NO. 126139
IN THE ILLINOIS SUPREME COURT

MOORE LANDSCAPES, LLC, Defendant-Appellant, v. SAMUEL VALERIO, JOSE PAZ, RUBEN GARCIA BARDOMIANO PAZ, EVARISTO VALERIO, LUIS MONDRAGON, SERGIO APARICIO, RAUL BERMUDEZ, RODRIGO VALERIO, JAVIER MORA, MARCOS HUERTA, JAIME MORA, Plaintiffs-Appellees.	)	On Appeal from the Order entered by the Appellate Court of Illinois, First Judicial District, No. 1-19-0185, on March 26, 2020, rehearing denied on April 22, 2020 There Heard on Appeal from the Order of The Circuit Court of Cook County, Case No. 2018 L 009656, entered January 25, 2019 ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT MOORE LANDSCAPES, LLC

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I. ARGUMENT

In response to Moore Landscapes' arguments, Plaintiffs fail to establish that their claims can be reconciled with the language of the Prevailing Wage Act. Plaintiffs do not even attempt to do so in any meaningful way. Instead, Plaintiffs make several arguments that impermissibly require that the Court consider several isolated issues, which are inherently inconsistent with other points that Plaintiffs raise in their response. Plaintiffs first argue that the Prevailing Wage Act is somehow ambiguous, which meant that the Appellate court could consider public policies relating to the Act. Appellee's Brief ("AE Br.") at 13-14. Remarkably, Plaintiffs did not identify where the Appellate Court identified an ambiguity in the statutory language. Moreover, immediately afterwards, Plaintiffs deny that any ambiguity under the statute exists. AE Br. at 20. Plaintiffs then argue that the Appellate Court's ruling should be interpreted as a finding that the Court implied an additional remedy under the statute that was not otherwise available to them under Section 11 of the Act, which tacitly concedes that the Circuit Court's determination that Section 11 did not cover their claim was correct. AE Br. at 19-20. Lastly, Plaintiffs improperly ask the Court to consult a dictionary for the meaning of "stipulated rate," when Section 4 of the Act defines what a "stipulation" means within the context of the Act. *See* AE Br. at 22.

In addition to the lack of coherence in Plaintiffs' arguments, Plaintiffs do not address the provisions of the Prevailing Wage Act on the whole with their arguments. As Moore Landscapes demonstrated, the Act defines the stipulation that it requires in Section 4(e) of the statute, as a clear and unequivocal statement that prevailing wages are required to be paid for the work performed under the contract. 820 ILCS 130/4(e). The Act also reflects that the legislature contemplated that a public body might fail to include

a required stipulation into the contract, and included specific remedies under such circumstances—which did not include a private right of action by employees. 820 ILCS 130/4(g). Fundamentally, however, while Plaintiffs contend that they should be allowed to pursue claims for prevailing wages to which they argue that they were entitled to receive, Plaintiffs do not explain why the statutory relief available through the Illinois Department of Labor is an inadequate remedy. By claiming that Moore Landscapes seeks to prevent Plaintiffs from obtaining prevailing wages, Plaintiffs' arguments erroneously and impermissibly treat the Department as though it did not have its own set of exclusive enforcement powers under the Act. As Moore Landscapes previously established, and Plaintiffs do not substantively address in response, Plaintiffs cannot ask this Court to interpret the Act based on arguments that ignore statutory provisions or in a manner that unconstitutionally delegates the Department's enforcement authority to private parties. For these reasons as well, the Court should reject Plaintiffs' interpretation of the Act and affirm the ruling of the Circuit Court.

A. Plaintiffs Failed To Refute That Each Of The Relevant Agreements Did Not Include Stipulations To Pay Plaintiffs Prevailing Wages.

In their brief, Plaintiffs badly mischaracterize the issues before this Court and argue that: "Moore Landscapes is contending that . . . to be able to sue under section 11, . . . the contract had to actually state plaintiffs were to receive $41.25 per hour." AE Br. at 8 9. The Court should summarily reject this argument, because Moore Landscapes has never contended that Prevailing Wage Act mandated that the contracts at issue specifically call out the dollar amount that each plaintiff needed to be paid in order for Plaintiffs to have the right to bring a claim under Section 11 of the Act. As Plaintiffs admit, Moore Landscapes provided the lower courts with guidance from the Illinois

Department of Labor, which interprets the duties of a public body under the Act. AE Br. at 6. The lower courts relied on this guidance to determine that the contracts at issue did not contain stipulations required by Section 4 of the Act. *Id.* None of this depended upon whether the contracts expressly identified a per-hour pay rate for laborers. The Court should reject Plaintiffs' efforts to raise these types of "straw man" arguments, as their positions are not responsive to Moore Landscapes' arguments or the reasoning of the lower courts. *Rosier v. Cascade Mt., Inc.*, 367 Ill. App. 3d 559, 568 (1st Dist. 2006) (arguments "not supported by adequate legal reasoning" should not be considered).

Rather, both the Circuit Court and the Appellate Court deferred to the Illinois Department of Labor's interpretation of a public body's duty under the Act and, in particular, what constitutes a stipulation within the meaning of the Prevailing Wage Act. *See* Op. ¶¶ 1, 19, 22. Plaintiffs do not challenge these aspects of the lower courts' rulings. And it was entirely appropriate for the courts to consider this guidance, as Illinois courts give substantial deference to an agency's interpretation of a statute that the agency enforces. *See Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16 *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 387 n.9 (2010) ("Courts accord such deference in recognition of the fact that agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent."). As reflected by the quoted FAQ document, the Illinois Department of Labor, the Circuit Court and the Appellate Court have each determined that a contract provision stating that a contractor would pay prevailing wages "when required" does not satisfy the public body's requirement, under Section 4(e) of the Act, to include a stipulation to pay prevailing wages. *Id.* Plaintiffs have provided this

Court with no basis to reject the Illinois Department of Labor's and the lower courts' interpretation of these provisions of the Act. Plaintiffs' reference to dictionary definitions of the meaning of a stipulation (AE Br. at 22) do not demonstrate that the lower courts erred in their deference to the Department's interpretation of Section 4, as applied to the contracts at issue.

In each agreement Plaintiffs attached to their pleading, the Chicago Park District used conditional language, by stating that Moore Landscapes would pay prevailing wages "when required." *See* Op. ¶ 5. The Appellate Court correctly determined that these provisions were not stipulations within the meaning of Section 4 of the Prevailing Wage Act. *Id*. at ¶ 19. Plaintiffs do not challenge that the Appellate Court and Circuit Court correctly deferred to the Illinois Department of Labor's interpretation of what is intended by Section 4. Nor have Plaintiffs provided the Court with an alternative explanation for how to interpret the relevant provisions of the Act.

Rather than address the relevant issues from within the context of the statute, Plaintiffs simply argue, based on their dictionaries, that the prevailing wage is the stipulated rate under the Act, irrespective of the actual language within the contract. AE Br. at 22 ("The prevailing wage applicable is the stipulated rate for the work done."). However, Plaintiffs' argument impermissibly asks this Court to disregard that the legislature clearly recognized in Section 4(g) of the Act that a contract prepared by a public body would not always include a stipulation requiring the payment of prevailing wages, and that the terms "stipulated rate" and "prevailing wage rate" cannot be viewed as interchangeable. *See Miller v. Department of Registration & Education*, 75 Ill. 2d 76, 81 (1979) (a statute should be evaluated as a whole, with each provision being construed in connection with every other section); *In re Goesel*, 2017 IL 122046, ¶ 13 ("[E]ach word,

clause, and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous.").

The Chicago Park District's decision to include only conditional language in the prevailing wage provision of each agreement with Moore Landscapes is understandable within the context of the landscaping work Moore Landscapes had been engaged to perform. The Court should recognize that these contracts did not include stipulations unconditionally requiring the payment of prevailing wages for all of the labor performed under the contracts presumably because not all of the work called for was actually "construction or demolition of public works," which is the character of the work that is covered by the Act. After all, one of the contracts called for, among other things, the maintenance of Park District gardens and the installation of seasonal lighting. App. 92-93. Another contract called for general landscaping work, turf maintenance and holiday decoration. App. 118. The final agreement called for, among other things, turf maintenance services, woody plant installation, Dutch Elm Disease control services, and other landscape services. App. 135-36. As reflected by Illinois Department of Labor guidance on whether landscaping work is covered by the Act, these categories of landscaping work need not be paid at a prevailing wage, because they do not involve work of a character similar to the construction or demolition of a public work. C 157. Plaintiffs do not dispute the applicability of the Department's guidance, and, indeed, have attempted to incorporate this same guidance into their own arguments relating to whether they were entitled to be paid prevailing wages for their work. AE Br. at 22-23.

In particular, the contracts at issue stated that Moore Landscapes needed to pay prevailing wages "when required" by the Act, meaning, under the plain terms of the documents, that it was up to Moore Landscapes to determine whether the Act required it

to pay prevailing wages. As noted, the Chicago Park District's approach in preparing these agreements was appropriate and extremely practical under the circumstances, because these agreements at issue called for landscaping work, which oftentimes need not be paid at a prevailing wage rate. Pertinent to this action, the Illinois Department of Labor has taken the position that prevailing wages do not apply to the replacement of diseased trees. C. 157. In the affidavits Plaintiffs (who were tree planters) filed with the Circuit Court, Plaintiffs each admitted that part of the work at issue involved the replacement of diseased trees, as paragraph 5 of the affidavits Plaintiffs provided to the trial court describes replacing diseased trees. C 146 through C 154, ¶ 5. Thus, the Court should recognize that the Chicago Park District did not require Moore Landscapes to pay prevailing wages across the board, because the contracts at issue included work where the prevailing wages did not apply, per Illinois Department of Labor guidance (which Plaintiffs do not call into question). Moreover, because Plaintiffs are, in effect, basing their claims on their own interpretation of the Department's guidance and are asking the courts to apply the Department's interpretation of the Act to the work that they claim to have performed, the Court should recognize that Plaintiffs' own arguments underscore that Moore Landscapes did not stipulate to paying Plaintiffs' at a prevailing wage rate in their contracts with the Chicago Park District.

As Moore Landscapes previously demonstrated, in order to address Plaintiffs' claims, a determination of whether Plaintiffs have accurately described situations where they performed covered work, but were not paid prevailing wages, would require an evaluation of what work had actually been performed and an assessment of whether such work was covered by the Act, but not paid at that rate. Plaintiffs do not refute this

position, and, indeed, refer to the Illinois Department of Labor's guidance to support their claims. AE Br. at 22-23 (arguing that the work described in affidavits was covered work pursuant to Department of Labor guidelines). The fact that Plaintiffs base their arguments on Department guidance, and not the actual contracts themselves, highlights that Moore Landscapes did not stipulate to pay Plaintiffs at a prevailing wage rate in the contracts at issue. Had the contracts actually included a stipulation requiring Moore Landscapes to pay Plaintiffs at a prevailing wage, Plaintiffs would not have needed to rely on Department guidance as a basis for their arguments. Moreover, Plaintiffs do not contest that evaluating the applicability of the Act in the absence of a stipulation falls within the enforcement authority of the Department, as described in Section 4(g) of the Act. 820 ILCS 130/4(g).

Further, as Plaintiffs admitted in each of the affidavits they submitted to the Circuit Court, some of the work that they themselves are claiming to have performed involved the replacement of diseased trees. C 146 through C 154, ¶ 5. Plaintiffs do not dispute they are not entitled to prevailing wages for work involving replacing diseased trees, as reflected by the Department's guidance. *See* C. 157. The Chicago Park District understandably, therefore, did not ask Moore Landscapes to stipulate that all of its labor for all of the work to be performed under these contracts would be paid at a prevailing wage rate. Rather, the agreements left it to Moore Landscapes to determine when to pay prevailing wages, based on a provision that called for Moore Landscapes to pay prevailing wages "when required." Plaintiff offers no other account or alternative interpretation of these agreements.

For these reasons, as Moore Landscapes previously demonstrated and Plaintiffs do not dispute, in the context of the contracts at issue and the applicable requirements of the Prevailing Wage Act, Moore Landscapes did not agree to pay its workers prevailing wages across the board for all of the work to be performed under the contracts. Again, the Illinois Department of Labor, the Appellate Court, and the Circuit Court have uniformly determined that the contracts did not include a stipulation to pay Plaintiffs prevailing wages. *See* Op. ¶¶ 1, 19, 22. Plaintiffs themselves do not argue otherwise, because their arguments are based on an Illinois Department of Labor interpretation of the Act's applicability, and an allegation that the work that they performed was covered by the Act, and not by reference to a clear statement in the contracts expressly calling for Plaintiffs to be paid prevailing wages.

For these reasons, the pertinent issue that Moore Landscapes presented to the Circuit Court and the Appellate Court boils down to, in the absence of a contractual stipulation covering Plaintiffs' work, which entity had been authorized by the legislature to determine whether Plaintiffs had the right to be paid prevailing wages: the courts or the Illinois Department of Labor. Plaintiffs provided the Court with no meaningful analysis of this issue, and, as discussed in greater detail below, tacitly concede that the Act requires that their claims be asserted with the Illinois Department of Labor. Further, they do not dispute that their claim under Section 11 is limited to seeking the difference between the "stipulated rates under the contract" and the actual rate they were paid, which is an amount that cannot be established in the absence of a stipulation. *See* 820 ILCS 130/11 ("Any laborer, worker or mechanic employed by the contractor or by any sub-contractor under him who is paid for his services in a sum less than the stipulated

rates for work done under such contract, shall have a right of action for whatever difference there may be between the amount so paid.").

As Moore Landscapes previously demonstrated, the legislature contemplated that contracts issued by public bodies may not always include a notice and stipulation called for by Section 4 of the Act. Section 4(g) describes the remedies available when a public body did not include a stipulation in its contract with a contractor:

> If proper written notice was not provided to the contractor . . ., the Department of Labor shall order the public body or other entity to pay any interest, penalties or fines that would have been owed by the contractor if proper written notice were provided. . . . For the purposes of this subsection, back wages shall be limited to the difference between the actual amount paid and the prevailing rate of wages required to be paid for the project.

820 ILCS 130/4(g). Plaintiff does not dispute that this subsection of the statute only calls for enforcement by the Illinois Department of Labor, and does not provide for a private party cause of action under these circumstances. Nor do they dispute that the lower courts agreed that proper written notice had not been provided to Moore Landscapes in the contracts, as reflected by Illinois Department of Labor guidance. *See also* Op. ¶¶ 1, 19, 22.

Because the legislature squarely addressed the manner in which the Act would be enforced under the scenario presented by Plaintiffs in this case, Plaintiffs cannot ask this Court to ignore the Department's enforcement authority, which are set forth, in part, in Section 4(g) of the Act. *See Miller*, 75 Ill. 2d at 81 (1979) (a statute should be evaluated as a whole, with each provision being construed in connection with every other section); *Goesel*, 2017 IL 122046, ¶ 13 ("[E]ach word, clause, and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous."). "There is no rule of construction which authorizes a court to declare that the legislature did not mean

what the plain language of the statute imports." *Illinois Power Co. v. Mahin*, 72 Ill. 2d 189, 194 (1978). Plaintiffs failed to refute that their remedy lies with the Department and not with the courts, based on the absence of contractual stipulations calling for them to be paid prevailing wages for the work they allege to have performed. For these reasons, the Court should reverse the decision of the Appellate Court and affirm the Circuit Court's dismissal of Plaintiffs' claims.

B. Plaintiffs' Arguments Impermissibly Fail To Address The Department of Labor's Role In Enforcing the Prevailing Wage Act.

As an independent and separate basis for reversing the Appellate Court and affirming the Circuit Court's order dismissing Plaintiffs' claims, the Court should recognize that Plaintiffs repeatedly mischaracterize the relevant issues in this case. They claim, without authority, that the Court should consider whether Section 11 of the Act requires "the Statute to be construed in favor of Plaintiffs' right to sue." AE Br. at 2. Plaintiffs fail to cite anything suggesting that the legislature intended to favor private party claims under the Act based on the facts Plaintiffs allege in this case. In particular, Plaintiffs cannot ask this Court to disregard the Illinois Department of Labor's independent well-defined enforcement authority, described in Sections 4, 6, and 11 of the Act, in favor of allowing them a private right of action. *See In re Goesel*, 2017 IL 122046, ¶ 13 ("[E]ach word, clause, and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous."). Plaintiffs further argue, inconsistently, that Section 11 is both ambiguous (Br. at 14) and unambiguous (Br. at 21). However, Plaintiffs waived this argument by not raising it before the trial court. *See Robinson v. Toyota Motor Credit Corp*., 201 Ill. 2d 403, 412-13 (2002); *Sylvester v.*

Chicago Park District, 179 Ill. 2d 500, 507 (1997) (issues not raised before the trial court cannot be raised on appeal).

Further, Plaintiffs badly mischaracterize the remedies available under the Act by suggesting that the Court should assume that their only means of pursuing a claim for prevailing wages is through the courts. Br. at 20 ("Most important, it is necessary in this case, that workers have the remedy of suing to collect the Prevailing Wage they are entitled to.").[1] This Court has held that "a party may . . . forfeit review" by citing irrelevant authorities and by failing to sincerely "attempt to comply with" Illinois Supreme Court Rule 341(h)(7). *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010); *see also RE/MAX R.E. Professionals v. Armstrong*, 288 Ill. App. 3d 552, 555 (4th Dist. 1997) (party's citation only to an irrelevant case constituted waiver); *Britt v. Federal Land Bank Assoc.*, 153 Ill. App. 3d 605, 608 (2nd Dist. 1987) ("We do not view the inclusion of citations to irrelevant authority scattered throughout their brief to constitute even an attempt to comply with the rule.").

The Court should find that Plaintiffs forfeited their opposition to Moore Landscapes' appeal based on their failure to account for the Illinois Department of Labor's enforcement rights under the Prevailing Wage Act in each of their arguments pertaining to the public policy of the Act. Plaintiffs cannot ask this Court to treat portions of the Act as superfluous. *See Goesel*, 2017 IL 122046, ¶ 13 ("[E]ach word, clause, and sentence of a statute must be given a reasonable construction, if possible, and should not

[1] Although it is not a basis for Moore Landscapes' appeal, as reflected in the amicus brief filed by the Illinois Landscape Contractors Association and Illinois Landscape Contractors Bargaining Association, Plaintiffs presumably have additional available remedies through their union representatives to address their concerns relating to the applicability of the Prevailing Wage Act and the amounts they were paid. Amicus Br. at 5, n.5.

be rendered superfluous."). They violate this rule by asking the Court to consider what they claim to be public policy arguments favoring their right to sue, while entirely disregarding the Department of Labor's statutory role and defined authority in enforcing the Act.

As Moore Landscapes demonstrated, it is not necessary for Plaintiffs to have the right to assert a claim against it in this case in order for Plaintiffs to have the ability to pursue a claim for prevailing wages. The Prevailing Wage Act expressly authorizes the Illinois Department of Labor to enforce the Act. 820 ILCS 130/4, 6, 11. The Court should recognize that Plaintiffs cite entirely irrelevant authorities when they refer to *Brandt Construction* and *Sackville Construction*. AE Br. at 17-19. Both of these cases involved claims filed by the Department of Labor, not the laborers, when the contractors did not receive proper notice under the Act. They do not in any way suggest that these claims could have been asserted by private parties. Similarly, the *Contreras* decision, cited by Plaintiffs on page 16 of their brief, is not relevant to this action because the federal district court in *Contreras* did not consider the Illinois Department of Labor's interpretation of the Act and did not address that the employees had the ability to pursue their claims with the Illinois Department of Labor. None of these authorities suggest a basis for the Court to find that Section 11 of the Act provides Plaintiffs with a remedy in this case.

Plaintiffs further misstate the law by arguing that the Court should find that they can proceed with their claims because they otherwise would have no other means to pursue their claims. Br. at 20. Specifically, Plaintiffs cite to *Fisher v. Lexington Health Care*, 188 Ill. 2d 455, 460-467 (1999) and similar cases in order to suggest that the Court

consider allowing Plaintiffs an implied right of action in this case. Br. at 19-21. By making this argument, Plaintiffs are necessarily suggesting that there is no adequate enforcement remedy available under the Act, which is the fourth factor that the Court must consider under the test set forth in *Fisher*. *See Fisher*, 188 Ill. 2d at 460. Despite having cited *Fisher*, Plaintiffs made no effort to explain why their remedies through the Illinois Department of Labor's separate enforcement rights under Sections 4, 6, and 11 of the Act would be inadequate. Plaintiffs' citation to caselaw discussing implied private rights of action in Illinois is inappropriate under Rule 341(h)(7), when Plaintiffs fail to address all of the possible remedies under the Act other than their own ability to bring a lawsuit.

The Court should recognize that the Prevailing Wage Act provides the Department with exclusive authority to enforce remedies that may apply in a case such as this, when the public body did not include language in the contracts required by Section 4 of the Act. 820 ILCS 130/4, 6, 11. Both the Circuit Court and Appellate Court found that the contracts at issue did not include language required by Section 4. Plaintiffs did not challenge these findings, thereby waiving the issue. Ill. Sup. Ct. R. 341(h)(7).

As Moore Landscapes demonstrated, and Plaintiffs do not respond to directly, the Illinois Constitution does not permit the Court to allow Plaintiffs to proceed with a claim that the legislature intended to be brought only by the Illinois Department of Labor, based on separate remedies set forth in Section 4(g) of the Act. Plaintiffs' failure to address the role of the Department under the Act or the enforcement mechanisms described in Section 4(g) is particularly egregious given that Moore Landscapes previously demonstrated in this appeal that the Appellate Court unconstitutionally delegated the

Department's enforcement authority to Plaintiffs. The Court should reject Plaintiffs' efforts to interpret Section 11 of the Act in an unconstitutional manner. *Bartlow v. Costigan*, 2014 IL 115152, ¶ 18 ("Reviewing courts have a duty to construe a statute to preserve its constitutionality whenever reasonably possible."). In addition, Plaintiffs waived their opposition to Moore Landscapes' arguments based on their complete failure to address these points or to harmonize their gloss on the statute within the context of the statute on the whole. *See Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 237 (2000) ("We will not supply contentions not advanced by the parties and, accordingly, deem the argument waived."). Accordingly, and for these reasons as well, the Court should reverse the Appellate Court and affirm the decision of the Circuit Court dismissing Plaintiffs' claims. Plaintiffs have not refuted that they brought their claims in the wrong forum.

II. CONCLUSION

For each of the foregoing reasons, Defendant-Appellant, Moore Landscapes, LLC, respectfully requests that the Court enter an Order reversing the decision of the Appellate Court and affirming the Circuit Court's entry of an order dismissing Plaintiffs' claims in their entirety.

Dated: January 12, 2021

Respectfully submitted,

MOORE LANDSCAPES, LLC,
Defendant-Appellant

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(l) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 4,219 words.

By: /s/ *Peter J. Gillespie*

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, Peter J. Gillespie, the undersigned attorney, hereby certify that I caused the foregoing Reply Brief of the Appellant to be served on the Clerk of the Supreme Court of Illinois via the electronic filing Vendor Odyssey File and Serve Illinois and also serving counsel by email on this 12th day of January, 2021 to:

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