Commonwealth of Massachusetts
Appeals Court

No. 2022-P-1031

Suffolk, ss.

RUSSELL METCALF and STEVEN THEURER,
Plaintiffs

vs.

BSC GROUP, INC., BSC COMPANIES, INC., and DAVID HAYES,
Defendants and Third-Party Plaintiffs

vs.

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION,
Third-Party Defendant.

On Appeal from Suffolk County Superior Court
Case No. 1784-cv-02963

Appellant's Brief

Date: December 5, 2022

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I. INTRODUCTION

For years, Russell Metcalf and Steven Theurer worked as surveyors on bridge- and roadway-construction projects across Central Massachusetts. Their employer, BSC (BSC Group, Inc. and BSC Companies, Inc.), admits to paying the appellants much less than half of what the law required it to pay. Yet the superior court did not hold BSC responsible for depriving the appellants of their hard-earned wages because BSC claimed not to know the law applied. That result is as wrong as it sounds.

When a law serves a critical public policy purpose, the legislature may hold a wrongdoer responsible, even if the wrongdoer did not intend to break the law, and no matter how good their reason for doing so. Massachusetts's Prevailing Wage Act is just such a strict-liability law. *See* Mass. Gen. L. ch. 149 §§ 26–27H. As the Supreme Judicial Court has explained, "an employer's reason for" violating the prevailing wage laws "is irrelevant." *Lighthouse Masonry, Inc. v. Div. of Admin. L. Appeals*, 466 Mass. 692, 699 (2013). An employer must make its workers whole, even if it "ha[d] no intent to violate the law." *Id.* So BSC's purported "ignorance of the law," or of the fact that the law applies, "is no excuse"

for its violation. *Commonwealth v. Belanger*, 30 Mass. App. Ct. 31, 33 (1991).

The decision below disregarded this strict liability scheme. The lower court reasoned that it could not hold BSC responsible (and could not make Mr. Metcalf and Mr. Theurer whole) because the Massachusetts Department of Transportation (MassDOT) did not attach a list of prevailing wages to its contracts with BSC. But this Court has already rejected that reasoning. The decision below ignored this Court's guidance that a missing wage schedule "does not relieve an employer of its obligation to pay prevailing wages . . . ." *Donis v. Am. Waste Servs., LLC* ("*Donis II*"), 95 Mass. App. Ct. 317, 324 (2019).

In placing dispositive (and exculpatory) weight on the missing lists of wages, the decision elevated the contracts' formalities above the very law meant to constrain them. The lower court considered *Donis* inapplicable because it addressed a separate subsection of the prevailing wage law—even though the provision at issue here imposes an obligation to pay the prevailing wage even more unequivocal than the provision in *Donis*.

These errors led the superior court to the inequitable conclusion below. The appellants did good work for BSC and MassDOT for years yet cannot obtain the wages to which the law entitled them. The decision below's reasoning renders the Prevailing Wage Act's private right of action a legal nullity unless the parties the law should constrain opt to adhere to the law. And it leaves the law's intended beneficiaries—laborers like Mr. Metcalf and Mr. Theurer who build and repair our bridges and roads—without a remedy.

Unless this Court corrects these errors, this case will become a roadmap for agencies and companies to evade paying workers what they are worth. It creates a perverse rule: employers and agencies may leave the prevailing wages out of a public works construction project contract and face no consequences. This result flouts the plain language of the Prevailing Wage Act (holding employers liable whenever the law is not followed) and undermines the law's purpose (ensuring a fair wage to laborers).

Because the Prevailing Wage Act makes BSC liable for underpaying its employees, no matter why it did so or what it wrote in

its contract with MassDOT, this Court should reverse the lower-court's summary judgment decision.

II. STATEMENT OF ISSUES

1. Massachusetts's Prevailing Wage Act holds an employer strictly liable for underpaying its workers on public-works construction projects, making an employer's reason for the violation irrelevant. BSC claims it did not know the Act applied to Mr. Metcalf and Mr. Theurer's work because MassDOT never supplied a list of prevailing wages. Did the court below err by finding BSC's reason for not paying the appellants a lawful wage not only relevant, but dispositive?

2. A contract's terms cannot override a legislative enactment. Under the Prevailing Wage Act, a public-works construction contract "shall" list, and an employer "shall" pay, the prevailing wage. The BSC-MassDOT contracts did not list, and BSC did not pay, the prevailing wage. Yet the decision below found BSC not liable "by contract," based on the lack of a prevailing-wage list. Did it err by finding that the contracts' flawed terms override the prevailing wage law?

3. The Prevailing Wage Act creates a private right of action meant to protect workers when the government and an employer negotiate

unfair wages. The decision below deprives employees of any remedy whenever an agency and an employer decline to include a prevailing wage list in their contracts. Does this rule nullify the private right of action and undermine the Act's worker-protective purpose?

III. STATEMENT OF THE CASE

Mr. Metcalf and Mr. Theurer sued BSC, alleging that BSC violated § 27 of the Massachusetts Prevailing Wage Act. JA-8–10. The superior court denied BSC's motion to dismiss, based on the Prevailing Wage Act's strict liability regime. JA-19–20. The plaintiffs amended their complaint to add claims against MassDOT, JA-21–24; but the court dismissed the appellants' claims against MassDOT on sovereign immunity grounds. JA-25–35.

In August 2021, BSC moved for summary judgment. JA-36–37. Mr. Metcalf and Mr. Theurer opposed. JA-430–45. On April 26, 2022, the superior court granted summary judgment in BSC's favor. JA-735–45/Add-1–11. Judgment for BSC entered on May 4, 2022. JA-746/Add-12. The appellants timely appealed. JA-6; JA-747.

IV. STATEMENT OF THE FACTS

A. BSC hired Mr. Metcalf and Mr. Theurer to provide surveying services on roadway and bridge construction projects across central Massachusetts.

BSC hired both Mr. Metcalf and Mr. Theurer on the same day in December 2011. JA-446–48. Mr. Metcalf, an Army veteran who learned the trade as an artillery surveyor, was a party chief. JA-447; JA-454. Mr. Theurer, who learned the trade from a family friend fresh out of high school, was an instrument person. JA-448; JA-530–31.

According to the offer letters, BSC hired both men in anticipation of BSC entering into "a contract with MassDOT for roadway construction in District 3." JA-447, JA-448. District 3 stretches down the center of the state, from the New Hampshire border to Connecticut, and encompasses towns and cities in western Middlesex and Worcester counties, including Natick, Framingham, Worcester, Chelmsford, and Marlborough. JA-376; JA-431; JA-539.

In 2013, Mr. Metcalf and Mr. Theurer began working as a survey team for BSC. JA-459–60; JA-532; JA-685. They performed field surveys on about thirty bridge- and roadway-construction projects in District 3 over the next three and a half years. JA-431; JA-737/Add-3. Mr. Theurer gave BSC 2,656 hours of his labor on these projects; Mr. Metcalf gave

3,264. JA-659. According to their MassDOT supervisor and others on their worksites, they did good work. JA-538; JA-610.

B. Mr. Metcalf and Mr. Theurer performed the type of work for which BSC must pay the Prevailing Wage.

Massachusetts law deputizes the commissioner of the Department of Labor Standards (DLS) to determine what types of labor on a public works project qualifies for the prevailing wage. Mass. Gen. L. ch. 149 § 26. DLS explained its "longstanding administrative interpretation" of the prevailing wage laws in a 2011 opinion letter. JA-582–83 (citing prior opinion letters dating back to 1996). It wrote that "the work of field engineers (surveying) performed under construction contracts let by awarding authorities . . . is 'construction' work . . . and, therefore, is subject to the prevailing wage law." *Id.* The agency has listed examples of "construction layout activities" for which employers must pay the prevailing wage, including "establishing grid lines" or "benchmarks for . . . right of way clearances, grades and elevations," and "providing reference points" for other tradesmen. JA-582.

Mr. Metcalf and Mr. Theurer performed this work. According to both their MassDOT supervisor and the general contractor's field supervisor, they provided benchmarks and right-of-way clearances,

grades, and elevations for the other trades on the job site; added control points to the site; and monitored, checked, and (as needed) re-established those reference points throughout the construction project. JA-571–72; JA-612. While Mr. Metcalf and Mr. Theurer worked under MassDOT's supervision, they often performed surveys requested by the on-site general contractor. JA-463, JA-465; JA-548; JA-571–72; JA-612. Sometimes, "the construction supervisor would call [Mr. Metcalf] directly and tell [him] what he needed." JA-463. Mr. Metcalf would then call his MassDOT supervisor who would "approve[]" the work. JA-612. This work "directly aided in the construction process." JA-572.

C. BSC agreed, under penalty of perjury, to comply with the prevailing wage laws.

Mr. Metcalf and Mr. Theurer's work fell under two contracts between BSC and MassDOT. In 2012, MassDOT contracted BSC to provide engineering field survey work for highway and bridge projects in District 3. JA-40; JA-431; JA-661; JA-736/Add-2. In 2015, MassDOT awarded BSC a second contract. JA-41–42; JA-665; JA-737/Add-3.

MassDOT and BSC used Massachusetts's standard-form contract. As BSC has acknowledged, *see* JA-45 (footnote 3), this form contract required contractors to "certify compliance with state" laws

including "prevailing wage programs and payments" and "G.L. c. 149," JA-134, JA-136–37. When BSC signed the BSC-MassDOT contracts, it swore "under pains and penalties of perjury" that it would comply with the prevailing wage laws. JA-137 ("incorporating by reference" the "Contractor Certifications," including the prevailing-wage-law certification, even if they were "not attached" to the contract); *see* JA-225; JA-299.

No one disputes that MassDOT and BSC did not comply with the prevailing wage laws in forming this contract: BSC itself has asserted that the contracts "did not incorporate a prevailing wage rates fee schedule." JA-662, JA-665; *see* also JA-40; JA-431; JA-739/Add-5. Instead, MassDOT just asked BSC what BSC wanted to pay its workers, then wrote BSC's chosen rates into the contract. JA-40, JA-42; JA-661–62, JA-665.

As the Attorney General's office has acknowledged in an email to MassDOT about the 2014 BSC-MassDOT contract, this should have "raised some red flags." JA-575. "[T]he description of the work" included "extensive field survey work required for implementing the construction element associated with MassDOT's statewide highway and bridge

construction program." *Id.* DLS has repeatedly required employers to pay the prevailing wage for exactly this type of work. *See* JA-578–79, JA-580–81, JA-582–83. BSC was not naïve: it had "a general sense" of what surveying work qualified for the prevailing wage. JA-646. Typically, BSC asked an awarding agency like MassDOT whether the prevailing wage applied whenever it contracted for any "large public project or publicly-funded project." *Id.* But when it came to the BSC-MassDOT contracts, BSC broke with its typical practice. It did not investigate whether the work was prevailing-wage eligible. It did not even ask MassDOT or DLS. *Id.*

D. BSC paid Mr. Metcalf and Mr. Theurer much less than the prevailing wage.

BSC admits that at least some of Mr. Metcalf and Mr. Theurer's work qualified for the prevailing wage. *Cf.* JA-46 (claiming "not *all* of [the appellants'] work qualified for payment of the prevailing wage" (emphasis added)). According to their MassDOT supervisor, they performed construction layout activities on at least two-thirds of the sites—meaning BSC should have paid the prevailing wage for that work. JA-594–609. On some of these projects, DLS had set, and *other* surveyors

received, a prevailing wage for the exact work Mr. Metcalf and Mr. Theurer did. JA-435; JA-507; JA-606.

BSC admits that it "did not pay" Mr. Metcalf and Mr. Theurer "the applicable prevailing wage for their work." JA-43; *see also* JA-432; JA-667; JA-737/Add-3. Although the then-prevailing wage for a party chief was between $64.47 and $68.90 per hour, BSC paid Mr. Metcalf just $24.72 to $25.20 per hour. JA-432; JA-667. And though the then-prevailing wage for an instrument person was between $63.05 and $67.44, BSC paid Mr. Theurer only $20.60 to $21.63. JA-432; JA-667.

Both Mr. Metcalf and Mr. Theurer quit their jobs at BSC to look elsewhere for a fair wage. JA-460, JA-481; JA-537. After Mr. Theurer quit BSC in December 2016, he went to work for another company where he earned the prevailing wage "on the same exact project doing the same exact work" for which BSC paid him a fraction of that. JA-535.

E. The superior court refused to hold BSC liable for paying less than the prevailing wage.

1. At the pleadings stage, the superior court rejected BSC's claim that it could not be liable if the BSC-MassDOT contracts had no prevailing wage schedule.

When BSC moved to dismiss Mr. Metcalf and Mr. Theurer's claims on the pleadings, it argued that it was not liable because the BSC-

MassDOT contracts did not include reference to prevailing wages. JA-16–17. The superior court rejected this argument. It reasoned that the Prevailing Wage Act "appear[ed] to be a strict liability statute," so BSC could not "fail to pay the prevailing wage," and then defend itself by "relying on a contract which allegedly did not have attached the prevailing wage [schedule] for public works project[s] . . . ." JA-19.

2. BSC moved for summary judgment, arguing again that it could not be liable where the BSC-MassDOT contracts did not recite the prevailing wage.

BSC moved for summary judgment, even though it acknowledged that "fact-intensive" disputes existed as to which of Mr. Metcalf and Mr. Theurer's work qualified for the prevailing wage. JA-46. To evade these factual disputes, BSC (1) claimed the Prevailing Wage Act did not apply, and (2) recycled its already-rejected argument that it would be unfair to apply it.

First, BSC argued that § 27 of the Prevailing Wage Act did not apply to the BSC-MassDOT contracts, pointing to an unrelated statute pertaining to capital asset management. JA-45 (citing Mass. Gen. L. ch. 7C § 58). Its argument implicitly presumed that the asset management

provision repealed the prevailing wage law's protections by implication. But it cited no authority for that presumption.

Second, BSC argued that it could not face liability under the Prevailing Wage Act. It acknowledged that employers are strictly liable for failure to pay the prevailing wage. JA-45–46. And it admitted it did not pay Mr. Metcalf and Mr. Theurer the prevailing wage. JA-44. But it shifted the blame, arguing that "MassDOT did not incorporate the prevailing wage rates into the contracts at issue." JA-48. [1] BSC disclaimed any ill intent, reasoning that the BSC-MassDOT contracts were "not low-bid contracts," so it was not trying to "beat out its competitors" by underpaying its workers. JA-671. At its core, BSC's argument was that it "was not on notice that the Prevailing Wage Act applied," so it would be unfair to penalize the company for not following the law. JA-46. For this claim, BSC relied (almost exclusively [2]) on

[1] It also attempted, on reply, to blame Mr. Metcalf and Mr. Theurer, because they "never raised this issue with BSC during their employment." JA-671. BSC pointed to no authority (and the plaintiffs have found none) imposing such an obligation on employees cheated out of a fair wage.

[2] Nearly every other case cited in BSC's summary judgment motion relied on *McGrath*.

McGrath v. ACT, Inc., 2008 Mass. App. Div. 257, 2008 WL 5115057 (Nov. 25, 2008)—an Appellate Division case which this Court has soundly criticized. *See Donis II*, 95 Mass. App. Ct. at 326 n.11.

3. At summary judgment, the superior court held BSC not liable because the BSC-MassDOT contracts did not have a prevailing wage schedule.[3]

The superior court granted summary judgment to BSC. Its decision acknowledged that the Prevailing Wage Act "is a strict liability statute," meaning that "an employer's reason for the violation is irrelevant; the fact of violation is sufficient for a penalty to issue." JA-738/Add-4 (quoting *Lighthouse Masonry*, 466 Mass. at 698–99). Yet it "agree[d]" that BSC could not be liable because the BSC-MassDOT contracts "d[id] not include a schedule of prevailing wage rates" and thus did not "put" BSC "on notice" that it was "required to pay the prevailing wage." JA-739/Add-5, JA-742–43/Add-8–9.[4]

The decision below, like the defendants, opted to follow *McGrath*, rather than *Donis*. JA-739–42/Add-5–8. It reasoned that *Donis* was

[3] Between the pleadings stage and summary judgment, this case was reassigned to a new judge. *Compare* JA-2 *with* JA-4.

[4] The court also credited the other justifications for non-compliance that BSC offered. *See* JA-736–37/Add-3–4, JA-743/Add-9.

"inapplicable" because *Donis* addressed a provision of the prevailing wage law specific to waste-management truck operators, rather than the default provision applicable here. JA-741/Add-7. And it interpreted *Donis* to apply only where an employer "agreed" to be bound by the law. JA-741–42/Add-7–8. Instead, it gave dispositive weight to the lack of a prevailing wage schedule in the BSC-MassDOT contracts, reasoning that because the appellants' work "was never subject to the prevailing wage rate *by contract*," it must not be subject to the prevailing wage rate *by law*. JA-739/Add-5 (emphasis added).

This appeal followed.

V. SUMMARY OF THE ARGUMENT

The decision below found that an employer cannot be held liable for failing to pay its workers a fair wage for labor on a public-works construction project unless the government attaches a list of prevailing wages. This result strips workers of the Prevailing Wage Act's protections unless their employers are "on notice" that the law applies and "stipulate[]" to be bound by it, JA-742–43/Add-8–9. It is thrice flawed and cannot stand.

First, the decision conflicts with the fundamental concept of a strict liability law. *See infra* Section VI.A (pages 27-30). The Prevailing Wage Act "provides a mechanism for setting and enforcing minimum wage rates for workers employed on public works projects." *Rego v. Allied Waste Servs. of Mass., LLC*, 100 Mass. App. Ct. 750, 752, *review denied* 489 Mass. 1109 (2022). Its purpose is to "achieve parity between the wages of workers" in public and private works, *Mullally v. Waste Mgmt. of Mass., Inc.*, 452 Mass. 526, 532 (2008).[5] The Act imposes strict liability, meaning "an employer's reason for the violation is irrelevant," and courts may hold employers liable even "where [they] ha[d] no intent to violate the law." *Lighthouse Masonry*, 466 Mass. at 698–99.

But the decision below failed to apply this strict liability regime. *See infra* Section VI.A.1 (pages 30–33). Instead, it credited BSC's argument that it could not hold BSC liable because the company was not on notice that the Prevailing Wage Act applied. JA-739/Add-5. BSC led the superior court astray with its reliance on *McGrath* for the rule that an employer bears no responsibility for an agency's failure to attach a

[5] The Act also requires agencies and employers to give preference to veterans like Mr. Metcalf. Mass. Gen. L. ch. 149 § 26.

prevailing wage rate schedule. *See infra* Section VI.A.2 (pages 33–37). This Court has already rejected *McGrath*'s reasoning, *see infra* Section V.A.2.b (pages 34–37), so "'failure to comply with this [rate schedule] requirement does not relieve an employer of its obligation to pay prevailing wages once it has contracted to do so.'" *Donis II*, 95 Mass. App. Ct. at 324.

Second, the decision below found that the BSC-MassDOT contracts supersede the law. JA-739/Add-5. This is wrong, as a matter of both law and fact. *See infra* Section VI.B (pages 38–45). Private agreements cannot override legislative enactments. Agencies and employers "may not negotiate to avoid complying with laws of general applicability . . . ." *Cambridge v. Atty. Gen.*, 410 Mass. 165, 173 (1991). The Prevailing Wage Act applies to the BSC-MassDOT contracts, whether the contracts recite the law or not. *See infra* Section VI.B.1 & 2 (pages 39–42). But that is beside the point: the evidence shows that BSC *did* agree, under penalty of perjury, to follow the prevailing wage laws. *See infra* Section VI.B.3 (pages 42–45).

Third, the rulings below, if left to stand, will cause structural harm to the Prevailing Wage Act by writing the private right of action out of

the law. *See infra* Section VI.C (pages 45–48). Courts do not, and should not, lightly leave an aggrieved party without a remedy at law or equity. *See Coastal Oil New Engl., Inc. v. Citizens Fuels Corp.*, 38 Mass. App. Ct. 26, 32 (1995). To endorse the decision below would be tantamount to rewriting the prevailing wage laws and thwarting their worker-protective aims.

Properly construed, then, the Prevailing Wage Act applies to the BSC-MassDOT contracts and the work performed by Mr. Metcalf and Mr. Theurer. The remaining question is, which work? Courts and factfinders must defer to DLS's interpretation of the prevailing wage laws to answer that question. *See infra* Section VI.D.1 (pages 49–52). And BSC may not dodge liability by pointing to a statute—unrelated to wages or labor—to suggest that the Legislature stealthily repealed the prevailing wage laws. *See* infra Section VI.D.2 (pages 52–56).

Because the decision below cannot be squared with either the plain language or purpose of the Prevailing Wage Act, this Court should reverse the lower-court's summary judgment decision.

VI. ARGUMENT

Summary judgment is inappropriate where there are disputed issues of material fact or where a movant is not "entitled to judgment as a matter of law." *Premier Cap., LLC v. KMZ, Inc.*, 464 Mass. 467, 474 (2013) (quoting Mass. R. Civ. P. 56(c)). An appellate court must "conduct a *de novo* examination of the evidence in the summary judgment record and view the evidence in the light most favorable to the parties opposing summary judgment," here, Mr. Metcalf and Mr. Theurer. *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. 316, 318 (2012) (citing *Miller v. Cotter*, 448 Mass. 671, 676 (2007); *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991)).

The decision below rests on errors of law and misreadings of the record which short-circuited the court's examination of whether there are triable issues of fact. Applying the correct law and viewing the record evidence in the light most favorable to the appellants, there exist disputes a jury must resolve.

A. The Prevailing Wage Act is a strict liability statute, making BSC's reasons for violating it irrelevant.

The Prevailing Wage Act "is a comprehensive legislative enactment that provides a mechanism for setting and enforcing minimum wage

rates for workers employed on public works projects." *Rego*, 100 Mass. App. Ct. at 752. Its "primary goal" is to "achieve parity between the wages of workers" in public and private works. *Mullally*, 452 Mass. at 532. Thus, the prevailing wage law "protects an employee's interest in receiving a wage commensurate with his or her labor . . . ." *Donis v. Am. Waste Servs., LLC* ("*Donis IV*"), 485 Mass. 257, 263 (2020).

To achieve this goal, the Act imposes strict liability on employers who do not pay the prevailing wage for eligible work. The Supreme Judicial Court held, in *Lighthouse Masonry*, that the law "specifically provides for civil penalties to be imposed where a contractor or subcontractor has no intent to violate the law." 466 Mass. at 698–99. "[A]n employer's reason for the violation is irrelevant; the fact of violation is sufficient for a penalty to issue." *Id.* at 699.

Strict liability regimes play a vital role in redressing public harms: they reflect a "public policy" judgment that the costs of a wrong should "fall on the party best able to afford to pay the damages and the party in control able to prevent the injury." *Rodriguez v. Olin Corp.*, 780 F.2d 491, 501 (5th Cir. 1986) (quoting *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 632 (5th Cir. 1983)). In other words, a strict-liability statute reflects a

legislative determination that "responsibility be fixed wherever it will most effectively reduce" the risk of, and consequences from, violation of the statute. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462 (1944) (Traynor, J., concurring).

Like the Commonwealth's other wage-related laws, the Prevailing Wage Act reflects the Legislature's judgment that employers, not employees, should bear the consequences of violating the Act. "Employers must 'suffer the consequences' of violating the statute regardless of intent." *Dixon v. City of Malden*, 464 Mass. 446, 452 (2013) (quoting *Somers v. Converged Access, Inc.*, 454 Mass. 582, 591 (2009)). And "employees should not be penalized because [a government entity] and [an employer] failed to ensure that the contract included prevailing wage schedules . . . ." *Rego*, 100 Mass. App. Ct. at 755 (citing *Donis II*, 95 Mass. App. Ct. at 325)).

For statutes like the prevailing wage law, which "impose punishment out of considerations of public policy, lack of knowledge of the law or of the fact that the law has been violated does not exonerate the person who may have unwittingly violated the statute." *Belanger*, 30

Mass. App. Ct. at 33. "In such instances, the old chestnut applies that ignorance of the law is no excuse." *Id.*

1. The decision below erred in finding that BSC's professed reasons for violating the Prevailing Wage Act excused its liability.

All public works construction contracts must include a prevailing wage rate schedule; and contractors must pay the prevailing wage to qualifying workers. Mass. Gen. L. ch. 149 § 27. To ensure compliance with this mandate, the Prevailing Wage Act imposes complementary obligations on the contracting agency, DLS, and the employer.

- The contracting agency "shall submit to the commissioner a list of the jobs" involved in a public works project and "shall request the commissioner to determine the rate of wages to be paid on each job." Mass. Gen. L. ch. 149 § 27.

- DLS "shall . . . determine" the prevailing wage for each eligible job, and "shall furnish said official or public body with a schedule of such rate or rates of wages." *Id.*

- An employer "shall" ensure it has an up-to-date wage rate schedule, and no employer "shall pay less than" the prevailing wage. *Id.*

The plain language of the statute, therefore, treats the employer as an important backstop against unfair wages. In other words, it requires exactly what the lower court refused to: it obligates employers to serve "as an enforcer" of the prevailing wage laws. JA-743/Add-9.

The Legislature's decision to impose penalties on employers drives home this obligation. Although agencies bear the initial responsibility to request a rate schedule, the Act imposes liability on the employer for failing to ensure compliance:

> Whoever shall pay less than said rate or rates of wages . . . on said works to any person performing work within classifications as determined by the commissioner . . . shall have violated this section and . . . shall be subject to a civil citation or order as provided in section 27C.
>
> [Mass Gen. L. ch. 149 § 27.]

It is reasonable to hold the employer responsible because if an agency fails to provide a prevailing wage rate schedule, employers "ha[ve] available to them the simple expedient of requesting one." *Donis II*, 95 Mass. App. Ct. at 325.

Yet the superior court "agree[d]" with BSC that the company "cannot be held liable." JA-738–39/Add-4–5. It acknowledged that the Prevailing Wage Act "is a strict liability statute." *Id.* But it ruled for BSC

anyway, reasoning that "neither [DLS] nor MassDOT set a prevailing wage for purposes of the" BSC-MassDOT contracts, and "the Contracts do not include a schedule of prevailing wage rates." *Id.* In a nutshell, BSC argued, and the decision below found, that BSC was not liable because it had no notice that its non-prevailing wage payments were unlawful.

But none of BSC's asserted reasons for violating the prevailing wage law matter. The notion that the defendants cannot be "held liable 'for conduct that was not known to be improper when undertaken' requires little discussion," because "[t]he prevailing wage law is a strict liability statute." *Donis II*, 95 Mass. App. Ct. at 324–25 (citing *Lighthouse Masonry*, 466 Mass. at 698–99).

The lack of a prevailing wage rate schedule attached to the contract may have been a "reason" why BSC did not pay Mr. Metcalf and Mr. Theurer the prevailing wage; but that "reason . . . is irrelevant." *Lighthouse Masonry*, 466 Mass. at 699. BSC could have asked MassDOT or DLS whether it should pay the prevailing wage, *Donis II*, 95 Mass. App. Ct. at 325, but its corporate representative admitted it did not, JA-655. It does not matter that BSC might have thought, based on the

MassDOT's bidding process, that the prevailing wage laws did not apply.[6] "Crediting this argument . . . would reward the Defendants for being willfully ignorant of the law," *Donis v. Am. Waste Servs., LLC* ("*Donis I*"), No. 2012-cv-1275, 2015 WL 13631158, at *6 (Super. Ct. June 30, 2015), and "ignorance of the law is no excuse," *Belanger*, 30 Mass. App. Ct. at 33.

2. The lower court should have followed *Donis*, not *McGrath*—which applies a misreading of the law already rejected by this Court.

The decision below rests its contrary conclusion on the reasoning found in *McGrath*.[7] But this Court has already held that *McGrath* is wrong—so the superior court was wrong to follow it.

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[6] The superior court viewed BSC's contention that it had no nefarious intent because it was not motivated to undercut competitors as further evidence BSC did not know the prevailing wage laws applied. JA-743–44/Add-9–10. Regardless, BSC's argument lacks merit: the Prevailing Wage Act "specifically provides for civil penalties" even where "a contractor or subcontractor has *no intent* to violate the law." *Lighthouse Masonry*, 466 Mass. at 698–99 (emphasis added).

[7] Apart from citing *Lighthouse Masonry* for the law's strict liability regime and *Donis* for the purpose of distinguishing it, the decision below relied only on *McGrath* and cases citing *McGrath*. *See* JA-735–45/Add-1–11.

a. *McGrath* disregards the plain language of the Prevailing Wage Act.

In *McGrath*, the district court appellate division held that the prevailing wage statute did not apply where there "ha[d] been no request by the municipality to establish a prevailing rate for contracted work." 2008 WL 5115057 at *2. It reasoned that § 27 of the Prevailing Wage Act "does not describe any duty" that inures to the employer related to "establishing public 'prevailing' wage jobs." *Id.* Rather, *McGrath* said, "[t]he onus is on the public bodies and [DLS]." *Id.*

McGrath misreads the statute. Yes, the duty to *request* a prevailing wage schedule from DLS falls to the agency. Mass. Gen. L. ch. 149 § 27. But the statute also imposes on employers the duty to pay the prevailing wage. *Id.* And it imposes liability on "whoever shall pay less than" the prevailing wage—i.e., the employer. *Id.* So, contrary to *McGrath*'s reasoning, the Prevailing Wage Act *does* impose a duty on employers.

b. In *Donis*, this Court identified *McGrath*'s flaws and rejected its reasoning; it should not now reverse course.

This Court "[is] not bound by *McGrath*." *Donis II*, 95 Mass. App. Ct. at 325 n.11. And this Court has already declined to adopt *McGrath*'s

reasoning, acknowledging that *McGrath* misread § 27 of the Prevailing Wage Act. *Id.*

Donis addressed one of the job-specific provisions of the Act pertaining to vehicle and equipment operators. *See id.* at 318 (quoting Mass. Gen. L. ch. 149 § 27F). In *Donis*, the defendant had waste-collection contracts with various Massachusetts towns. *Id.* at 325. The municipalities failed to obtain annual updates to the wage schedules. *See id.* at 320–21.

The superior court in *Donis* disagreed that the municipalities' failure "relieved" the defendant of any liability: "[c]rediting this argument," the court explained, "effectively would reward the Defendants for being willfully ignorant of the law, a result that the courts historically have been exceedingly reluctant to embrace." *Donis I*, 2015 WL 13631158, at *6 (citing *Commonwealth v. N.Y. Cent. & Hudson River R. Co.*, 202 Mass. 394, 398 (1909)). Instead, a company unsure whether it must pay the prevailing wage has "both the means and the legal obligation to obtain that information . . . to ensure their compliance with the law." *Id.* Failure to do so "'furnishes no ground of justification or defense.'" *Id.* (quoting *N.Y. Cent.*, 202 Mass. at 398).

This Court affirmed. It acknowledged that the prevailing wage laws "put[] the onus on the awarding authority, not the employer, to request the rates from" DLS. *Donis II*, 95 Mass. App. Ct. at 324. But it "conclude[d] that an awarding authority's failure to comply with this requirement does not relieve an employer of its obligation to pay prevailing wages once it has contracted to do so." *Id.* The provision at issue in *Donis* "expressly conditions the legitimacy of a public works contract on the inclusion of 'a stipulation requiring prescribed rates of wages,'" so "regardless of whether the awarding authority concurrently obtains a rate schedule, the employer must pay prevailing wages under § 27F, as stipulated to in the contract." *Id.* (quoting Mass. Gen. L. ch. 149 § 27F).

In so holding, this Court rejected the *Donis* defendant's plea that *McGrath* controlled, pinpointing *McGrath*'s critical flaw:

> The Appellate Division seemed not to have considered that employers are strictly liable under the prevailing wage law, or that § 27 provides that "[t]he general contractor shall annually obtain updated rates from the public official or public body and no contractor [*sic*] or subcontractor shall pay less than the rates so established."
>
> [*Id.* at 325 n.11 (quoting Mass. Gen. L. ch. 149 § 27).]

The Supreme Judicial Court declined to upset this Court's ruling on the prevailing-wage-law claims. *See Donis v. Am. Waste Servs., LLC* ("*Donis III*"), 483 Mass. 1106 (2019) (granting appellate review "limited to" other issues).

In *Donis II*, then, this Court (with the Supreme Judicial Court's blessing) has already refused to excuse an employer's failure to pay the prevailing wage just because an agency did not provide a prevailing wage schedule. It ought not do so here, either. *Donis II*, therefore, requires rejecting *McGrath*'s and the decision below's errant reasoning.

3. Applying this Court's teachings in *Donis*, rather than the already-rejected *McGrath* case, compels reversal.

Section 27 of the Prevailing Wage Act's plain language imposes strict liability, as this Court has already found. *Donis II*, 95 Mass. App. Ct. at 325 n.11. That strict-liability regime makes for a very straightforward rule: if an employer does not pay its laborers the prevailing wage for qualifying work—for *any* reason—it has violated the law and must make its workers whole.

BSC admits that it "did not pay Mr. Metcalf and Mr. Theurer the prevailing wage for their work . . . ." JA-43. Instead, it paid Mr. Metcalf less than 40% of the prevailing wage, and Mr. Theurer less than a third.

JA-432; JA-667. Whatever BSC's reason for depriving its employees of a lawful wage, the lower court should have denied summary judgment on these facts. Because the decision below instead credited BSC's reasons for failing to pay the prevailing wage to dismiss Mr. Metcalf and Mr. Theurer's claims, this Court should reverse.

B. The terms of a privately negotiated agreement—even one between a state agency and a company—cannot override the Prevailing Wage Act's requirements.

The decision below focused on the fact that the BSC-MassDOT contracts did not mention the prevailing wage laws. That led the superior court to put *Donis* aside because, the court reasoned, *Donis*' reached only those circumstances where the employer "has agreed" be bound by the Prevailing Wage Act. JA-742/Add-8 (citing *Donis II*, 95 Mass. App. Ct. at 324–25)) (emphasis removed). This reasoning betrays (at least) three flaws: (1) it allows agencies and employers to contract away their legal obligations to workers; (2) it draws an artificial, and irrelevant, distinction between two provisions of the Prevailing Wage Act; and (3) it overlooks BSC's agreement to be bound by the prevailing wage laws.

1. State law, not the terms of a contract, governs BSC's obligations to pay a prevailing wage.

A contract's silence about a specific law does not mean that the law does not apply. "[T]he laws which subsist at the time and place of the making of a contract . . . enter into and form part of it, as if they were expressly referred to or incorporated in its terms." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.17 (1977) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429–30 (1934)).

At the same time, contracting parties cannot moot laws by which they are bound. Legislative enactments "cannot be overridden by" a private contract. *Nat'l Ass'n Gov't Employees v. Commonwealth*, 419 Mass. 448, 453 (1995) (addressing collective bargaining agreement). So "[o]ne whose rights . . . are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). "[C]ourts have long refused to give effect to" contracts purporting to waive a law's applicability where doing so "would do violence to the public policy underlying the legislative enactment." *Spence v. Reeder*, 382 Mass. 398, 413 (1981) (rejecting waiver of a wage-related law). That is because "their uniform application for the protection of all citizens alike is

desirable." *Washington Nat'l Bank v. Williams*, 188 Mass. 103, 107 (1905).

Massachusetts's laws protecting employees against unfair wage practices are one such example. *Cf.* Mass. Gen. L. ch. 149 § 148 ("No person shall by a special contract with an employee or by any other means exempt himself [or herself] from [the Wage Act]."). Parties to a municipal or government contract "may not negotiate to avoid complying with laws of general applicability." *Cambridge*, 410 Mass. at 173.

The decision below is incompatible with this clear proscription. It reasoned that BSC did not violate the terms of the BSC-MassDOT contracts, so it could not "be held liable . . . *as a matter of contract*," even if its conduct violated the prevailing wage law. JA-739/Add-5 (emphasis added). This reasoning transforms BSC's and MassDOT's failure to comply with the statute into a basis to acquit BSC. It invites employers to avoid complying with the prevailing wage laws by pointing to their own violation of the law as exonerating evidence. Left to stand, the outcome the decision below would "destroy the very purpose of the statute." *Spence*, 382 Mass. at 413.

2. Section 27 of the Prevailing Wage Act binds BSC whether BSC agrees it does or not.

The decision below did not follow *Donis* because that case dealt with "a different section from the Act than the one at issue here." JA-741/Add-7. It focused on the fact that § 27F (at issue in *Donis*) requires an employer to "stipulate[] to compliance" with the prevailing wage laws, while § 27 (at issue here) does not. JA-742–43/Add-8–9.

But both provisions accomplish the same thing—obligating an employer to pay the prevailing wage—using different language. Section 27F requires employers to stipulate to paying the prevailing wage for eligible work and then adhere to that stipulation. Section 27 does not mention a stipulation. It simply requires employers to pay the prevailing wage for eligible work, full stop: "no contractor or subcontractor shall pay less." Mass. Gen. L. ch. 149 § 27. If there exists any basis to distinguish the effects of § 27 and § 27F, the former (i.e., the one at issue here) is more unequivocal: employers must pay the prevailing wage whether they agree to or not.

It does not matter what a given public works contract says; the language of the Prevailing Wage Act, not the private agreement, controls an employer's obligations to its workers. The decision below's reasons for

distinguishing *Donis*, therefore, fall apart. Section 27 requires employers to pay the prevailing wage for eligible work, even if a contract is silent on the issue.

But as it turns out, the BSC-MassDOT contracts were not.

3. The BSC-MassDOT contracts explicitly required compliance with the prevailing wage laws.

There is evidence from which a jury would likely find that BSC agreed (at MassDOT's insistence) to comply with the prevailing wage laws. Having thus "contracted to do so," BSC had an "obligation to pay prevailing wages." *Donis II*, 95 Mass. App. Ct. at 324. That evidence is as follows.

The BSC-MassDOT contracts used Massachusetts's standard-form contract. JA-225; JA-299. That form incorporates by reference a set of "Contractor Certifications," including an agreement to comply with Massachusetts General Laws chapter 149 and, explicitly, all "prevailing wage programs and policies." JA-134, JA-136–37.

BSC admitted as much in the margins of its summary judgment motion; though the form contract's reference to the prevailing wage laws is hardly "generic[]," as BSC claimed. *See* JA-45. The form requires any signatory to certify "under pains and penalties of perjury" to comply with

the Contractor Certifications. JA-134; JA-225; JA-299. This is so even if (as with the BSC-MassDOT contracts, *see generally* JA-222–94; JA-295–381) the signatories omitted the certifications from the final contract package. The contracts "incorporated by reference" those certifications even "if not attached" to the final contract. JA-225; JA-299.

BSC knew that these provisions controlled before it ever signed the BSC-MassDOT contracts. When MassDOT published its request for response (announcing its need for a surveying contractor), it required any applicants to include the standard-form contract with their proposal. JA-69. It also advised applicants they would have to agree to certain "special provisions." JA-74. One of those provisions stated that, if anything in the final contract "conflict[ed]" with the standard-form contract, "the provisions contained in the standard contract shall prevail." *Id.*

BSC accepted these terms. When BSC responded to MassDOT's request for responses, its proposal included the standard-form contract—along with its contractor certifications requiring compliance with the prevailing wage laws—and the special provisions. JA-137; JA-201. The final BSC-MassDOT contracts both contained the special provisions. Both stated:

> [i]n the event of conflicts between any parts of this Contract and the COMMONWEALTH OF MASSACHUSETTS STANDARD CONTRACT (STANDARD CONTRACT), the provisions contained in the STANDARD CONTRACT shall prevail.
>
> [JA-255; JA-332.]

In both contracts, therefore, the certification requiring BSC to comply with the prevailing wage laws overrode any wage provisions to the contrary. And BSC's executives signed these contracts, each time agreeing under penalty of perjury to comply with the prevailing wage laws. JA-225; JA-299.

The superior court overlooked this evidence. Instead, the decision below focused exclusively on the fact that the BSC-MassDOT contracts omitted a prevailing wage rate schedule, *see* JA-739/Add-5, even though Mr. Metcalf and Mr. Theurer alerted the Court that they disputed that this failure was "dispositive" of whether "the prevailing wage was not due to be paid" to them, JA-662–63.

And BSC tried to downplay this evidence. In its summary judgment brief, BSC asserted in the margins that the hierarchy of precedence in the standard-form contract meant that the BSC-MassDOT contracts' terms (meaning BSC's sub-legal wages) trumped the standard-form

contract. JA-45 (citing JA-134). The special provisions language in the contract, however, belie that assertion. At best, BSC reveals a factual dispute, which should have led to the denial of its summary judgment motion.

But viewing the BSC-MassDOT contracts in the light most favorable to Mr. Metcalf and Mr. Theurer, BSC "agreed" to be bound by the prevailing wage laws, just as the defendant in *Donis* did. 95 Mass. App. Ct. at 324–25. So even accepting the lower court's unduly narrow reading of *Donis* and its focus on the contracts' terms over the statute's requirements, BSC should face liability for failing to pay Mr. Metcalf and Mr. Theurer a prevailing wage. By overlooking the plain terms of the BSC-MassDOT contracts, the decision below failed to "view the evidence in the light most favorable to the parties opposing summary judgment," which constitutes reversible error. *LeBlanc*, 463 Mass. at 318.

C. The decision below, if left to stand, strips Prevailing Wage Act victims of the remedy afforded by the legislature.

It is a core precept of statutory interpretation that "[i]f a sensible construction" of a statute "is available," the court "shall not construe a statute to make a nullity of pertinent provisions . . . ." *Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375–76 (2000). This

especially holds true when the pertinent provision provides a private right of action. Courts are loathe to leave victims of statutory violations "without remed[y]." *Commonwealth v. Unitt*, 91 Mass. App. Ct. 93, 98 n.17 (2017). That is why, in *Coastal Oil of New England v. Citizens Fuels Corp.*, this Court reversed a ruling that nullified a statutory right of action: an aggrieved party "should not have been left without a remedy." 38 Mass. App. Ct. 26, 32 (1995).

Courts around the country agree, and with good reason. Adopting an interpretation that "could leave severely injured parties without a remedy" would "encourage tortfeasors to" commit wrongdoing "knowing they are safe from recourse." *Kelly v. Whiting*, 17 Ohio St. 3d 254, 254 (1985) (Celebrese, J., concurring). Where a reading of a statute would "render an injured victim devoid of adequate protection"—and where that lack of protection "is contrary to the legislative intent envisaged by" a statute—such a reading is "contrary to the legislative intent." *Motor Veh. Acc. Indem. Corp. v. Continental Nat'l Am. Group Co.*, 35 N.Y.2d 260, 264 (1974).

The superior court's reasoning in this case suffers from precisely that infirmity. The Prevailing Wage Act grants a private right of action

against those who violate it. Mass Gen. L. ch. 149 § 27. The statute does not say whom an employee may sue—the state agency or the employer. But the lower court gave a daunting answer: no one.

The superior court culled Mr. Metcalf and Mr. Theurer's claims against MassDOT at the pleadings stage.[8] JA-30. At summary judgment, it eliminated their claims against BSC, too. *See* JA-744/Add-10. Together, these decisions leave employees with no remedy unless an agency and an employer deign to provide one by attaching a wage schedule to a contract.

This outcome cannot be squared with either public policy or the language of the Prevailing Wage Act itself. By reading a lack-of-notice defense into a strict-liability statute that provides no such defense, the decision leaves laborers like Mr. Metcalf and Mr. Theurer without adequate protection, even though the law says they should have a cause of action. It leaves employees with no way to vindicate their rights, and no other party able and inclined to vindicate their rights for them.

Worse, it leaves to the very parties the law should constrain the discretion of whether the law will apply. Both the public agency (with its constrained budget) and the employer (with its profit margins) each have

[8] The appellants do not challenge this ruling on appeal.

independent motives to pay the lowest wages possible. To save money at the expense of laborers, the agency and employer need only omit a prevailing wage schedule from a contract for constructing public works. Then they would be free to underpay workers and stay "safe from recourse." *Kelly*, 17 Ohio St. 3d at 254 (Celebrese, J., concurring).

The Prevailing Wage Law is binding, not a mere suggestion that agencies and employers can opt out of. Put simply, there must be a remedy where the statute contemplates one. The decision below's contrary conclusion eviscerates the worker-protective public policy underpinning the Prevailing Wage Act. *Cf. Mullally*, 452 Mass. at 532. This Court should not countenance the gutting of the Prevailing Wage Act.

D. There exist triable issues of fact that warrant remand after correcting the legal errors in the decision below.

Applying the proper strict liability standard under the Prevailing Wage Act, there remain disputed issues of fact that a jury must resolve. BSC has conceded as much. It argued below that "not *all*" of Mr. Metcalf and Mr. Theurer's "work qualified for payment of the prevailing wage." JA-46 (emphasis added). That means some did. And it acknowledged that

the question of which work qualified "is a fact-intensive process," *id.*—precisely the sort of issue that cannot be resolved as a matter of law.

The existence of complex factual disputes, even multiple complex factual disputes, provides no valid basis to seek (or grant or uphold) summary judgment. *Contra id.* Quite the opposite. The "fact intensive" nature of the questions in this case should have compelled denial of BSC's motion, and now compels reversal of the superior court's judgment. *See O'Reilly & Assocs., Inc. v. Davis Park Commercial One, LLC*, 64 Mass. App. Ct. 1103, 2005 WL 1844433, at *3 (2005). But fortunately, DLS provides clear guidance on how to resolve this case on the merits.

1. Courts and juries must defer to the Commissioner of DLS when resolving factual disputes regarding what surveying work requires paying the prevailing wage.

In light of the Prevailing Wage Act's "broad delegation to the [DLS] commissioner of 'the details of how the prevailing wage law should be applied,'" courts must defer to the commissioner's interpretations of the Act's scope. *Niles v. Huntington Controls, Inc.*, 92 Mass. App. Ct. 15, 22 (2017) (quoting *Teamsters Joint Council No. 10 v. Director, Dept. of Labor & Workforce Dev.*, 447 Mass. 100, 109 (2006)). Unless the commissioner adopts an interpretation "contrary to the plain language of the statutes

or their underlying purposes," it "is entitled to deference." *Mullally*, 452 Mass. at 533. Ignoring the commissioner's determinations is reversible error. *See Niles*, 92 Mass. App. Ct. at 22; *Teamsters*, 447 Mass. at 109.

Under "DLS' longstanding administrative interpretation" of the prevailing wage laws, the agency has explained, "the work of field engineers (surveying) performed under construction contracts let by awarding authorities . . . is 'construction' work . . . and, therefore, is subject to the prevailing wage law." JA-582–83. In a 1996 opinion letter, DLS explained that this includes individuals engaged as field engineer "Instrument Person[s]" and "Chief[s] of Party," JA-578–79. DLS has also explained that it focuses on the type of work done, rather than formalities such as the title assigned to the worker, to determine whether the work "directly and substantially aid[s] the construction process itself." JA-580–81. If so, the work "qualif[ies] as engaging in the work of construction." *Id.* Thus, DLS has found that "construction layout activities," such as "establishing . . . benchmarks for . . . right of way clearances, grades and elevations" and "providing reference points" for other tradesmen all qualify as work subject to the prevailing wage. JA-582–83.

There exists evidence from which a jury could conclude that Mr. Metcalf and Mr. Theurer performed this work. Their on-site MassDOT supervisor testified that they provided reference points for on-site tradesmen and established benchmarks for right-of-way clearances. JA-612. And a contractor on several of the sites where the appellants worked swore to the same. JA-572. Mr. Metcalf and Mr. Theurer often did this work at the behest of the general contractor. *See* JA-463, JA-465; JA-548; JA-571–72; JA-612. BSC's corporate representative could not dispute, and instead deferred to, these on-site personnel's opinions. JA-651, JA-653. Out of roughly three dozen projects on which Mr. Metcalf and Mr. Theurer worked, almost two-thirds involved construction lay-out activities that qualified for the prevailing wage. JA-594–609. Sometimes, they were on the same site as other survey crews doing the same work. Those crews received the prevailing wage; Mr. Metcalf and Mr. Theurer did not. JA-606. And when Mr. Theurer left BSC (where he did not make the prevailing wage) and joined another company, he "ended up working on the same exact project doing the same exact work and [he] was making the prevailing wage." JA-535. From this evidence, a reasonable jury could

conclude that Mr. Metcalf and Mr. Theurer performed qualifying work, for which BSC did not pay the prevailing wage.

2. A provision of Massachusetts's capital asset management laws does not imply the repeal the prevailing wage laws.

Below, BSC argued that the prevailing wage laws could not apply to the BSC-MassDOT contracts because a different statute, Massachusetts General Law Chapter 7C § 58, applied. JA-45. Section 58—which did not become effective until after BSC signed the first of the two BSC-MassDOT contracts—does not address wages at all. Instead, the provision addresses "Capital Asset Management and Maintenance," *see generally* Mass. Gen. L. ch. 7C (title).

BSC couched the applicability of the two statutes as an either/or proposition, betraying its presumption that the capital asset management law repealed the Prevailing Wage Act by implication, at least whenever an agency describes public works labor as "designers' services." Mass. Gen. L. Ch. 7C § 58(e)(1). The superior court signaled its sympathy to this argument,[9] but "d[id] not reach" the issue. JA-744/Add-

[9] It credited factual assertions that the BSC-MassDOT contracts were not "low bid" contracts, that MassDOT's announcement of the 2014

10. Regardless, BSC's argument does not provide an independent basis to affirm dismissal.

A "[r]epeal of a statutory enactment by implication is disfavored under our jurisprudence." *Town of Concord v. Water Dept. of Littleton*, 487 Mass. 56, 60 (2021). Courts apply a "strong presumption against implied repeals of a prior law." *Dartmouth v. Greater New Bedford Reg. Voc. Tech. High Sch. Dist.*, 461 Mass. 366, 374–75 (2012). The party pressing (or suggesting) an implied repeal argument can overcome that presumption only by showing that the earlier statute "is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand."[10] *Doherty v. Commissioner of Admin.*, 349 Mass. 687, 690 (1965). In the absence of "express words" of repeal, courts "prefer to give meaning to both enactments" by "strictly constru[ing]" the latter statute "to effectuate its consistent operation with previous legislation." *Commonwealth v. Hayes*, 372 Mass. 505, 512 (1977) (citing *Colt v. Fradkin*, 361 Mass. 447, 449–50 (1972)).

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contract opportunity cited § 58, and that MassDOT—which has the same motivations as BSC here—thought the contracts were "consistent with" § 58. *See* JA-736–37/Add-2–3, JA-743/Add-9.

[10] BSC did not attempt to meet this standard in its briefs below.

Courts assessing whether one statute impliedly repeals another look to whether the earlier statute "is within" the "scope" of the newer statute and, if so, whether it is "'repugnant to and inconsistent with'" the newer law. *Town of Concord*, 487 Mass. at 62 (quoting *Doherty*, 349 Mass. at 690). BSC's presumption that § 58 impliedly repeals the Prevailing Wage Act fails at both steps.

First, the Prevailing Wage Act does not fall "within the scope of" § 58. *Id.* Section 58 has nothing to do with the justness of wages paid to those constructing public works. *Cf. Mullally*, 452 Mass. at 532. Instead, it focuses on capital asset management, ensuring that agencies select "designers" of "public building projects" "on the basis of qualifications." Mass. Gen. L. ch. 7C §§ 44(a), 58(e)(1). This provision's primary purpose is to "ensure that the commonwealth receives the highest quality design services for all its public building projects[.]" Mass. Gen. L. ch. 7C § 44. That is, it reflects the simple recognition that there are some jobs—like designing buildings or bridges that do not fall down—that the Commonwealth should not relegate to the lowest bidder.

Second, the Prevailing Wage Act's concern for worker pay is not inconsistent with, let alone repugnant to, the goals of § 58. BSC would

have the courts believe otherwise, because under § 58, wage negotiations occur after an agency selects a company for the contract. JA-45 (citing Mass. Gen. L. ch. 7C § 58(e)(1)). But there is no inconsistency here: the two provisions "can be harmonized." *Town of Concord*, 487 Mass. at 62. Section 58 provides that "[a]n agency may solicit or use pricing policies and proposals or other pricing information to determine consultant compensation only after the agency has selected a firm and initiated negotiations with the selected firm." Mass. Gen. L. ch. 7C § 58(e)(1). An agency could "select[] a firm" like BSC based upon its qualifications, and after doing so, "use" prevailing wage rate schedules supplied by DLS "to determine . . . compensation." *Id.* That would both ensure that the agency selected a contractor "on the basis of qualifications" *and* that the contractor paid its workers a fair wage.

But MassDOT did not do this: it asked BSC what wages it wanted to pay, and accepted BSC's answer. JA-40, JA-42; JA-661, JA-665. Nothing in the capital asset management statute required MassDOT to "solicit" "pricing . . . proposals" only from BSC—it could have sought and obtained prevailing wage rate schedules from DLS and used that information to "determine . . . compensation." Mass. Gen. L. § 58. And

nothing in the law required BSC to suggest wages less than the prevailing wage (especially since MassDOT did not award the contracts on a low-bid basis). BSC could have asked for a prevailing wage schedule, *Donis II*, 95 Mass. App. Ct. at 325, and then submitted those prevailing wages when asked by MassDOT. But it opted not to. JA-661–62, JA-665.

The Prevailing Wage Act is "not within" any preclusive "scope" of the capital asset management law—rather, it can and should be read as "consistent with it." *Town of Concord*, 487 Mass. at 63. Thus, § 58 did not work an implied repeal of the prevailing wage laws, and BSC cannot escape liability for underpaying the appellants by pointing to that statute—either here or on remand.

VII. CONCLUSION

The decision credited BSC's ignorance of the law when it should have imposed strict liability. It relied on a wrongly decided, non-binding case for a rule that this Court has already rejected and nullified the Prevailing Wage Law's private right of action. It overlooked evidence that BSC agreed to follow the prevailing wage laws, and bypassed factual disputes that require a jury to resolve. This decision, if left to stand, provides budget-constrained agencies and profit-focused employers with

a loophole in the prevailing wage laws big enough to drive a backhoe through.

For all the foregoing reasons, this Court should reverse and remand for trial to ensure that laborers like Mr. Metcalf and Mr. Theurer receive the wages to which they are legally entitled.[11]

Dated: December 5, 2022

Respectfully Submitted,

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[11] The appellants respectfully request an award of attorney's fees and costs associated with this appeal. Mass R. App. P. 26(a).

Counsel for the Appellants Russell Metcalf and Steven Theurer

CERTIFICATE OF COMPLIANCE

This brief complies with Massachusetts Rules of Appellate Procedure 16(a)(13), 16(e), 18, and 21. It also complies with all requirements of Massachusetts Rule of Appellate Procedure 20 because it contains 9,689 words (including all headings, footnotes, and quotations in the introduction and those portions of the document enumerated in Massachusetts Rule of Appellate Procedure 16(a)(5)-(11)) set forth in Century Schoolbook, size 14.

Kristie A. LaSalle (BBO #692891)
Counsel for Appellants

December 5, 2022

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, I electronically filed the foregoing brief with the Clerk of the Court of Appeals using the Massachusetts Courts' eFile system. All participants are registered users of the e-File system and will be served by the electronic system:

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO. 1784CV02963-B

RUSSELL METCALF and
STEVEN THEURER,

vs.

BSC GROUP, INC. et al., and
MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION, third party defendant

NOTICE SENT (3)
04/29/2022

(sc)

MEMORANDUM OF DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANT BSC GROUP, INC. (Paper 22) AND THIRD PARTY DEFENDANT MASSACHUSETTS DEPARTMENT OF TRANSPORTATION (Paper 28)

Plaintiffs Russell Metcalf and Steven Theurer allege that Defendants BSC Group, Inc. and BSC Companies, Inc. (collectively, BSC) should have, but failed to, pay them the prevailing wage pursuant to G. L. c. 149, § 27, for work they performed for BSC under two contracts between BSC and Third-Party Defendant Massachusetts Department of Transportation (MassDOT). Plaintiffs have brought a claim for violation of G. L. c. 149, § 27 against BSC and Defendant David Hayes, BSC Group, Inc's president from 2015 to 2018. BSC and Hayes bring third-party claims against MassDOT, seeking to hold it liable under theories of implied contractual indemnity and/or unjust enrichment, should Plaintiffs prevail.

The matter is now before the court on motions for summary judgment brought by BSC and Hayes against Plaintiffs (Paper 22), and by MassDOT against BSC (Paper 28). Plaintiffs concede they cannot recover against Hayes, Memorandum in Opposition, Paper 30, at page 15,[1]

[1] Donis v. American Waste Services, LLC, 485 Mass. 257, 263, 266 and n. 10 (2020). Plaintiffs' Opposition briefs for both Motions unsurprisingly appear identical, as MassDOT's primary argument is that it cannot be held liable because BSC cannot be held liable.

but otherwise oppose both motions. BSC and Hayes oppose MassDOT's Motion to the extent they do not prevail on their own Motion. BSC's Limited Opposition (Paper 31), at 1-2. Following hearing on March 9, 2022, and for the reasons stated below, both Motions are **ALLOWED**.[2]

Undisputed Record Facts[3]

On or about June 13, 2011, MassDOT released RFR #201106S1EFS (2011 RFR), which sought proposals from qualified parties to provide engineering field surveying services for MassDOT on an on-call basis. Statement of Consolidated Facts on BSC's and Hayes's Motion (BSC Facts) 1. The 2011 RFR was bid on a qualifications, and not a "low bid," basis. Bidders did not submit information regarding their costs to perform the contract, but rather only their qualifications, with costs to be determined after award of the contract. BSC Facts 3. The RFR contained no information about the rate to be paid any bidder's employees. BSC Facts 4.

BSC bid for and was awarded the contract, after which it proceeded to negotiate the terms and to provide information to MassDOT, to determine the amount that MassDOT would pay BSC for its work. BSC Facts 5. The final contract (2012 Contract) did not incorporate a prevailing wage rate fee schedule. BSC Facts 6, 12. Article VI of the contract set regular and overtime compensation on a not-to-exceed basis per "unit" of surveyors. BSC Facts 10-11. The original length term of the 2012 contract ran from January 1, 2012 to December 31, 2013, but it was extended through December 31, 2014. BSC Facts 13.

On January 1, 2013 (thus, in the middle of the 2012 Contract term), G. L. c. 7C, § 58 addressing work performed by architects, engineers, and related professional firms became

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[2] BSC's and Hayes' Motion to Strike the Affidavit of Wayne Taylor (Paper 26) will be DENIED as moot.

[3] The court does not reference the Statement of Undisputed Material Facts submitted by MassDOT. as it is clear from careful review of all pleadings that MassDOT does not dispute these facts.

effective.[4] On or about June 30, 2014, MassDOT released RFR #201406S1EFS (2014 RFR) pursuant to that statute. BSC Facts 18, 21. The 2014 RFR sought proposals from qualified parties to provide engineering field surveying services for MassDOT on an on-call basis for the 2015-2017 time period. BSC Facts 18. As with the 2011 RFR, the 2014 RFR was bid on a qualifications, and not a low-bid, basis. BSC Facts 20. BSC bid for and was awarded the contract (2015 Contract), after which it proceeded to negotiate the terms and to provide information to MassDOT to determine the amount MassDOT would pay BSC for its work. BSC Facts 22. The 2015 Contract did not incorporate a prevailing wage rate fee schedule. BSC Facts 25, 29. Article VI of the Contract set regular and overtime compensation on a not-to-exceed basis per unit of surveyors. BSC Facts 27-28.

From January 2012 to June 2017, BSC employed Plaintiff Metcalf as a Survey Party Crew Chief. BSC Facts 30. From April 2013 to December 2016, BSC employed Plaintiff Theurer as a Survey Instrument Operator. BSC Facts 31. Thus both men performed land surveying work on behalf of BSC for MassDOT pursuant to the 2012 and 2015 Contracts. BSC Facts 32. BSC paid the Plaintiffs the regular wage rate, rather than a prevailing wage rate. BSC Facts 35. MassDOT maintains the RFP's, the Contracts, and the wages were all lawfully issued pursuant to professional services contracts consistent with G. L. c. 7C, § 58, that is, the Contracts are not public construction contracts subject to G.L. c. 149 section 27. DOT's Memorandum in Support, (Paper 29), at pages 8-11.

[4] That statute provides: "An agency shall select architects, engineers and related professional firms on the basis of qualifications for the type of professional services required, and on technical proposals, if submitted. An agency may solicit or use pricing policies and proposals or other pricing information to determine consultant compensation only after the agency has selected a firm and initiated negotiations with the selected firm." G. L. c. 7C, § 58(e)(1).

Discussion[5]

The Prevailing Wage Act, G.L. c. 149 section 26 (the Act) "govern[s] the setting and payment of wages on public works projects." Donis, 485 Mass. at 263, quoting McCarty's Case, 445 Mass. 361, 370 (2005)(Sosman, J., concurring). It is a strict lability statute. Lighthouse Masonry, Inc. v. Division of Admin. Law Appeals, 466 Mass. 692, 698-699 (2013). The Act "specifically provides for civil penalties to be imposed where a contractor or subcontractor has no intent to violate the law. See G.L. c. 149, § 27C(b)(2). . . . [A]n employer's reason for the violation is irrelevant; the fact of violation is sufficient for a penalty to issue." Id. at 699.

The Act's primary goal is "to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry." Donis, 485 Mass. at 263, quoting Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526, 532 (2008). Ensuring such parity "not only protects an employee's interest in receiving a wage commensurate with his or her labor, it also prevents a contractor from 'offer[ing] its services for less than what is customarily charged by its competitors for nonpublic works contracts.'" Id. at 263-264, quoting Mullally, 452 Mass. at 533.

Accordingly, the Act provides in relevant part that the "rate per hour of the wages paid to . . . laborers in the construction of public works shall not be less than the rate or rates of wages

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[5] There is no dispute about the standard of review. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Helfman v. Northeastern Univ., 485 Mass. 308, 314 (2020), quoting Godfrey v. Globe Newspaper Co., 457 Mass. 113, 118-119 (2010). The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue. Scholz v. Delp, 473 Mass. 242, 249 (2015). Record evidence and all reasonable inferences drawn therefrom are construed in favor of the party opposing the motion. Borden Chem., Inc. v. Jahn Foundry Corp., 64 Mass. App. Ct. 638, 645 (2005). However, "[b]are assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment." Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp., 469 Mass. 800, 804 (2014). The court considers admissible record evidence as presented by any pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. O'Connor v. Redstone, 452 Mass. 537, 550 (2008).

to be determined by the [Director of the Department of Labor Standards] as hereinafter provided." G. L. c. 149, § 26. Section 27 of the Act provides:

> "Prior to awarding a contract for the construction of public works, . . . [the] public official or public body [whose duty it shall be to cause public works to be constructed] shall submit to the [Director] a list of the jobs upon which ... laborers are to be employed, and shall request the [Director] to determine the rate of wages to be paid on each job. Each year after the awarding of the contract, the public official or public body shall submit to the [Director] a list of the jobs upon which ... laborers are to be employed and shall request that the [Director] update the determination of the rate of wages to be paid on each job. The general contractor shall annually obtain updated rates from the public official or public body and no contactor [sic] or subcontractor shall pay less than the rates so established. . . . The [Director], subject to the provisions of section twenty-six, shall proceed forthwith to determine the same, and furnish said official or public body with a schedule of such rate or rates of wages as soon as said determination shall have been made. In advertising or calling for bids for said works, the awarding official or public body shall incorporate said schedule in the advertisement or call for bids by an appropriate reference thereto, and shall furnish a copy of said schedule, without cost, to any person requesting the same. Said schedule shall be made a part of the contract for said works and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract."

G. L. c. 149, § 27 (emphasis supplied).

In this case it is undisputed that neither the Director nor MassDOT set a prevailing wage for purposes of the 2012 and 2015 Contracts, and that the Contracts do not include a schedule of prevailing wage rates. BSC argues that as a result it cannot be held liable for violation of Section 27 of the Act, as a matter of contract. The court agrees.

In a much-cited case before the Appellate Division of the Massachusetts District Court, the court affirmed summary judgment in favor of the defendant employer (ACT, Inc.) on this very basis, explaining:

> "Section 27 of G.L. c. 149 spells out the duties of parties involved in the procedure establishing public "prevailing" wage jobs. Significantly, the statute does not describe any duty in that process on such an employer such as ACT. The onus is on the public bodies and the Department of Labor ("DOL"). Before a public body (here, a municipal customer) awards a public works contract, it must submit to DOL a list of the jobs upon which workers such as mechanics and laborers are to be employed and to request DOL to determine the rate of wages to be paid on each job. Id. DOL, pursuant to G.L. c. 149,

> § 26, must then determine those wages and furnish the public body with a schedule of them, which schedule must appear in advertising or bid solicitations, and is made part of any project contract. Id. § 27. The uncontroverted evidence here is that none of ACT's municipal customers adhered to any aspect of these statutory mandates."

McGrath v. ACT, Inc., No. 08–ADMS–40018, 2008 WL 5115057, at *2 (Mass. App. Div. Nov. 25, 2008)(Williams, P.J.)(emphasis supplied).

Several state and federal trial courts in Massachusetts -- including one Superior Court case involving a contract with MassDOT very similar to the Contracts here -- have found the analysis in McGrath to be persuasive. Bronske v. Alpha Surveying and Engineering, Inc., NOCV2015-00948, slip. op. at 8-9 & n.4 (Mass. Super. April 11, 2016)(Kelley, J.)(citing McGrath in dismissing Prevailing Wage Act claim filed by field engineer/survey party chief employed under MassDOT contract); Andrews v. Weatherproofing Techs., Inc., 277 F. Supp. 3d 141, 153 (D. Mass. 2017)(Hillman, J.)(citing McGrath, and granting employer summary judgment on Prevailing Wage Act claim, because "[w]here there has been no request by the public body/municipality to set a prevailing wage rate for contracted work, the [Act] does not apply"); Tomei v. Corix Utilities (U.S.) Inc., Civ. A. No. 07-cv-11928DPW, 2009 WL 2982775, at *12 (D. Mass. Sept. 14, 2009)(Woodlock, J.)(citing McGrath for the proposition that "where a municipality fails even to request a prevailing wage rate schedule from the DOL, or the DOL fails to furnish such a schedule, there is no duty on a private employer to solicit or otherwise establish prevailing wage rates on its own."); Andrews v. First Student, Inc., Civ. A. No. 10-11053-RGS, 2011 WL 3794046, at *4 (D. Mass. Aug. 26, 2011)(Stearns, J.)(citing Tomei in discussion of G. L. 71, § 7A, which contains language analogous to G. L. c. 149, § 27).

I also find McGrath's reasoning persuasive, and conclude the undisputed facts here: that MassDOT never sought a prevailing wage rate determination from the Director in connection with the 2011 and 2014 RFRs; and that no prevailing wage rate schedule appeared in the 2012

and 2015 Contracts at any time, precludes recovery by Plaintiffs. Plaintiffs rely in their Opposition(s) almost exclusively on the Appeals Court decision in Donis v. American Waste Servs., LLC, 95 Mass. App. Ct. 317 (2019), S.C., 485 Mass. 257 (2020), arguing that the decision's reference to the "strict liability" component of the Act requires rejection of both BSC's argument and the reasoning in McGrath. This contention is unavailing.

The plaintiffs in Donis were employees of American Waste Services, LLC (AWS) and worked on waste disposal trucks. 95 Mass. App. Ct., at 319. AWS employed them under contracts with several municipalities, each of which required AWS to comply with the Act, including G. L. c. 149, § 27F, a different section from the Act than the one at issue here. Id. Section 27F applies to public works contracts involving the use of "trucks, vehicles or equipment" and provides:

> No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works by the commonwealth or by a county, city, town or district, shall be entered into or given by any public official or public body unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the [Director], to be paid to the operators of said trucks, vehicles or equipment. Any such agreement, order or requisition which does not contain said stipulation shall be invalid, and no payment shall be made thereunder. Said rates of wages shall be requested of said [Director] by said public official or public body, and shall be furnished by the [Director] in a schedule containing the classifications of jobs, and the rate of wages to be paid for each job.

G. L. c. 149, § 27F. Unlike in this case, the original contracts in Donis were accompanied by a prevailing wage rate schedule. However, the municipalities did not consistently request that the Department of Labor Standards issue an updated schedule when those contracts were renewed or extended. Donis, 95 Mass. App. Ct. at 320. Consequently, some of the renewed and extended contracts were accompanied by a concurrently issued rate determination, but others were not. Id.

at 320-321. Plaintiffs sued under Section 27F, claiming they had not been paid the prevailing wage, and prevailed pursuant to a stipulation in the trial court. Id. at 321.

On appeal, the defendants argued, among other things, that no liability could attach where the municipalities failed to obtain a wage rate schedule concurrently with execution of the contracts. Id. at 322. Based on the language of Section 27F, the Appeals Court disagreed, explaining:

> "[Section] 27F puts the onus on the awarding authority, and not the employer, to request the rates from the department. See G. L. c. 149, § 27F ("Said rates of wages shall be requested of [the department] by said public official or public body ..."). Nonetheless, we conclude that an awarding authority's failure to comply with this requirement does not relieve an employer of its obligation to pay prevailing wages once it has contracted to do so. General Laws c. 149, § 27F, expressly conditions the legitimacy of a public works contract on the inclusion of 'a stipulation requiring prescribed rates of wages, as determined by the [department].' Contracts that do not contain such a stipulation are 'invalid, and no payment shall be made thereunder.' Id. Thus, regardless of whether the awarding authority concurrently obtains a rate schedule, the employer must pay prevailing wages under § 27F as stipulated to in the contract. . . . [T]he purpose of the prevailing wage law . . . is 'to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry.' Mullally, 452 Mass. at 532. Allowing the defendants to avoid their obligation to pay the prevailing wage, to which they stipulated, would contravene this statutory purpose."

Donis, 95 Mass. App. Ct. at 324 (emphasis added).

In so ruling, the Appeals Court rejected the defendants' assertion that such a conclusion was unjust because it would hold them liable "for conduct that was not known to be improper when undertaken." Id. at 324. It found the argument deserving of "little discussion," in part because "an awarding authority's failure to comply with this [rate schedule] requirement does not relieve an employer of its obligation to pay prevailing wages once it has agreed to do so." Id., at 324-325. (emphasis added).

Thus, in each of the contracts at issue in Donis, the employers stipulated to compliance with G.L. c. 149, section 27F, and all the original contracts, and some of the renewed and

extended contracts, contained current rate schedules. Those defendants were clearly put on notice that they were required to pay the current prevailing wage, and could easily have requested a current rate schedule for any renewed or extended contract that omitted one. Id. at 324-325. In footnote 11 of its opinion, the Appeals Court stated that McGrath was "distinguishable because § 27, unlike § 27F, does not require that the contract contain a stipulation mandating prescribed rates of wages." Id. at 325 n. 11.

I rule the Appeals Court's decision in Donis inapplicable to the circumstances here, because the Court's holding was expressly premised on the stipulation language in Section 27F, language not present in Section 27.[6] Moreover, I do not read footnote 11 of the decision to be a wholesale rejection of McGrath. I thus disagree with Plaintiff's argument that "[t]he Donis court rejected the holding in McGrath." Paper 30, at page 11. To read footnote 11 of the Appeals Court decision in that manner would seemingly require every employer to function as an enforcer and guarantor of the government's obligations under the Act. Employers would be held to an independent duty to confirm that a contract is not subject to the Act -- even when the public body awarding the contract has already made that determination – or face liability. Plaintiffs have cited no authority suggesting that the strict liability scheme of the statute extends that far.

To repeat, the Donis circumstances are not present here. The work at issue in this case was never subject to the prevailing wage rate by contract. Indeed, MassDOT signaled in each RFR and in each Contract that the prevailing wage law did not apply. The 2011 and 2014 RFRs each were bid on a qualification, and not a low-bid basis, and they included no information regarding the rate to be paid to any of a bidder's employees. After BSC was awarded each

[6] See also, Rego v. Allied Waste Services of Massachusetts, LLC, 100 Mass. App. Ct. 750, 755 (2022)("It is undisputed that [the defendant employer] agreed to pay its workers the prevailing wage at rates established by the commissioner").

Contract, BSC provided the pay rates for its employees, and MassDOT then calculated the total unit price to be used in that Contract. Article VI of each Contract set regular and overtime compensation on a not- to-exceed basis per unit of surveyors.

Contrary to Plaintiffs' argument, nothing in the record before me supports any inference – reasonable or otherwise – that DOT or the employer manipulated this contracting process to avoid paying the prevailing wage. Cf. Camara v. Attorney General, 458 Mass. 756, 760-761 (2011)(addressing "special contracting," "peculiar to provisions that are not ordinarily found in contracts relating to the same subject matter," pursuant to the Wage Act, G.L. c. 149, section 148, and failure to protect wage earners from employers avoiding compliance with statute).

Accordingly, BSC is entitled to summary judgment on Plaintiffs' prevailing wage claim.

I have also reviewed and respect the parties' rather extensive filings on the question of Plaintiffs' actual work performed under the Contracts, in the context of DOT's position that the Act does not apply to that work at all, because the Contracts were professional services contracts consistent with G.L. c. 7C, section 58. See also, Donis, 485 Mass. at 262 ("The Prevailing Wage Act applies only to workers employed on certain public works projects."). However, I do not reach that dispute, because DOT cannot be held liable, for multiple other reasons.[7]

First, it is the law of this case that DOT possesses sovereign immunity from liability to the Plaintiffs, because the Act does not provide a waiver. Paper 16, at pages 5-6 (Leighton, J., 11/13/18). Second, the court is aware of no authority imposing liability on the public official or public body for a violation of the statute, and Plaintiffs provide none. Third, even were BSC to

[7] See also, Andrews, 277 F.Supp. at 153-154 ("It is not necessary for the Court to address whether the WTI misclassified the work performed by the Plaintiffs in order to avoid paying them prevailing wages on public works contracts. Simply put, there is no evidence in the record to support a finding that either Plaintiff was not paid prevailing wages on any job to which (sic) for which a prevailing wage was set."). (emphasis in original).

be held liable, its two remaining claims against DOT for which there is no sovereign immunity[8] -- implied contractual indemnity and unjust enrichment – fail as a matter of law. Because there is no evidence demonstrating MassDOT breached any promise, expressed or implied, in its Contracts with BSC, the BSC Defendants have not established on the record before me the "special factors" required to recover under a theory of implied contractual indemnity. Fall River Housing Authority v. H.V. Collins Co., 414 Mass. 10, 14 (1992). And, the existence of the now presumptively valid Contracts between BSC and MassDOT precludes BSC's unjust enrichment claim. Boston Med'l. Ctr. Corp. v. Secretary of Exec. Office of Health and Human Services, 463 Mass. 447, 467 (2012)(quantum meruit); Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005)(unjust enrichment).

Conclusion

For the reasons stated, the Motion for Summary Judgment brought by BSC Group, Inc., BSC Companies, Inc. and David Hayes (Paper 22), and the Motion for Summary Judgment brought by the Massachusetts Department of Transportation (Paper 28) are each **ALLOWED**. Defendants BSC's Motion to Strike the Affidavit of Wayne Taylor (Paper 26) is **DENIED as moot**.

SO ORDERED.

Dated: April 26, 2022

Christine M. Roach

[8] C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 391-392 (1985).

NOTIFY

34

SUMMARY JUDGMENT
MASS. R. CIV. P. 56

Trial Court of Massachusetts
The Superior Court

Michael Joseph Donovan, Clerk of Court

DOCKET NUMBER
1784CV02963

CASE NAME
Russell Metcalf et al
vs.
BSC Group Inc et al

COURT NAME & ADDRESS
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
BSC Group Inc
BSC Companies Inc
Hayes, David
Mass Dept of Transportation (as amended)

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Metcalf, Russell
Theurer, Steven

This action came before the Court, Christine M Roach, presiding, upon Motion for Summary Judgment of the defendant named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

that the Motions for Summary Judgment brought by BSC Group, Inc., BSC Companies, Inc., David Hayes and the Massachusetts Department of Transportation are each ALLOWED and this case is DISMISSED.

Notice sent 5-4-22

JUDGMENT ENTERED ON DOCKET May 4 2022
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED
04/26/2022

~~CLERK OF COURTS~~/ ASST. CLERK
X Christine M. Hayes

Date/Time Printed: 04-26-2022 11:26:17

SCV061: 03/2016

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 26

§ 26. Public works; preference to veterans and citizens; wages

Effective: November 11, 2009
Currentness

In the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the commonwealth, or by a county, town, authority or district, or by persons contracting or subcontracting for such works, preference shall first be given to citizens of the commonwealth who have been residents of the commonwealth for at least six months at the commencement of their employment who are veterans as defined in clause Forty-third of section 7 of chapter 4 and who are qualified to perform the work to which the employment relates and, within such preference, preference shall be given to service-disabled veterans; and secondly, to citizens of the commonwealth generally who have been residents of the commonwealth for at least six months at the commencement of their employment, and if they cannot be obtained in sufficient numbers, then to citizens of the United States, and every contract for such work shall contain a provision to this effect. Each county, town or district in the construction of public works, or persons contracting or sub-contracting for such works, shall give preference to veterans and citizens who are residents of such county, town, authority or district and, within such preference, preference shall be given to service-disabled veterans. The rate per hour of the wages paid to said mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works shall not be less than the rate or rates of wages to be determined by the commissioner as hereinafter provided; provided, that the wages paid to laborers employed on said works shall not be less than those paid to laborers in the municipal service of the town or towns where said works are being constructed; provided, further, that where the same public work is to be constructed in two or more towns, the wages paid to laborers shall not be less than those paid to laborers in the municipal service of the town paying the highest rate; provided, further, that if, in any of the towns where the works are to be constructed, a wage rate or wage rates have been established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and employers, the rate or rates to be paid on said works shall not be less than the rates so established; provided further, that in towns where no such rate or rates have been so established, the wages paid to mechanics, teamsters, chauffeurs and laborers on public works, shall not be less than the wages paid to the employees in the same trades and occupations by private employers engaged in the construction industry. This section shall also apply to regular employees of the commonwealth or of a county, town, authority or district, when such employees are employed in the construction, addition to or alteration of public buildings for which special appropriations of more than one thousand dollars are provided. Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided.

Permanent and temporary laborers employed by the state department of highways and by the metropolitan district commission shall receive such salary or compensation as may be fixed under and in accordance with sections forty-five to fifty inclusive of chapter thirty.

Credits

Amended by St.1935, c. 461; St.1937, c. 346; St.1938, c. 413; St.1946, c. 591, § 46; St.1947, c. 334; St.1954, c. 627, § 32; St.1956, c. 606, § 1; St.1960, c. 401, § 1; St.1964, c. 609, § 1; St.1967, c. 296, §§ 2, 3; St.1986, c. 665; St.1991, c. 552, § 94; St.1998, c. 236, § 5; St.2009, c. 132, §§ 5, 6, eff. Nov. 11, 2009.

Notes of Decisions (68)

M.G.L.A. 149 § 26, MA ST 149 § 26

Current through Chapter 125, 134, 136, 144-147, 149, 158, 174 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 27

§ 27. List of jobs; classification; schedule of wages; penalty; civil action

Effective: August 8, 2008
Currentness

The commissioner shall prepare, for the use of such public officials or public bodies whose duty it shall be to cause public works to be constructed, a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed, including the transportation of gravel or fill to the site of said public works or the removal of surplus gravel or fill from such site. The commissioner shall classify said jobs, and he may revise such classification from time to time, as he may deem advisable. Prior to awarding a contract for the construction of public works, said public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices, teamsters, chauffeurs and laborers are to be employed, and shall request the commissioner to determine the rate of wages to be paid on each job. Each year after the awarding of the contract, the public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices and laborers are to be employed and shall request that the commissioner update the determination of the rate of wages to be paid on each job. The general contractor shall annually obtain updated rates from the public official or public body and no contactor [1] or subcontractor shall pay less than the rates so established. Said rates shall apply to all persons engaged in transporting gravel or fill to the site of said public works or removing gravel or fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators. The commissioner, subject to the provisions of section twenty-six, shall proceed forthwith to determine the same, and shall furnish said official or public body with a schedule of such rate or rates of wages as soon as said determination shall have been made. In advertising or calling for bids for said works, the awarding official or public body shall incorporate said schedule in the advertisement or call for bids by an appropriate reference thereto, and shall furnish a copy of said schedule, without cost, to any person requesting the same. Said schedule shall be made a part of the contract for said works and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract. Any person engaged in the construction of said works shall cause a legible copy of said schedule and subsequent updates to be kept posted in a conspicuous place at the site of said works during the life of the contract. An apprentice performing work on a project subject to this section shall maintain in his possession an apprentice identification card issued pursuant to section 11W of chapter 23. The aforesaid rates of wages in the schedule of wage rates shall include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans as provided in said section twenty-six, and such payments shall be considered as payments to persons under this section performing work as herein provided. Any employer engaged in the construction of such works who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in said construction. Whoever shall pay less than said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner, and whoever, for himself, or as representative, agent or officer of another, shall take or receive for his own use or the use of any other person, as a rebate, refund or gratuity, or in any other guise, any part or portion of the wages, including payments to health and welfare funds and

pension funds, or the equivalent payment in wages, paid to any such person for work done or service rendered on said public works, shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall also be deemed to be employers of the employees of any corporation within the meaning of sections 26 to 27B, inclusive.

Offers of restitution or payment of restitution shall not be considered in imposing such punishment.

When an investigation by the attorney general's office reveals that a contractor or subcontractor has violated this section by failing to pay said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner, or that a contractor or subcontractor has, for himself, or as representative, agent or officer of another, taken or received for his own use or the use of any other person, as a rebate, refund or gratuity, or in any other guise, any portion of the wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, paid to any such person for work done or service rendered on said public works, the attorney general may, upon written notice to the contractor or subcontractor and the sureties of the contractor or subcontractor, and after a hearing thereon, order work halted on the part of the contract on which such wage violations occurred, until the defaulting contractor or subcontractor has filed with the attorney general's office a bond in the amount of such penal sum as the attorney general shall determine, conditioned upon payment of said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner.

An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

Credits

Amended by St.1935, c. 461; St.1955, c. 180; St.1956, c. 606, § 2; St.1960, c. 401, § 2; St.1964, c. 609, §§ 2, 3; St.1967, c. 296, §§ 4, 5; St.1973, c. 625, §§ 1, 2; St.1983, c. 394; St.1987, c. 284, § 1; St.1987, c. 559, § 9; St.1993, c. 110, § 173; St.1998, c. 236, § 6; St.2002, c. 357, § 3; St.2008, c. 80, § 1, eff. July 12, 2008; St.2008, c. 303, §§ 21, 22, eff. Aug. 8, 2008.

Notes of Decisions (32)

Footnotes

1 So in enrolled bill; probably should read “contractor”.

M.G.L.A. 149 § 27, MA ST 149 § 27

Current through Chapter 125, 134, 136, 144-147, 149, 158, 174 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.