevailing wage to some of Appellants' coworkers – all of whom had equal or less training and experience than Appellants – for doing the same class of work as Appellants at the same time as Appellants. *APP. 336, 339; APP. 368-69; APP. 647, 671-75.*

Accordingly, Affordable Granite & Stone knowingly received value to which the company was not entitled while the City of Minneapolis paid the company as if Appellants were being paid the prevailing wage for terrazzo restoration work when, in fact, the company paid Appellants a much lower wage rate – that is, as if Appellants were janitors. *APP. 372-73, 375-78; APP. 447, 451; APP. 572, 574, 584, 586-87; APP. 706-07, 718-20; APP. 1812-13; APP. 1918-2218; ADD. 10.*

That Affordable Granite & Stone paid Appellants as janitors is especially remarkable because the Minneapolis Convention Center had its own on-site staff do the janitorial work while Affordable Granite & Stone performed the Minneapolis Convention

Center Contract. *APP. 520, 534; APP. 632, 636* (“[T]he Convention Center custodial staff will maintain the cleanliness of the floor. . . .”).

3. The economic opportunism of paying Appellants at a wage rate far less than promised under oath and than required by law created a windfall for Affordable Granite & Stone

To obtain the Minneapolis Convention Center Contract, Affordable Granite & Stone promised under oath that the company will pay the prevailing wage – and the company then reconfirmed its sworn promise in writing. *ADD. 1; ADD. 9*. At the beginning of the project on which Appellants worked, Affordable Granite & Stone assured the City of Minneapolis that the company “will be *paying the prevailing wage for terrazzo repair. . . .*” *ADD 9 (emphasis added)*.

The Minneapolis Convention Center Contract itself explicitly required Affordable Granite & Stone to pay the prevailing wage. *APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 18*. Furthermore, the City of Minneapolis paid Affordable Granite & Stone millions of dollars with the expectation that the company was paying Appellants the prevailing wage as both the Minneapolis Prevailing Wage Ordinance and the Minneapolis Convention Center Contract dictated from the beginning. *APP. 572, 574, 584, 586-87; APP. 706, 740; ADD. 10*.

Although the District Court and Court of Appeals did not question the propriety of classifying Appellants as Terrazzo Mechanics for purposes of the prevailing wage, Affordable Granite & Stone’s submissions to the Minnesota Supreme Court may. In that regard, both the Minneapolis Prevailing Wage Ordinance and the Minneapolis Convention Center Contract between Affordable Granite & Stone and the City of

Minneapolis obligated the company to pay its employees consistent with the Federal Davis-Bacon Act regulations and applicable Federal Davis-Bacon Act prevailing wage schedule issued by the DOL. *APP. 572, 574, 584; APP. 706, 740; ADD. 18.*

The Federal Davis-Bacon Act regulations, which are expressly incorporated into the Minneapolis Prevailing Wage Ordinance as well as into the Minneapolis Convention Center Contract, mandate as follows:

Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

See 29 C.F.R. § 5.5(a)(1)(i) (emphasis omitted). This regulation seeks to encourage employers to have complete and accurate time/pay records, thereby discouraging wage underpayment. Id.

The DOL recently reaffirmed that 29 C.F.R. § 5.5(a)(1)(i) requires the job classification with the highest wage rate to apply to all hours worked unless the employer records specify the hours spent working in each applicable job classification:

But the law is clear: while it is permissible under the contract labor requirements for employees to work in more than one classification, the contractor then has the added responsibility to make certain that it properly documents and pays the employee for the various types of work he performed and for the hours he performed it. . . . ***We do not penalize the employees for the employer's failure to keep adequate records. Therefore, [the employer] must pay its employees the rate of the highest paid classification for all hours worked.*** . . .

Palisades Urban Renewal Enter., LLP, ARB Case No. 07-124, at 8 (U.S. DOL Admin. Review Board, July 30, 2009) (emphasis added) (*included herein at APP. 986-94*).

Pursuant to the well-settled doctrine of deference to agency interpretation, the DOL's interpretation of its own regulation should control here. Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 842-45 (1984). In other words, Affordable Granite & Stone cannot lawfully compensate Appellants at multiple wage rates unless the company created and maintained documents tracking the hours Appellants spent working in multiple job classifications.

Affordable Granite & Stone never specified in the company's business records when Appellants allegedly worked as anything other than Terrazzo Mechanics – let alone what alternative job classification(s) purportedly applied. *APP. 787-928; APP. 1918-2218*. Therefore, Affordable Granite & Stone had to pay Appellants as Terrazzo Mechanics for the entire time, as the City of Minneapolis determined after investigating Appellants' wage underpayment claims. *ADD. 10*.

Also under the controlling Federal Davis-Bacon Act regulation in this case, an employer has a legal duty to pay the prevailing wage to all employees not registered in a state or federally approved apprenticeship program, regardless of whether the employees are considered a "journeyman." See 29 C.F.R. § 5.5(a)(4)(i); see also Minn. R. § 5200.1070, Subps. 1-3. This obligation provides an important economic incentive for contractors like Affordable Granite & Stone to use the best trained and most highly skilled employees on publicly funded projects. Id. Affordable Granite & Stone admittedly did not enroll any Appellant in a state or federally approved apprenticeship program, so the company had a legal duty to pay Appellants the prevailing wage of Terrazzo Mechanics. *APP. 168, 171; APP. 647, 655*.

B. The Unjust Enrichment Doctrine Safeguards Against Economic Opportunism That Undercuts Commercial Stability, So Affordable Granite & Stone's Creative After-The-Fact Rationales For The Company's Windfall Do Not Defeat Appellants' Claims

As outlined above in Part V.A., the unjust enrichment doctrine helps to deter and correct what Law & Economics scholars refer to as economic opportunism – that is, manipulative behavior which interferes with efficient business dealings. See, e.g., Henry E. Smith, “An Economic Analysis of Law Versus Equity,” 8-35 (Yale Law School, Economics and Organization Workshop, November 4, 2010) (*included herein at ADD. 67-124*); see also generally Oliver E. Williamson, The Economic Institutions of Capitalism (1985) (analyzing the implications of the transaction-cost approach for, among other matters, contract law and labor policy).

Affordable Granite & Stone's conduct here exemplifies the kind of economic opportunism that, if tolerated, would dismantle the level playing field on which Minnesota's fair and open commercial system has been built. In particular, Affordable Granite & Stone attempted to manipulate the contracting regime by representing under oath and subsequently in writing that it will pay the prevailing wage on a publicly funded project for which Affordable Granite & Stone would receive premium compensation. *ADD. 1; ADD. 9.*

After obtaining the Minneapolis Convention Center Contract based on the company's representations under oath, Affordable Granite & Stone turned around and paid its employees, including Appellants, substantially less than the company had represented it would pay to obtain the Contract – and much less than what the law

required in any event. *APP. 572, 574, 584, 586-87; APP. 706, 740; APP. 421-45; APP. 1918-2218; ADD. 1; ADD. 9; ADD. 13-14.* This attempt to game the contracting system was to the detriment of Affordable Granite & Stone’s honest competitors (who based their bids on the legally required labor costs), to the detriment of Affordable Granite & Stone’s employees (who had the right to be paid prevailing wage), to the detriment of the City of Minneapolis (which had the legitimate expectation that the prevailing wage would be paid), and ultimately to the detriment of the public-contracting regime – which relies on above-board dealings and fair competition.

When Appellants attempted to hold Affordable Granite & Stone accountable for such economic opportunism, the company created an array of rationales in an effort to explain away its manipulation. Before entering into the Minneapolis Convention Center Contract, the City of Minneapolis could not have reasonably foreseen such post-contract-execution machinations by Affordable Granite & Stone:

- * The President/CEO of Affordable Granite & Stone declared, “I don’t know what prevailing wage is” even though the President/CEO had executed the company’s Prevailing Wage Certificate to obtain the Minneapolis Convention Center Contract and, moreover, despite the President/CEO sending a subsequent letter to the City of Minneapolis to confirm again that the company “will be paying the prevailing wage. . . .” (*APP. 647, 669; ADD. 1; ADD. 9*);
- * Affordable Granite & Stone then proclaimed it had no legal obligation to pay the prevailing wage despite the company’s promise under oath to pay the prevailing wage, the incorporation of that sworn promise into the Minneapolis Convention Center Contract, the subsequent affirmation in writing that that the company will pay the prevailing wage, and the applicability of the Minneapolis Prevailing Wage Ordinance to the company (*APP. 572, 574, 584, 586-87; 706, 740; ADD. 9; ADD. 18*); and
- * Affordable Granite & Stone also declared it did not have to pay Appellants the prevailing wage for Terrazzo Mechanics because Appellants purportedly only did

janitorial work even though Appellants operated a Beaver Tractor, a Bobcat, and 900-pound, propane-powered Eagle Machines to abrade and refinish the Minneapolis Convention Center flooring and, furthermore, despite the fact that the governing wage schedule had no job classification for janitorial work and the Minneapolis Convention Center's on-site staff actually cleaned the Minneapolis Convention Center (*APP. 421-445; APP. 520, 534; APP. 1223-25*).

Such economic opportunism not only prejudices Affordable Granite & Stone's employees, it also harms honest contractors as well as undermines the fair and open competition on which Minnesota's economy depends. See, e.g., Universities Research Ass'n v. Coutu, 450 U.S. 754, 774, n.25 (1981) (quoting the co-author of the Federal Davis-Bacon Act: "[i]f an outside contractor gets the contract, and there is no discrimination against the honest contractor, it means that he will have to pay the prevailing wages, just like the local contractor."). To allow market manipulation by companies like Affordable Granite & Stone would force many legitimate contractors to choose between following the rules and securing future business. That would undermine the rule of law and be an invitation to economic anarchy.

Appellants cannot seek redress for Affordable Granite & Stone's economic opportunism directly through the Minneapolis Prevailing Wage Ordinance, as summarized more fully above in Part IV.A.2.-.3. That does not, however, defeat Appellants' unjust enrichment claims. As acknowledged by Affordable Granite & Stone, for example, the City of Minneapolis "could not create a private right of action [to recover disputed wages]." *APP. 2962 (citing E. McQuillin, Municipal Corporations § 22:1)*. In any event, the absence of administrative remedies for Appellants, discussed above in Part IV.A.2.-.3., supports Appellants' claims under the unjust enrichment

doctrine. See, e.g., Acton Constr., 383 N.W.2d at 417 (citing Minnesota Supreme Court cases) (confirming that unjust enrichment claims flow from “an obligation raised or imposed by law and is independent of any real or expressed intent of the parties.”).

Before the Supreme Court, Affordable Granite & Stone will likely argue – for the first time and following the Court of Appeals’ reasoning – that Appellants purportedly have “unclean hands” because Appellants did not file their suit until approximately six months after the last act of wage underpayment. That new defense, which Affordable Granite & Stone did not assert in any versions of the company’s Answers or in any of the company’s briefing before the District Court or before the Court of Appeals, turns on the allegation that laches purportedly bars Appellants’ unjust enrichment claims.

As a threshold matter, the Minnesota Legislature has established that former employees in Appellants’ position have at least two years from the last act of wage underpayment to file suit. See Minn. Stat. § 541.07(5). The Minnesota Supreme Court has also determined that employees have at least two years from the last act of wage underpayment to file suit under the Payment of Wages Act in particular. Kohout, 162 N.W.2d at 240. The pursuit of Appellants’ claims within around six months after the last legal violation clearly is not dilatory.

In recently holding that the laches defense did not apply, the Minnesota Supreme Court reiterated that prejudice must be shown for the defense to be successful. Melendez v. O’Connor, 654 N.W.2d 114, 117 (Minn. 2002) (“[R]egardless of whether there has been an unreasonable delay by petitioners in filing their petition, there would be no prejudice. . . .”); see also City of Cloquet v. Cloquet Sand & Gravel, Inc., 251 N.W.2d

642, 645 (Minn. 1977) (citing Minnesota Supreme Court precedent and reaffirming that, “to prevail on a defense of laches, prejudice must be shown.”). Affordable Granite & Stone has shown no prejudice caused by Appellants filing their suit within approximately six months after the last act of wage underpayment.

Even if Affordable Granite & Stone had not waived the purported unclean hands/laches defense, whether the company has suffered prejudice would be a fact question to be determined at trial. See, e.g., Modjeski v. Federal of Winona, Inc., 240 N.W.2d 542, 546 (Minn. 1976) (holding that “[l]aches consists of more than a mere failure to act. It requires that prejudice result from the failure to act. The determination of prejudice must be based upon factual considerations and we therefore remand. . . .”).

In sum, it would be unjust and encourage deleterious economic opportunism to allow Affordable Granite & Stone to retain the windfall it received in this case. Affordable Granite & Stone paid Appellants a substantially lower wage rate than what the company promised under oath, promised in writing, and promised to Appellants directly. *APP. 1918-2218; ADD. 1; ADD. 9; ADD. 13-14*. The wage rate Affordable Granite & Stone paid Appellants was also significantly less than what the law required the company to pay. *APP. 421-45; APP. 572, 574, 584, 586-87; APP. 706, 740; APP. 1918-2218*. In fact, the applicable prevailing wage schedule did not authorize a wage rate anywhere close to what Affordable Granite & Stone paid Appellants – not to mention a wage rate for janitorial work. *APP. 421-445; APP. 1918-2218; ADD. 10*.

Given the undisputed evidence showing Affordable Granite & Stone’s improper windfall, a reasonable trier of fact could conclude that the company unjustly enriched

itself. Therefore, Appellants' case should be remanded. See, e.g., Doe, 757 N.W.2d at 350; Sauter, 70 N.W.2d at 353; Vacura, 364 N.W.2d at 391.

CONCLUSION

Affordable Granite & Stone did not pay wages that were “actually earned” and requested by Appellants – flouting the Payment of Wages Act and the contracting parties’ intent to benefit Appellants. In the process, Affordable Granite & Stone reaped a windfall at Appellants’ expense. In affirming summary judgment for Affordable Granite & Stone, the Court of Appeals misapplied and otherwise disregarded Minnesota Supreme Court precedent and, furthermore, overlooked undisputed evidence supporting Appellants’ claims. 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: September 2, 2011

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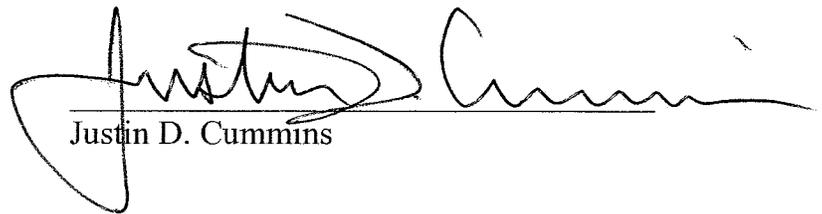
ATTORNEYS FOR APPELLANTS

CERTIFICATE

Pursuant to Minnesota Rule of Appellate Procedure 132.01, Subd. 3, the undersigned set the type of the Principal 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 13,190 words, as determined by employing the word counter of the word-processing software, Microsoft 2003, used to prepare the Principal Brief.

Dated: September 2, 2011

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