

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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**HENNEPIN COUNTY ATTORNEY FREEMAN'S  
AMICUS CURIAE BRIEF**

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## LEGAL ISSUE

1. May a public entity's enforcement of its own prevailing wage requirements be supplemented by underpaid employees pursuing a private cause of action against their employers?

*Most Apposite Legal Authority:*

McDaniel v. Univ. of Chicago, 548 F.2d 689 (7th Cir. 1977)

Hartt v. United Const. Co., Inc., 655 F.Supp. 937, 939 n.2 (W.D. Mo. 1987),  
aff'd, 909 F.2d 508 (8th Cir. 1990)

U.S. ex rel. Glynn v. Capeletti Bros., Inc., 621 F.2d 1309, 1317 (5th Cir. 1980)

Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.,  
125 Cal.Rptr.2d 804 (Cal. Ct. App. 2002)

U.S. v. Binghamton Const. Co., Inc., 347 U.S. 171 (1954)

40 U.S.C. § 3141, *et seq.*

Minn. Stat. § 177.41, *et seq.*

Mpls. Ord., Ch. 24, Art. IV, § 24.200, *et seq.*

## STATEMENT AND CERTIFICATION OF *AMICUS CURIAE*<sup>1</sup>

Prevailing wage laws are, at their core, intended to protect employees working on public projects. The Supreme Court of the United States has said that the federal prevailing wage law, the Davis-Bacon Act, 40 U.S.C. § 3141, *et seq.*, “is a minimum wage law designed for the protection of construction workers.” U.S. v. Binghamton Const. Co., Inc., 347 U.S. 171, 178 (1954). Minnesota’s prevailing wage law, the Minnesota Prevailing Wage Act, Minn. Stat. § 177.41, *et seq.*, declares its underlying policy:

**It is in the public interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works be compensated according to the real value of the services they perform. It is therefore the policy of this state that wages of laborers, workers, and mechanics on projects financed in whole or part by state funds should be comparable to wages paid for similar work in the community as a whole.**

Minn. Stat. § 177.41 (emphasis added).

The Minnesota Uniform Municipal Contracting Law authorizes political subdivisions and other municipal entities to require contractors and subcontractors to pay the prevailing wage to their employees. Minn. Stat. § 471.345, subd. 7. In 1987, the Hennepin County Board passed a resolution requiring that the prevailing wage be paid on County construction projects. Subsequently, the Hennepin County Board in 1992

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<sup>1</sup> Counsel for Appellants, Oscar Caldas, *et al.*, did not author this brief in whole or in part. No persons or entities made any monetary contributions to the preparation or submission of this brief.

established the position of “Prevailing Wage Field Inspector” in the County Attorney’s Office. The purpose of the Field Inspector, also known as the Prevailing Wage Enforcement Officer, is to investigate compliance with and enforce the prevailing wage provisions contained in County contracts. The Board further requested that the County Attorney coordinate with other public entities in the seven county metro area with respect to prevailing wage enforcement. The City of Minneapolis enacted its own prevailing wage law in the Minneapolis Prevailing Wage Ordinance (Ch. 24, Art. IV, § 24.200, *et seq.*). See Addendum of Appellants at pp. 17-19.

Both the Davis-Bacon Act and the Minnesota Prevailing Wage Act provide means for employees who have been paid less than the prevailing wage to recover the wages owed them through administrative procedures. These procedures, though, often prove insufficient to protect the interests of their intended beneficiaries, the employees, especially in light of the limited financial resources of most public entities who enforce the prevailing wage requirements of their contracts. Recognizing the unfairness of leaving underpaid employees without recourse, courts have crafted ways for the employees to recover the wages owed them. Private actions by employees to obtain the prevailing wages their employers are contractually obligated to pay are an important supplement to the relief provided for in the prevailing wage laws themselves.

As the party in Hennepin County charged with enforcing prevailing wage requirements for County contracts and coordinating prevailing wage enforcement with other public entities, *Amicus* Freeman’s interest in this matter is public in nature.

## STATEMENT OF FACTS

*Amicus* Freeman will not repeat the detailed factual background Appellants have provided. Suffice it to note, Respondent Affordable Granite & Stone, Inc. was obligated to pay Appellants the applicable prevailing wage both by virtue of the City of Minneapolis Prevailing Wage Ordinance (Ch. 24, Art. IV, § 24.200, *et seq.*) and its contract with the City of Minneapolis. See Appellant's Addendum at pp. 17-19; Appellant's Appendix at pp. 572, 574, 584, 586-87.

## ARGUMENT

### **I. Prevailing Wage Laws Provide Means for Underpaid Employees to Recover the Wages Owed Them.**

The federal Davis-Bacon Act provides protection to employees who have been paid less than the prevailing wage. First, the Davis-Bacon Act provides that the Comptroller General of the Department of Labor may withhold contractor payments and disburse those withholdings directly to employees who have been paid less than the prevailing wage. 40 U.S.C. § 3144(a)(1). Second, if the payments withheld by the Comptroller General are insufficient to reimburse the employees the full amount they are owed, the employees have the right to bring a civil action under the Miller Act, 40 U.S.C. § 3131, *et seq.*, against the contractor and the contractor's sureties to recover the wages owed to them. 40 U.S.C. § 3144 (a)(2); See also Universities Research Ass'n v. Coutu, 450 U.S. 754, 758 (1981) (detailing the legislative scheme under 40 U.S.C. § 3144 (a)(2)); McDaniel v. Univ. of Chicago, 548 F.2d 689, 694 (7th Cir. 1977) (same). By

making these remedies available, Congress clearly intended to provide a means for underpaid employees to recover the wages owed them.

Similarly, the Minnesota Prevailing Wage Act provides protection to employees who have been paid less than the prevailing wage. Under the Minnesota Prevailing Wage Act, the Commissioner of the Minnesota Department of Labor and Industry has the authority to “withhold payment of sufficient sum to the prime or general contractor on the project to satisfy the back wages assessed or otherwise cure the violation.” Minn. Stat. § 177.43, subd. 6a. Whether the Commissioner has the authority to pay the withheld funds directly to underpaid employees like the Comptroller General can under the Davis-Bacon Act is not absolutely clear. What is clear, though, is that under Minn. Stat. § 177.27, subd. 8, employees may bring a civil action in district court seeking redress for a violation of the Minnesota Prevailing Wage Act, and other wage laws. Like Congress in enacting the Davis-Bacon Act, the Minnesota legislature intended to provide a means for underpaid employees to recover the wages owed them.

It is unclear what protections the Minneapolis Prevailing Wage Ordinance affords underpaid employees. Section 24.250 of the Minneapolis Prevailing Wage Ordinance states that the City of Minneapolis has the right to withhold contract payments to the extent of the underpayment of required wages, but does not provide that those withholdings can be paid directly to underpaid employees. Section 24.220 of the Minneapolis Prevailing Wage Ordinance states that the “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 shall fully

comply with such provisions.” Though the United States Department of Labor obviously does not enforce this ordinance, employees who work on municipal projects requiring payment of prevailing wage, to be sure, should have similar opportunities to recoup underpayments as do employees working on federal and State of Minnesota prevailing wage projects.

## **II. Courts Have Recognized Private Causes of Action to Allow Employees to Recoup Underpayments of the Prevailing Wage.**

It would be unjust for the intended beneficiaries of the prevailing wage laws, the employees, to be left without recourse to recover the wages owed them. Recognizing this potential injustice, courts have fashioned remedies for employees to recover unpaid prevailing wages. Some courts have held that the Davis-Bacon Act implies a private right of action for employees to recover the wages owed to them. See, e.g., McDaniel, 548 F.2d at 695; Hartt v. United Const. Co., Inc., 655 F.Supp. 937, 939 n.2 (W.D. Mo. 1987), aff'd, 909 F.2d 508 (8th Cir. 1990); Norling v. Valley Contracting & Pre-Mix, et al., 773 F.Supp. 186, 189 (D.N.D. 1991). Admittedly, other courts have reached the opposite conclusion. See, e.g., Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 676 (9th Cir. 1998); U.S. ex rel. Glynn v. Capeletti Bros., Inc., 621 F.2d 1309, 1317 (5th Cir. 1980); U.S. ex rel. Bradbury v. TLT Const. Corp., 138 F.Supp.2d 237, 240 (D.R.I. 2001).

In interpreting their own prevailing wage laws, moreover, numerous state courts have found that employees have a private right of action to recover unpaid prevailing wages. See e.g., Dayhoff v. Temsco Helicopters, Inc., 848 P.2d 1367, 1374 (Alaska

1993); Callaway v. N.B. Downing Co., 172 A.2d 260, 263 (Del. Super. Ct. 1961); Stampco Const. Co. v. Guffey, 572 N.E.2d 510, 513 (Ind. Ct. App. 1991); Green v. Jones, 128 N.W.2d 1, 5 (Wis. 1964).

Courts have been particularly willing to imply a private right of action when the administrative remedies provided for in the prevailing wage laws prove insufficient to protect the employees' interests. See McDaniel, 548 F.2d at 694-95 (holding that the implication of a private right of action under the Davis-Bacon Act was necessary because the remedies provided for in the Act were insufficient to effectuate the Congressional intent of protecting employees); Norling, 773 F.Supp. at 189 (holding that a private cause of action exists under the Davis-Bacon Act when the express protections provided by the Act are unavailable); Callaway, 172 A.2d at 263 ("...we certainly think that it would be defeating the intent of the Legislature...if we were to hold that the very ones whom the law as [sic] intended to protect [employees] were helpless to secure that protection..."). Unfortunately, the protections provided under the Minneapolis Prevailing Wage Ordinance have not enabled Appellants to recoup their underpayments. This Court should not allow Appellants' interests to remain unprotected.

Another way in which courts have fashioned relief for employees who have been paid less than prevailing wage is through state contract law. Courts have repeatedly held that employees are third-party beneficiaries of the contract between the contractor and the governmental entity when the contract incorporates prevailing wage laws. See, e.g.,

- McDaniel, 548 F.2d at 693 ("The laborer is not only the principal beneficiary of the statute, but also a third-party beneficiary of a contract provided for by the statute.")

- Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc., 125 Cal.Rptr.2d 804, 812 (Cal. Ct. App. 2002) (“...a worker on a public works project may maintain a private suit against the contractor to recover deficiency in wages as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages.”)
- Fasse v. Lower Heating & Air Conditioning, Inc., 736 P.2d 930, 934 (Kan. 1987) (“The district court was correct in finding that the parties to the contract intended to pay workers contract wages based on the Davis-Bacon wage scale and that the workers were third party beneficiaries under the contract.”)
- Favel v. American Renovation & Const. Co., 59 P.3d 412, 426 (Mont. 2002) (“Workers, as third party beneficiaries to the Contracts...may bring and pursue a state claim to enforce the terms of the Contract.”).

Significantly, this Court’s third-party-beneficiary analysis under Minnesota contract law is quite similar to the inquiry whether a private cause of action exists under a statute. The first element for implying a private cause of action is whether “the plaintiff belongs to the class for whose benefit the statute was enacted.” Flour Exchange Bldg. Corp. v. State, 524 N.W.2d 496, 499 (Minn. Ct. App. 1994) (citing Cort v. Ash, 422 U.S. 66, 78 (1975), cited in Counties of Blue Earth v. Minnesota Dept. of Labor & Industry, 489 N.W.2d 265, 268 (Minn. Ct. App. 1992)). Similarly, the threshold requirement for recovery as a third-party beneficiary is a showing of “intent by the contracting parties to confer on [him] a benefit.” Cretex Cos., Inc. v. Constr. Leaders, Inc., 342 N.W.2d 135, 139 (Minn. 1984).

Again, courts have repeatedly held that the prevailing wage laws were enacted to benefit employees. See Binghamton Constr. Co., 347 U.S. at 178 (“On its face, the [Davis-Bacon] Act is a minimum wage law designed for the benefit of construction workers.”); U.S. ex rel. Glynn, 621 F.2d at 1313 (“The language, indeed the purpose of the [Davis-Bacon Act] clearly reveals that laborers and mechanics are the principal

beneficiaries of the act.”). In fact, the Minnesota Prevailing Wage Law states this explicitly. “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. Accordingly, a contract incorporating prevailing wage laws evidences an intent to confer on employees the benefit of being paid the prevailing wage, satisfying Minnesota’s third-party beneficiary requirement. Whether labeled a private cause of action under the Minneapolis Prevailing Wage Ordinance or a third-party beneficiary contractual claim, Appellants, and those similarly situated, should be able to pursue litigation on their own behalf to recoup prevailing wage underpayments.

### **III. Allowing Contractors to Ignore their Prevailing Wage Obligations Also Harms Honest Bidders for Contracts.**

To be sure, employees of contractors which renege on their contractual obligations to pay prevailing wage will suffer if the decision of the Minnesota Court of Appeals is allowed to stand. In addition, honest bidders on public projects will also be harmed if other bidders are permitted to shirk their promises to pay their employees prevailing wage. Such disingenuous bidders will be able to underbid contractors who planned on honoring their commitments to pay prevailing wage, encouraging non-compliance with prevailing wage laws.

Hennepin County is fortunate to have a position explicitly devoted to prevailing wage enforcement, the Prevailing Wage Enforcement Officer. However, many governmental entities do not have such a position. Even jurisdictions with prevailing wage enforcement officers, though, often have insufficient resources to monitor, to the

extent desired, all of their contracts with a prevailing wage requirement. Thus, prevailing wage violations may, and often do, slip through the enforcement cracks. When that happens, the intended beneficiaries of prevailing wage laws, the employees, should have the opportunity through private litigation to recover the wages to which they are entitled. If the employees are not given such an opportunity, not only will the employees be harmed, but honest bidders for public contracts will be harmed, leading to a breakdown of the entire prevailing wage system.

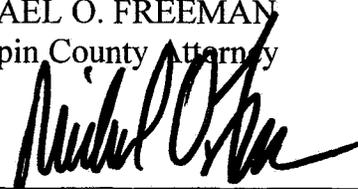
**CONCLUSION**

For the reasons stated above, *Amicus* Freeman asks that the decision of the Minnesota Court of Appeals be reversed and Appellants be awarded the unpaid prevailing wages to which they are entitled.

Respectfully submitted,

Date: September 19, 2011

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## CERTIFICATE

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subs. 1 and 3, for a brief produced with 13-point typeface in Times New Roman, a proportional font. The length of this brief is 2,448 words. This brief was prepared using Microsoft Word 2003.

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