

NO. A12-1017

State of Minnesota
In Court of Appeals

Minnesota Laborers Health and Welfare Fund,
Minnesota Laborers Pension Fund, Minnesota Laborers Vacation Fund,
Construction Laborers' Education, Training, and Apprenticeship Fund
of Minnesota and North Dakota, Minnesota Laborers Employers
Cooperation and Education Trust,

Appellants,

vs.

Granite Re, Inc.,

Respondent,

vs.

EnviroTech Remediation Services, Inc., David P. Sobaski,
Karla P. Sobaski, Daniel Krause, Margaret Krause, Brent Krause,
Jane Krause, William Sievers, Jill Sievers, Brent Anderson,
and JoAnne M. Anderson,

Third-Party Respondents.

BRIEF, ADDENDUM AND APPENDIX OF APPELLANTS

ANDERSON, HELGEN, DAVIS
& NISSEN, P.A.
Pamela H. Nissen (#259810)
Rebecca A. Peterson (#392663)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
(612) 435-6363

FELHABER, LARSON, FENLON
& VOGT, P.A.
Ruth S. Marcott, Esq. (#0176825)
444 Cedar Street, Suite 2100
St. Paul, MN 55101
(651) 312-6034

Attorneys for Appellants

(Additional Counsel for the Respondents appear on inside cover)

GREGERSON, ROSOW, JOHNSON
& NILAN, LTD.

Daniel R. Gregerson (#0336518)
650 Third Avenue South, Suite 1600
Minneapolis, MN 55402
(612) 338-0755

Attorneys for Respondent Granite Re, Inc.

FORSBERG LAW OFFICE, P.A.
Eric W. Forsberg (#30995)
222 South Ninth Street, Suite 2960
Minneapolis, MN 55402
(612) 215-3302

*Attorneys for Third-Party Respondents
Daniel Krause, Margaret Krause, Brent Krause,
Jane Krause, William Sievers and Jill Sievers*

EnviroTech Remediation Services, Inc.
c/o William J. Sievers
2451 Forest Street
St. Paul, MN 55109

Unrepresented

David P. Sobaski
9006 Carter Path
Inver Grove Heights, MN 55076

Unrepresented

Karla P. Sobaski
9006 Carter Path
Inver Grove Heights, MN 55076

Unrepresented

Brent Anderson
6236 Knoll Drive
Edina, MN 55436

Unrepresented

JoAnne M. Anderson
6236 Knoll Drive
Edina, MN 55436

Unrepresented

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

TABLE OF CONTENTS

STATEMENT OF THE ISSUES 6

STATEMENT OF THE CASE 7

STATEMENT OF FACTS 11

STANDARD OF REVIEW 20

SUMMARY OF THE ARGUMENT 20

ARGUMENT 21

 I. The District Court Committed Reversible Error By
 Determining That The Appellant Funds Are Not A Third-
 Party Beneficiary To The Contract Between Granite Re
 And EnviroTech. 21

 II. The District Court Committed Reversible Error By
 Concluding The Statute Of Limitations Was Not Tolled By
 EnviroTech’s Fraudulent Concealment. 32

 A. This Court may consider outside jurisdictional cases as
 persuasive authority..... 33

 B. The statute of limitations on the bond claim did not begin
 to run in favor of Granite Re until Appellant Funds
 discovered EnviroTech’s fraudulent conduct 34

 C. Appellant Funds acted with Due Diligence in Discovering
 EnviroTech’s Fraud..... 39

 III. Conclusion 43

TABLE OF AUTHORITIES

Cases

<i>Alessi v. Raybestos-Manhattan, Inc.</i> , 451 U.S. 202 (1985).....	41
<i>Bd. Of Educ. Of Community High School Dist.No.99, DuPage County v. Hartford Acc. and Indem. Co.</i> , 504 N.E.2d 1000 (Ill. App. Ct.1987)	30
<i>Board of Sup'rs of Fairfax County v. Southern Cross Coal Corp.</i> , 380 S.E.2d 636 (1989)	38
<i>Bondy v. Allen</i> , 635 N.W.2d 244 (Minn. App. 2001).....	20
<i>Collins v. Johnson</i> , 374 N.W.2d 536 (Minn. App. 1985)	40
<i>Commercial Money Center, Inc. v. Illinois Union Ins. Co.</i> , 508 F.3d 327 (6th Cir. 2007)	37
<i>Connecticut Mut. Life Ins. Co. v. Schurmeier</i> , 147 N.W. 246 (1914).....	32
<i>Cretex Cos</i> , 342 N.W.2d	6, 10
<i>Dobson Bros. Const. Co. v. Ratliff, Inc.</i> , 4:08CV3103, 2009 WL 837790 (D. Neb. Mar. 26, 2009)	33
<i>Dobson Bros. Const., Co. v. Ratliff, Inc.</i> , 4:08CV3103, 2009 WL 806800 (D. Neb. Feb. 27, 2009)	33
<i>Entzion v. Ill. Farmers Ins. Co.</i> , 675 N.W.2d 925 (Minn.App.2004).....	34
<i>Gelin v. Gelin</i> , 40 N.W.2d 342 (1949)	34
<i>Gibson v. Prudential Ins. Co.</i> , 915 F.2d 414 (9th Cir.1990)	42
<i>Gordon v. Microsoft Corp.</i> , 645 N.W.2d 393 (Minn. 2002).....	33
<i>Haberle v. Buchwald</i> , 480 N.W.2d 351 (Minn. Ct. App. 1992)	35
<i>Hartford Fir Ins. Co. v. Trustees of Const. Industry</i> , 125 Nev. 149 (2009)	28
<i>Hemmerlin-Stewart v. Allina Hosp. & Clinics</i> , 2005 WL 2143691 (Minn.App. 2005).....	7
<i>Hemmerlin-Stewart v. Allina Hospitals & Clinics</i> , 2005 WL 2143691 (Minn. Ct. App. Sept. 6, 2005).....	39, 40

<i>In re Kemper Ins. Companies</i> , 819 N.E.2d 485 (Ind. Ct. App. 2004)	38
<i>Jane Doe 43C v. Diocese of New Ulm</i> , 787 N.W.2d 680 (Minn. Ct. App. 2010)	40
<i>Louis v. Louis</i> , 636 N.W.2d 314 (Minn. 2001)	20
<i>MacKenzie v. Summit Nat. Bank of St. Paul</i> , 363 N.W.2d 116 (Minn. Ct. App. 1985)	33, 36
<i>Martin v. Casey</i> , 5 A.D.2d 185 (N.Y. 1958)	28
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724, (1985)	42
<i>Miernicki v. Duluth Curling Club</i> , 699 N.W.2d 787 (Minn. Ct. App. 2005)	34
<i>Milwaukee Bd. of School Directors v. BITEC, Inc.</i> , 321 Wis. 2d 616 (Ct. App. 2009)	37
<i>Mountbatten Surety Co., Inc.</i> , 2000 WL 1752916	28
<i>Nassar v. Chamoun</i> , 2012 WL 426595 (Minn. Ct. App.)	26
<i>National Elec. Industry Fund v. Bethlehem Steel Corp.</i> , 296 Md. 541 (1983)	28
<i>Nebraska Beef, Ltd. v. Universal Sur. Co.</i> , 607 N.W.2d 227 (Neb. App. 2000)	30
<i>Northern Nat'l Bank v. Wiczek</i> , 2011 WL 1833100 (Minn. Ct. App. 2011)	<i>passim</i>
<i>Offerdahl v. Univ. of Minn. Hosps. & Clinics</i> , 426 N.W.2d 425, 427 (Minn.1988)	20
<i>Patterson v. Wu Family Corp.</i> , 608 N.W.2d 863, 866 (Minn.2000)	20
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987)	41
<i>Rhode Island Hosp. Trust Nat. Bank v. Ohio Cas. Ins. Co.</i> , 789 F.2d 74 (1st Cir. 1986)	37

<i>Rush v. Jostock</i> , 710 N.W.2d 570, 580 (Minn. Ct. App. 2006).....	33
<i>Savig v. First Nat. Bank of Omaha</i> , 781 N.W.2d 335 (Minn. 2010).....	34
<i>Schmucking v. Mayo</i> , 183 N.W. 633 (1931).....	<i>passim</i>
<i>STAR Centers, Inc. v. Faegre & Benson, L.L.P.</i> , 644 N.W.2d 72 (Minn. 2002).....	20
<i>Trustees for Michigan Laborers' Health Care Fund v. Warranty Builders, Inc.</i> , 921 F. Supp 471 (E.D. Mich. 1996).....	28
<i>Trustees of Plumbers and Steamfitters Local 21 Annuity Fund v. Hartford Fire Ins. Co.</i> 809 N.Y.S.2d 848 (Sup. C. 2005).....	28, 29
<i>Twin City Constr. Co. v. ITT Indust. Credit Co.</i> , 358 N.W.2d 716 (Minn. Ct. App. 1984).....	<i>passim</i>
<i>Twin City Pipe Trades Service Assoc., Inc., v. Peak Mechanical, Inc.</i> 689 N.W.2d 549 (Minn. App. 2004).....	29, 30
<i>U.S. Leasing Corp. v. duPont</i> , 69 Cal.2d 275 (1968).....	37
<i>United States v. Carter</i> , 353 U.S. 210 (1957).....	<i>passim</i>
<i>Vill. of Herkimer v. Am. Sur. Co. of New York</i> , 18 A.D.2d 94 (1963).....	38, 39
<i>Wellington Power Corp. v. CNA Sur. Corp.</i> , 614 S.E.2d 680 (2005).....	38
<i>Williamson v. Prasciunas</i> , 661 N.W.2d 645 (Minn. Ct. App. 2003).....	35
<i>Wright Way Const. Co., Inc. v. Harlingen Mall Co.</i> , 799 S.W.2d 415 (Tex. App. Corpus Christi 1990).....	38

Statutes

29 U.S.C. § 1001	8
29 U.S.C. § 1144(a).....	41
29 U.S.C. § 1144(c).....	41
29 U.S.C. § 186(c)(5).....	7

Other Authorities

Restatement (First) of Security § 121; Statute Of Limitations—Effect
On Surety’s Liability Of Principal’s Concealment Of Default
(1941) 33, 37

Restatement (Third) of Suretyship & Guaranty § 66; Effect Of
Principal Obligor’s Concealment Of Default On Statute Of
Limitations With Respect To Secondary Obligation (1996).....*passim*

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that the Appellant Funds, who are employee benefit plans, to which the principal on the payment bond is contractually obligated to submit contributions for its employees' benefits, are not third-party beneficiaries to the payment bond?

This issue was raised in the district court through cross-motions for summary judgment. The district court denied the Appellant Funds' motion for summary judgment and granted Respondent Granite Re, Inc.'s motion for summary judgment, finding improperly that the employees rather than the employer were obligated to make the contributions to the Funds, and holding that the Funds were not claimants under the bond because they did not have a direct contract with Third-Party Respondent EnviroTech Remediation Services, Inc., the principal and they were not third-party beneficiaries. Specifically, the district court found that the parties to the bond did not intend to benefit the Appellants at the time the bond was executed. The Funds perfected an appeal from that Order for Summary Judgment on June 15, 2012.

The most apposite cases on this issue include:

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

United States v. Carter, 353 U.S. 210 (1957)

Twin City Constr. Co. v. ITT Indust. Credit Co., 358 N.W.2d 716 (Minn. Ct. App. 1984)

Nat'l Bank v. Wiczek, 2011 WL 1833100 (Minn. Ct. App. 2011)

2. Whether the district court improperly determined that a surety company may benefit from its principal's fraudulent actions and holding that the doctrine of fraudulent concealment does not apply to the surety relationship?

This issue was raised in the district court through cross-motions for summary judgment. The district court granted Respondent's motion for summary judgment, finding that the Funds had not timely filed their claim on the bond because the statute of limitations imposed by the bond was not tolled by the principal's fraudulent action. The Funds perfected an appeal from that Order for Summary Judgment on June 15, 2012.

The most apposite cases and authorities on this issue include:

Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931)

Restatement (Third) of Suretyship & Guaranty, § 66 (1996)

Hemmerlin-Stewart v. Allina Hosp. & Clinics, 2005 WL 2143691 (Minn.App. 2005)

REQUEST FOR ORAL ARGUMENT

Appellants, the Funds, request oral argument.

STATEMENT OF THE CASE

The Funds are multi-employer, jointly-trusted employee benefit plans created and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), as amended 29 U.S.C. § 186(c)(5), and administered in accordance with the provisions of the Employee Retirement

Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, *et seq.* The Funds are funded through contributions from employers pursuant to the terms of various collective bargaining agreements between the employers and the Laborers District Council of Minnesota and North Dakota.

EnviroTech Remediation Services, Inc. (“EnviroTech”) is an employer as defined under ERISA, signatory to a collective bargaining agreement between EnviroTech and the Laborers District Council of Minnesota and North Dakota (“CBA”). Appellants’ Appendix (“Appendix” or “App.”) 2-3. The CBA contractually obligated EnviroTech to pay to its employees certain hourly compensation for work performed under the CBA, including both an amount paid directly to the employee as a wage and an amount paid directly to the Funds to pay for the employee’s benefits. App. 41, 53-54, 58-60.

In approximately February 2008, EnviroTech entered into an agreement or agreements with Brandenburg Industrial Service Co. (“Brandenburg”) to perform asbestos and lead abatement services on the High Bridge Project at the High Bridge Generating Plant, located in St. Paul, Minnesota. *Id.* The agreement(s) required EnviroTech’s employees to perform work covered under the CBA. EnviroTech obtained a Subcontract Labor and Material Payment bond from Granite Re, Inc. that assured payment of all amounts due for labor and services provided relating to the High Bridge Project. App. 3.

During the course of the High Bridge Project, EnviroTech reported hours to the Funds on the monthly fringe benefit report forms, including some of the hours

its employees worked on the High Bridge Project. App. 3. Through the federal litigation against EnviroTech and other defendants (Civil File No. 09-1976 MJD/JJG, District of Minnesota), the Appellant Funds discovered an extensive fraudulent payroll scheme orchestrated by EnviroTech. App. 4-5. Specifically, EnviroTech hid thousands of hours its employees worked through the use of cash and accounts payable checks; including hours its employees worked on the High Bridge Project. App. 4-5; App. 166-69. These employees' hours were not reported to the Appellant Funds. App. 166-69. Because EnviroTech did not pay the owed fringe benefit contributions for the High Bridge Project hours, its employees were not properly compensated pursuant to terms and requirements under the CBA. App. 5, 40-43, 166-69. As a result, in breach of the terms of the payment bond, EnviroTech did not pay all amounts due for the labor provided to the High Bridge Project.

Upon discovering the fraudulent scheme, the Funds filed a claim against the payment bond. App. 5. Granite Re, Inc. denied the claim and the Funds filed suit against Granite seeking \$245,168.86 for the unpaid fringe benefit contributions owing for the High Bridge Project, arising out of the fraudulent payroll practice. *Id.*

The parties moved for summary judgment. App. 25,29. The Honorable Shawn M. Moynihan dismissed the Funds' claims against Granite Re, Inc. and denied the Funds' motion for summary judgment on March 6, 2012. Appellants' Addendum ("Add.") 1-4. Specifically, the district court determined that the

Appellant Funds are not a "claimant" under the bond because they did not have a direct contract with EnviroTech. Add. 3-4. The court further determined the Funds are not third-party beneficiaries of the contract between Granite and EnviroTech. Add. 3-4. This was reversible error as the Appellant Funds are in fact third-party beneficiaries under either the duty-owed or the intent to benefit test.

Under the third-party contract beneficiary doctrine in this state, a third party can recover on the contract if shown to be an "intended beneficiary" under either the "intent to benefit" or the "duty owed" test. See *Cretex Cos. v. Construction Leaders, Inc.*, 342 N.W.2d 135, 138-140. The duty-owed test requires that the performance of the promise will satisfy an obligation of the promisee. The intent-to-benefit test is satisfied when "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." It is not necessary both tests are satisfied.

Here, the duty-owed test is met because a payment by Granite Re, Inc. to the Appellant Funds will fully satisfy the promisee's obligations to fully compensate its laborers under the governing CBA. The intent-to-benefit test also satisfied since the intention of Granite Re and EnviroTech for the bond was to ensure that all amounts due and owing for labor provided to this project would be paid. Through its fraudulent payroll practice, EnviroTech avoided payment to the Appellant Funds of amounts owing for the labor its employees provided on this

project. The Funds satisfy both tests and are third-party beneficiaries of the contract.

Secondly, the district court improperly rejected the Appellant Funds' argument that the statute of limitations was tolled under the doctrine of fraudulent concealment. The district court concluded that it was EnviroTech, the third-party defendant, and not Granite Re, that fraudulently concealed the Funds' cause of action. Ignoring the surety relationship between Granite Re. and EnviroTech, the district court's ruling allows Granite Re. to improperly benefit from EnviroTech's fraudulent practices that prevented the Appellant Funds discovering the owed contributions within the statute of limitations Granite Re imposed with its bond.

STATEMENT OF FACTS

The Appellants are Employee Benefit Plans

The Appellants are five separately organized, multi-employer, jointly-trusted employee benefit plans. These trust funds are funded through employer contributions; made by employers on behalf of the employer's individual employees; made pursuant to a contract between the employer and the Laborers District Council of Minnesota and North Dakota ("Union"). App. 1, 40-41. This contract is a collective bargaining agreement. *Id.*

Through these employer contributions, the Appellant Funds provide the employees health and welfare benefits, pension and retirement benefits, vacation benefits, and training benefits. The Funds are administered in accordance with ERISA and operate pursuant to a number of written plan documents and policies,

including an agreement and declaration of trust and a collection policy. App. 1, 49-51. Almost 900 employers contribute to the Appellant Funds pursuant to various contracts with the Union. Their contributions are required to maintain the funding levels required by various statutes and regulations. December, 1, 2011 Transcript, 17-18. EnviroTech is one of the contributing employers with a direct contract with the Union. App. 41, 46.

EnviroTech's Contractual Obligations

The terms and conditions of the employment contract between EnviroTech and its employees are governed by the Collective Bargaining Agreement ("CBA") between the Minnesota Environmental Contractors Association and the Laborers' District Council of Minnesota and North Dakota and its affiliated Local Unions. App. 41, 46-62. Per this CBA, EnviroTech was required to pay its employees, during the relevant period of this dispute, a total of \$39.89 per hour, increasing by \$1.60 per hour starting May 1, 2008, for each hour the employee works performing covered services. App. 53-55. A portion of that hourly payment was required to be remitted to the Appellant Funds for payment of certain benefits such as health and retirement benefits. Add. 17-21; App. 41, 53-55, 58-60. Additionally, the terms of the CBA bound EnviroTech to all of the provisions in the agreements and declarations of trust of the Funds and all policies. App. 58-60.

Because the Funds do not have independent knowledge of the hours individual employees work for the various employers, the CBA required employers such as EnviroTech to complete and submit a report form every month identifying all of the hours each employee worked along with a payment for the amounts due to the Funds per the current applicable rate as set forth in the CBA on account of those hours. App. 41-42, 58-60.

The CBA required EnviroTech to produce its employment and payroll records for examination and audit by the Trustees of the Appellant Funds or their authorized agents whenever such examination is deemed, by the Trustees, to be necessary to the proper administration of the Funds and to ascertain whether the employer has properly complied with its contribution obligations App. 41-42, 58-60. Without an audit, the Funds are not able to determine whether and employer has complied with its payment obligations.

High Bridge Generating Plant Demolition and Construction Project

In or around February 2008, based upon records provided to the Funds, EnviroTech entered into an agreement or agreements with Brandenburg Industrial Service Co. ("Brandenburg") to perform asbestos and lead abatement services on the High Bridge Project at the High Bridge Generating Plant. App. 42, 63-146. EnviroTech's employees performed work covered under the CBA at the High Bridge Generating Plant. EnviroTech was, therefore, contractually obligated to pay to those employees the agreed upon hourly amounts, which

included both amounts paid directly to the employee as wages and those amounts paid to the Funds for the employees' benefits. App. 42.

EnviroTech obtained a Subcontract Labor and Material Payment Bond, issued by Respondent Granite Re, assuring the payment of all amounts owing relating to the High Bridge Project (bond no. GRMN28376A). App. 42-43, 147-50.

Throughout the relevant time period, the Funds received fringe fund report forms from EnviroTech, reporting hours its employees worked on various projects, including the High Bridge Project. App. 42-43, 151-54. The forms were completed by EnviroTech and until the auditing process, the Funds had no means by which they could determine whether the reports accurately identified all hours worked by EnviroTech's employees. *Id.*

The Appellant Funds Uncover EnviroTech's Fraud Against the Funds in the Federal Litigation

Throughout at least the last two to three years of its operations, EnviroTech developed a dual payroll process. In this scheme, a portion of the employees' hours were paid through the business checking account and were booked as "payroll" on the check register and in the company's financial records. Nissen App. 34-39. Simultaneously, a second set of employee hours were either run through the business checking account booked as "accounts payable" or the hours were paid to the employees using envelopes of cash. *Id.* These hours were not reported to the Funds, and the payments did not appear on the payroll registers. App. 166-67.

In order to discover the fraud, the Funds needed to review a number of different documents that EnviroTech refused to produce to the Funds. App. 166-69. As an environmental contractor, EnviroTech was required to maintain records of the time its employees spent on various asbestos or hazardous material abatement projects via a sign-in / sign-out form on which employees logged the time they arrived at the project and the time they left the project. Minn. R. 4620.3440 (2009). Because EnviroTech would not and did not produce these records, the Funds served a Subpoena on Brandenburg on October 5, 2010. App. 31-32. On October 25, 2010 Brandenburg provided the Funds with copies of the sign-in / sign-out forms that EnviroTech's employees completed for the High Bridge Project. *Id.*

From the High Bridge Project sign-in / sign-out sheets, the Funds' auditor determined that EnviroTech's employees' hours were not on any of the payroll documents provided to the Funds' auditor and were not reported to the Funds for hours in the months they were working on the High Bridge Project. App. 166-69.

In the federal litigation, EnviroTech is not represented by counsel. Substantially all of its management employees transferred to a new company and that new company refused to cooperate with the production of the records relating to EnviroTech. Affidavit of Joshua A. Dorothy dated November 15, 2011, Exhibit T. The Funds were forced to subpoena records from Central Bank, EnviroTech's bank. Through the Subpoena, Central Bank produced approximately 7,000 checks. Ms. Carlson prepared a check register by

reviewing each of the 7,000 checks and entering the data into a spreadsheet including the names of the people to whom checks were written, the date on the check and the amount. App. 168-69.

In addition to the sign-in / sign-out sheets and the copies of the checks, the Funds obtained a partial set of documents from Mr. Sievers, a principal of EnviroTech on or about January 19, 2011. App. 31-33. Contained in those records were payroll registers for various weeks covered by the audit period. These payroll registers are the type of document that was previously shown to the auditor during routine payroll audits. App. 166-69. Except for a few minor discrepancies, EnviroTech's payroll registers match the fringe fund report amounts. *Id.*

Preparation of the Audit Invoice for the High Bridge Project

Upon receipt of the sign-in / sign-out sheets from Brandenburg, the Funds' auditor began preparation of the audit invoice. App. 166-69. The workweek starting March 30, 2009 provides several examples of EnviroTech employees who signed in and out for work at the High Bridge Project, who were not included on the payroll records, but who were paid via an accounts payable check and therefore their hours were not known to the Funds until the review of the sign-in / sign-out sheets. In the payroll register for the workweek of March 30, 2009 through April 3, 2009, there is no mention of employees Wilmer Aguilar-Funes, Andres Ordonez, and Vicente Rivera. EnviroTech did not issue payroll checks to those employees for this time period. App. 167-68, 170-83. However, the daily

sign in / sign out sheets for the High Bridge Project include hours worked each day for each of those employees. App. 168, 184-96.

The daily sign in / sign out sheets demonstrate that Wilmer Aguilar-Funes signed in for 8 hours of work at the High Bridge Project each day that week, for a total of 40 hours of work. App. 168. On both April 3 and April 10, 2009, Aguilar-Funes received a separate check from EnviroTech classified as an "account payable" check, each in the amount of \$1,200.00. App. 168, 197-99. The daily sign in / sign out sheets demonstrate that Vicente Rivera was not included on the payroll report but did sign in for 40 hours of work for that week. App. 168, 200-02. Likewise, on both April 3 and April 10, 2009, Rivera received a separate check from EnviroTech classified as an "account payable" check each in the amount of \$1,200.00. *Id.* The same pattern is true for Andres Ordonez for this period. App. 168-69, 203-05.

Mr. Dahl, one of EnviroTech's senior management employees admitted in his deposition that these individuals were EnviroTech employees and that they were performing covered work. App. 35-39. He further confirmed that EnviroTech engaged in the fraudulent payroll scheme and in addition to the accounts payable checks, would distribute envelopes of cash to employees. App. 38-39.

After reviewing all of the sign-in / sign-out sheets, the limited payroll records obtained, and the 7,000 checks, the Funds' auditor prepared an audit invoice identifying all hours worked on the High Bridge Project by EnviroTech's

employees which were not reported to the Funds. App. 168. The total amount the Funds' Auditor initially determined to be due for the period of March 24, 2008 through May 1, 2009 on this project for fringe benefit contributions is \$246,352.00. App. 169, 206-09. In May 2011, the Funds' auditor reviewed some additional records and further adjusted the contribution rate to account for the removal of the association fee. The final audit invoice amount reflects a total amount due of \$245,168.86. App. 169, 210-13. Until this audit was completed, the Funds were not aware of the amount of hours worked by EnviroTech's employees on the High Bridge Project, which were not reported to the Funds. App. 42-43.

Claim on the Payment Bond

The \$2,010,740 Subcontract Labor and Material Bond issued by Granite Re ensures that all labor used in the performance of the contract for the High Bridge Project will be promptly paid. The EnviroTech employees were not paid for the labor they provided on the High Bridge Project and therefore, on February 16, 2011, the Funds mailed a notification to Granite Re, Inc., asserting a claim on the bond covering the High Bridge Project for the amounts due for the hours the employees worked on that project. App. 43, 155-56. On February 17, 2011, the Funds mailed an amended notification of their claim in the amount of \$246,352.00. App. pp. 43, 159. Granite Re denied responsibility for the claim.

Procedural History

The Funds filed a lawsuit against Granite Re in Dakota County District Court on April 5, 2011. Granite Re answered on April 26, 2011 and filed a third-party complaint against EnviroTech and the individual guarantors on the bond, David P. Sobaski, Karla P. Sobaski, Daniel Krause, Margaret Krause, Brent Krause, Jane Krause, William Sievers, Jill Sievers, Brent Anderson and JoAnne M. Anderson. Some of the individual guarantors retained counsel and entered into an agreement with Granite Re regarding their participation in the litigation. EnviroTech and several of the guarantors did not ever file an answer to the third-party complaint.

The parties exchanged limited discovery. In 2011, the Funds and Granite Re each moved for summary judgment. App. 27-30. While Attorney Eric Forsberg made an appearance for Daniel Krause, Margaret Krause, Brent Krause, Jane Krause, William Sievers and Jill Sievers, those third-party defendants did not file any written materials. The hearing for the cross-motions was held on December 15, 2011. December 15, 2011 Transcript.

On March 6, 2012, the district court issued an Order and Judgment, dismissing the Funds' claims against Granite Re. Add. 1-11. The third-party defendants were dismissed through a series of stipulations, notices, and then subsequent orders from the district court. App. 225-34. The Funds filed their initial appeal on May 4, 2012. Pursuant to Order from this Court dated June 12, 2012, the Funds re-filed their appeal on June 15, 2012.

STANDARD OF REVIEW

In reviewing a district court's ruling on a summary judgment motion, the appellate court must determine (1) whether any issues of material fact exist; and (2) whether the district court erred in its application of the law. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000); *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). Whether a genuine issue of material fact exists or whether the district court erred in its application of the law is reviewed *de novo*. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). The appellate court is not bound by and need not give deference to the district court's decision on a question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. Ct. App. 2001). The evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001); *Offerdahl*, 426 N.W.2d at 427. Accordingly, the appellate court is not bound by, and need not, give deference to the district court's legal decision on whether the doctrine of fraudulent concealment applies here nor whether the Appellant is a proper claimant under the bond. *Bondy*, 635 N.W.2d at 249.

SUMMARY OF THE ARGUMENT

The Appellant Funds are proper claimants on the bond as they are not only the intended beneficiaries of the payment bond between Respondent Granite Re and Third-Party Respondent EnviroTech, payment by Granite Re will completely

discharge EnviroTech's obligations to the Funds with respect to the project covered by the Bond.

The statute of limitations imposed by Granite Re's bond was tolled due to Granite Re's principal's fraud. Granite Re cannot be allowed to hide behind its principal's fraudulent actions at a cost to the employees who provided labor to the project and the Funds.

The district court erred in dismissing the Funds' claims and in denying the Funds' motion for summary judgment. The district court's order should be reversed and the Funds' motion for summary judgment should be granted in its entirety.

ARGUMENT

I. The District Court Committed Reversible Error By Determining That The Appellant Funds Are Not A Third-Party Beneficiary To The Contract Between Granite Re And EnviroTech.

The district court incorrectly held that Appellant Funds failed to satisfy the third-party beneficiary requirements. Add., 3-4. A review of pertinent caselaw and policy guidelines demonstrates that the Appellant Funds are a third-party beneficiary of the payment bond between Granite Re and EnviroTech. As established below, since the entire purpose of the bond at issue here is to ensure full payment to those providing labor to the project and Granite Re's payment to the Funds' will fully and completely discharge EnviroTech's

obligations to the Funds for the hours worked on the project, the two relevant inquiries for the Court are satisfied.

A. In Minnesota, a third-party need only satisfy one of two tests to establish third-party beneficiary status: intent to benefit; or duty-owed.

The seminal case on the question of third-party beneficiary status is *Cretex Cos.*, 342 N.W.2d at 138. In this case, the Supreme Court reviewed the history of third-party beneficiary contract law and absolutely clarified that a party need only meet one of two tests: duty owed or intent to benefit. *Id.* at 139.

We hereby adopt the intended beneficiary approach outlined in Restatement (Second) of Contracts § 302 (1979). Under this approach, if recognition of third-party beneficiary rights is "appropriate" and either the duty owed or the intent to benefit test is met, the third party can recover as an "intended beneficiary." For the third party to recover, *there is no need to satisfy both the duty owed and the intent to benefit tests*

Id. (emphasis added).

In the *Cretex* case, the Court specifically noted that the bond at issue was only a performance bond and construed the intent of that bond to only benefit the property owner. The Court emphasized that third-party recovery is warranted where the surety bond by reasonable implication expresses an intent to benefit third-parties. *Id.* at 141.

B. Payment by Granite Re will completely discharge EnviroTech's obligations to the Funds for this project and therefore the Funds are third-party beneficiaries to the payment bond.

Contrary to the district court's conclusion, the Appellant Funds fully satisfy the duty-owed requirements in considering whether a party is an intended beneficiary. *Id.*, pp. 7-10. The duty-owed test focuses on the discharge of a duty otherwise owed to the third-party. For example, a construction contractor, Twin City Construction Company, contracted with Bridge Street Partnership for the construction of a hotel. *Twin City Const. Co. vs. ITT Indust. Credit Co.*, 358 N.W.2d 716 (Minn. Ct. App. 1984). Twin City completed \$600,000 worth of work on the hotel, but then ceased construction due to non-payment from Bridge Street. Twin City perfected a mechanic's lien on the property. Bridge Street Partnership obtained a loan from ITT to complete the hotel, but was required to obtain a release from Twin City of the mechanic's lien. Twin City granted the release and constructed the hotel. ITT made most of the required payments but refused to make the last payment to Twin City. Twin City sued ITT seeking payment of the final amounts due. *Id.* at 717.

The *Twin City Const. Co* court found that Twin City was a third-party beneficiary of the contract between ITT and Bridge Street, finding that the duty-owed test is met if the promisor's performance under the contract discharges a duty otherwise owed to the third-party by the promisee. In the Twin City case, the Court concluded that ITT's (promisor's) payment to Twin City (third-party) would discharge the debt otherwise owed to Twin City by Bridge Street

(promisee). *Id.* at 718. Here, Granite Re's (promisor's) payment to the Funds (third-party) will discharge the debt EnviroTech (promisee) owes to the Funds.

The duty-owed test is easily met here as shown in a recent decision discussing this test. Specifically, as a Minnesota court explained recently:

To satisfy the duty-owed test, Nisswa Properties must show that the bank's contractual performance discharged a duty otherwise owed to Nisswa Properties by Nisswa Marine. See *Cretex*, 342 N.W.2d at 138 (discussing test). Nisswa Properties argues that the duty-owed test is met because Nisswa Properties was financially dependent on lease payments from Nisswa Marine. But there is no evidence that the bank assumed Nisswa Marine's obligations under the lease. See *Twin City Constr. Co. v. ITT Indus. Credit Co.*, 358 N.W.2d 716, 718 (Minn. Ct. App. 1984) (concluding that duty-owed test was met where promisor assumed an obligation that promisee owed to third party).

Nat'l Bank, 2011 WL 1833100, *4. Here, Granite Re's contractual performance would discharge EnviroTech's duty to pay Plaintiffs the owed fringe contributions. Granite Re, thereafter can seek indemnification from EnviroTech as provided under the Bond. Add., pp. 22-24. Indeed, the purpose of this type of bond – payment bond – is to contractually agree to pay the monies EnviroTech owes if it fails to submit full payment for work on the High Bridge Project. And clearly based on the CBA, EnviroTech owes money directly to Appellant Funds based on work performed on the project that is the subject of the Bond in order to fully compensate the employees who provided labor on the High Bridge Project. To hold that Appellant Funds are not proper claimants would create an opportunity for businesses to purposefully not pay fringe benefits as enforcement by the

individual employees would be unlikely. Plaintiffs' Memo in Opposition to Def. Granite Re's Motion for Summary Judgment, filed December 6, 2011, pp. 12-14.

Simply put, EnviroTech had an obligation to pay the full amount due for the hours its employees worked on the project. That obligation is satisfied through payments to the employees on the paycheck (or cash equivalent) and payments to the Funds for the benefits. EnviroTech was obligated to pay to the Funds the hourly contribution rates. Upon Granite Re's payment of the hourly contribution rate for the hours worked on the project, EnviroTech's obligations to pay those amounts to the Funds will be fully discharged.

To be sure, EnviroTech owes other amounts to the Funds for projects completely unrelated to the High Bridge project. There is no requirement that the payment from Granite Re satisfy every obligation EnviroTech owes, only that obligation associated with the hours these employees worked, the foundation of the Funds' claim.

C. Granite Re and EnviroTech intended that the payment bond would protect the laborers working on the project and ensure that all compensation was received, including the amounts owing to the Appellant Funds.

By securing the bond, EnviroTech sought to ensure all owed payments and compensation would be covered by Granite Re. Despite this fact, the district court improperly that without a "direct contract," the Appellant Funds are not intended beneficiaries. Add. 3-4, 6-10. This holding goes against the terms of the

bond and also the basic relationship between EnviroTech, the employees and the Appellant Funds' trustees.

To satisfy the intent to benefit test, the "circumstances [must] indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Nassar v. Chamoun*, 2012 WL 426595, *2 (Minn. Ct. App.) (citing Restatement (Second) of Contracts § 302(1)(b)); *Cretex*, 342 N.W. 2d at 139. The Court's determination of the parties' intent necessarily requires a review of the surrounding circumstances at the time the parties entered into the contract, including what the parties' knew of their existing obligations, and generally require some manifestation of the parties' intent to benefit a third party in the written terms of the contract. *Id.* at *2 (citing *Hickman Safeco Ins. Co. of Am.*, 695 N.W.2d 365, 370, 370 n. 7 (Minn. 2005)); *Cretex*, 342 N.W.2d at 140.

Here, by the very terms a payment bond is intended to benefit third parties. *Add.*, pp. 22-24. There is no dispute that the payment bond expressly benefits all individuals providing labor to the project to ensure they receive full payment for their services. If the claim for the unpaid employee benefit contributions had been filed by the employees, there would be no dispute. The question the district court improperly answered below, is whether the Appellant Funds, to whom the CBA directs the employee contributions to be remitted, are included in those third parties Granite Re and EnviroTech intended to benefit.

The Court should begin with a review of all of the surrounding circumstances. The surrounding circumstances are best explained in language

found from a 1957 United States Supreme Court's decision. See *United States v. Carter*, 353 U.S. 210 (1957). In this case, the Supreme Court found that union benefit fund trustees have standing to sue on a contracting bond for their funds' beneficiaries.

Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created [the employer's] obligation to make the specified contributions, but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment. The trustees stand in the shoes of the employees and are entitled to enforce their rights.

Id. at 219-20. The Court went on to further explain its rationale:

"Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers."

Id. at 219-220. The Court specifically held that contributions to benefit funds were a fundamental component of a laborer's compensation. See *id.* at 217-218 ("Not until the required contributions have been made will ... employees have been 'paid in full' for their labor"). Numerous individual states have construed their statutorily created bonds to allow recovery of contributions by employee benefit plan trustees who are not in direct privity of contract. See, e.g., *Trustees for Michigan Laborers' Health Care Fund v. Warranty Builders, Inc.*, 921 F. Supp

471, 474-76 (E.D. Mich. 1996); *Hartford Fir Ins. Co. v. Trustees of Const. Industry*, 125 Nev. 149, 157-58 (2009).

This rationale is not limited to statutory bonds, however. In evaluating trustees' standing to sue on a common-law bond, the New York Appellate division stated, it is "quite immaterial that the bond in the Carter case was a statutory bond while the bond in this case is a common-law bond." *Martin v. Casey*, 5 A.D.2d 185, 190 (N.Y. 1958); see also, *Mountbatten Surety Co., Inc. v. Kips Bay Cinemas, Inc.*, 2000 WL 1752916, *9 (S.D.N.Y. Nov. 29, 2000) ("Although *Carter* is not directly binding, the Court's conclusion that the Miller Act's goal of securing workers' benefits gave union trustees standing to sue on behalf of the funds' beneficiaries is persuasive on the issue of whether ERISA's worker benefit goals ... justify giving [the Trustees] standing in this case."). This has been cited as part of the majority rule that generally allows union trustees to recover contributions through payment bonds on beneficiaries' behalf. See *National Elec. Industry Fund v. Bethlehem Steel Corp.*, 296 Md. 541, 549-51 (1983).

This rationale still applies even if a private payment bond does not explicitly identify a Plan/Union as a "claimant," as is the case in the present action, where the bond defines a "claimant as "one having a direct contract with the Principal for labor, material, or both...." *Trustees of Plumbers and Steamfitters Local 21 Annuity Fund v. Hartford Fire Ins. Co.*, involved a functionally identical scenario. In this case, a claimant on the payment bond was defined as "an individual or

entity having a direct contract with the contractor or with a subcontractor of the contractor to furnish labor, materials or equipment for use in the performance of the contract.” 809 N.Y.S.2d 484 (Sup. Ct. 2005). Despite the bond language, the court held that, in keeping with the Supreme Court’s decision in *Carter*, the Union Trustees had the standing to sue on the payment bond. See *id.* at 4. (“The Union Trustees and the employees of the contractor are joined at the hip. There is no presumption that the Union does not provide labor. ‘The Trustees stand in the shoes of the Employees and are entitled to enforce their rights’”) (quoting *Carter*, 353 U.S. at 220).

In the present case, the Appellant Funds stand in the shoes of the employees, and brings this action simply to enforce their rights. Minnesota Courts have not had the opportunity to directly address whether trustees have standing to sue on a common-law payment bond under which they are not defined as claimants. To comport with *Carter*, as well as with jurisdictions that have addressed this exact question, the Court must conclude that the Trustees, on behalf of their beneficiaries, do have standing to bring the present claim.

Minnesota has construed its mechanic’s lien statute to provide that employee benefit plans, such as the Appellant Funds, are within the class of parties protected by the statute even though not expressly listed in the statute. See *Twin City Pipe Trades Service Assoc., Inc., v. Peak Mechanical, Inc.* 689 N.W.2d 549 (Minn. App. 2004). In this case, the *Peak* court reasoned that in effect the employees of the delinquent employer would have otherwise been

authorized to proceed with a claim, have effectively transferred their rights to the employee benefit plans. *Id.* at 555. In rendering its decision, the Court in *Peak* followed the reasoning of the U.S. Supreme Court's *Carter* decision, finding that while the *Carter* decision focused on contractors surety bonds and *Peak* focused on mechanics liens, both sets of laws served the same purpose : "to protect laborers." Following that reasoning, this Court held that trust funds are proper claimants under the mechanics lien statutes as they are also proper claimants under the federal law.

Other jurisdictions have held that a claimant may include an intended third-party beneficiary of the contract. *Nebraska Beef, Ltd. v. Universal Sur. Co.*, 607 N.W.2d 227, 233 (Neb. App. 2000); *see also Bd. Of Educ. Of Community High School Dist.No.99, DuPage County v. Hartford Acc. and Indem. Co.*, 504 N.E.2d 1000, 1005 (Ill. App. Ct.1987). In *Nebraska Beef*, the court explained that a bond claimant must either be a party to or an intended third-party beneficiary of the performance bond under which the plaintiff claimed. *Nebraska Beef*, 607 N.W.2d at 233. Similarly, it follows that a bond, which is governed by contract law in Minnesota, should therefore allow a third-party beneficiary to be the proper claimant. *See id.* If not, who would watch over the watchdogs? A surety – in the business of securing payment – would consistently escape paying unpaid benefits as what individual employee could hire a lawyer to take on this watchdog? Moreover, by limiting the language this way, the court system could

be flooded with individual suits. The Appellant Funds are able to collectively pursue all monies due, that is not an option for an individual employee.

For EnviroTech to comply with its contractual obligation to Granite Re, it was obligated to promptly make all payments due for labor. EnviroTech owed total compensation to the employees of approximately \$43 per hour, but that obligation to the employees was only satisfied by making a payment to the employee on the check and a payment to the Funds. See *Northern Nat'l Bank v. Wiczek*, 2011 WL 1833100, *3 (Minn. Ct. App.). Granite Re's payment under the payment bond to the Funds will satisfy EnviroTech's obligation to make full payment to the employees on the High Bridge Project.

The entire purpose of the payment bond is to ensure that those that provide labor and material to the project are compensated for their services and the materials supplied to complete the project. The payment bond, unlike the performance bond, is structured to ensure that payments are made by the principal. The principal here was a Union contractor and used its trained employees to perform the services on the project. The purpose of the bond was to make sure that those employees were paid for their services. The employees were not paid in full for their services. At the time that EnviroTech purchased the bond it was a Union contractor and it was fully aware of its obligation to make payments to the Funds for all hours its employees worked. It purchased a payment bond from Granite Re to make sure that all payments for labor and material were covered.

II. The District Court Committed Reversible Error By Concluding The Statute Of Limitations Was Not Tolloed By EnviroTech's Fraudulent Concealment.

This Court should reverse the district court's holding that Appellant Funds' allegations that EnviroTech fraudulently concealed their cause of action are not sufficient to toll the statute of limitations against Granite Re under equitable principles. *Id.*, 10-11. The district court exclusively reasoned that because the action was brought against the surety, Granite Re, and not the principal who committed the fraud, the statute of limitations should not be tolled. *Id.* This reasoning is inconsistent with the recognized principle that:

“Where the principal's concealment of his default prevents the running of the Statute of Limitations until the discovery of the default, the statute does not begin to run in favor of the surety until the creditor may reasonably be expected to discover the default.”

Restatement (First) of Security § 121; Statute Of Limitations—Effect On Surety's Liability Of Principal's Concealment Of Default (1941); Restatement (Third) of Suretyship & Guaranty § 66. Effect Of Principal Obligor's Concealment Of Default On Statute Of Limitations With Respect To Secondary Obligation (1996).

The district court's holding further contradicts the long accepted rule that a surety's liability is tied directly to its principal's liability. *Connecticut Mut. Life Ins. Co. v. Schurmeier*, 147 N.W. 246, 248 (1914) (“The principal having broken the

bond, the liability of the surety follows.”); see also *MacKenzie v. Summit Nat. Bank of St. Paul*, 363 N.W.2d 116, 120 (Minn. Ct. App. 1985).

Bros. Const., Co. v. Ratliff, Inc., 4:08CV3103, 2009 WL 806800 (D. Neb. Feb. 27, 2009) report and recommendation adopted sub nom. *Dobson Bros. Const. Co. v. Ratliff, Inc.*, 4:08CV3103, 2009 WL 837790 (D. Neb. Mar. 26, 2009). As such, this Court should reverse the district court’s decision to grant Granite Re’s Motion for Summary Judgment.

A. This Court may consider outside jurisdictional cases as persuasive authority

It appears that this case presents an issue of first impression for Minnesota Courts: whether a principal’s fraudulent concealment tolls the limitations for a claim against a surety of a performance or payment bond. This Court may therefore consider cases from federal and other states’ courts as persuasive authority in its analysis. *Rush v. Jostock*, 710 N.W.2d 570, 580 (Minn. Ct. App. 2006) (“While we find no Minnesota caselaw to assist this court in resolving the narrow question before us, that of foreign jurisdictions informs our inquiry”) (citations omitted). *Gordon v. Microsoft Corp.*, 645 N.W.2d 393, 402 n.9 (Minn. 2002) (“We will often look to case law from other states for guidance when our own jurisprudence is undefined.”). Moreover, the critical principles here are based on general rules of suretyship, which are well recognized in various jurisdictions. In such similar instances, Minnesota Courts have recognized that its law should be construed to further the majority rule or uniform law. *Savig v.*

First Nat. Bank of Omaha, 781 N.W.2d 335, 346 (Minn. 2010); *Gelin v. Gelin*, 229 Minn. 516, 522, 40 N.W.2d 342, 346 (1949).

B. The statute of limitations on the bond claim did not begin to run in favor of Granite Re until Appellant Funds discovered EnviroTech's fraudulent conduct

The Doctrine of Fraudulent Concealment is Applicable.

Despite the extensive allegations of fraudulent concealment by EnviroTech in the complaint, the district court flatly rejected any tolling of the statute of limitations against Granite Re. Add., 10-11. In doing so, the district court refused to even consider the underlying allegations, and instead, improperly interpreted the doctrine of fraudulent concealment as relevant only to named parties in an action. Add., pp. 10-11. This is improper under Minnesota's long standing equitable law and widely accepted suretyship principles.

"The purpose of a statute of limitations is "to prescribe a period within which a right may be enforced and after which a remedy is unavailable for reasons of private justice and public policy." *Miernicki v. Duluth Curling Club*, 699 N.W.2d 787, 788 (Minn. Ct. App. 2005) (citing *Entzion v. Ill. Farmers Ins. Co.*, 675 N.W.2d 925, 928 (Minn. Ct. App. 2004)). Minnesota Courts, however, have recognized that under principles of equity, an individual should not benefit from the protection of the statute of limitations when they have fraudulently hidden a legal claim. *Schmucking v. Mayo*, 183 Minn. 37, 40, 235 N.W. 633, 634 (1931).

Minnesota Courts first adopted the doctrine of fraudulent concealment in 1931 by holding that “when a party against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence ...” *Id.* This decision went on to articulate the longstanding public policy and equitable principles that support adoption of this doctrine:

It also seems to us that the rule as stated is supported by the weight of moral and equitable principles which in our practice are not entire strangers in actions at law. If one's legal title to property is endangered by the fraud of another, the courts will give relief; and if the rights which one has to a legal remedy to establish such title be defeated, by a like fraud, is not the principle the same?

Schmucking, 183 Minn. at 40. As the doctrine developed in Minnesota, the courts have established that a party must establish: (1) the defendant made a statement(s) that concealed plaintiffs potential cause of action; (2) the statement(s) were intentionally false; and (3) the concealment could not have been discovered by reasonable diligence. *Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. Ct. App. 2003) (citing *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. Ct. App. 1992)). It was here where the district court's analysis ended. Add., pp. 10-11. The court simply concluded that because the term “defendant” was included in the limited cases addressing this doctrine in Minnesota, no further scrutiny was required in considering whether Granite Re, as a surety, is likewise subject to this doctrine. If the district court properly

considered this equitable rule – that the doctrine prevents individuals benefitting from their fraud, along with certain suretyship principals, it would have properly determined that statute of limitations did not expire as to the bond claim against Granite Re.

Going back to the first half of the twentieth century, the legal community has recognized that that the concealment by a principle will toll the statute of limitations against a surety. Restatement (First) of Security § 121; Statute Of Limitations—Effect On Surety’s Liability Of Principal’s Concealment Of Default (1941). (“Where the principal’s concealment of his default prevents the running of the Statute of Limitations until the discovery of the default, the statute does not begin to run in favor of the surety until the creditor may reasonably be expected to discover the default.”) This rule has continued to be included in recent restatements. Restatement (Third) of Suretyship & Guaranty § 66; Effect Of Principal Obligor’s Concealment Of Default On Statute Of Limitations With Respect To Secondary Obligation (1996). In considering the fundamental purpose of a surety, this rule is not only sensible, but the only logical application of the doctrine of fraudulent concealment in surety related actions.

Indeed, it appears to be a majority rule that a surety’s liability is tied directly to its principal. For instance, in *Mackenzie*, 363 N.W.2d at 120, while discussing the right of a surety to seek indemnification as codified in Minnesota, the court acknowledged that a surety’s liability is based on the principal’s debt. *Id.* Likewise, the First Circuit utilized the general rule of a surety’s liability for its initial

framework when determining whether a reassignment of a bond by principal also transfers the liability of the surety. Specifically, the court stated: “The basic rule on the liability of sureties is that “the surety is not liable to the creditor unless his principal is liable.” *Rhode Island Hosp. Trust Nat. Bank v. Ohio Cas. Ins. Co.*, 789 F.2d 74, 78 (1st Cir. 1986). In *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327 (6th Cir. 2007), the Sixth Circuit applied California suretyship law in a complex case concerning the collapsed of a business alleged to merely be a ponzi scheme. The relevant issue before the Court was whether the applicable insurance contract was in fact a surety contract. The court held that California law limits the liability of the surety to the extent that the principal would be liable. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 344 (6th Cir. 2007) (citing *U.S. Leasing Corp. v. duPont*, 69 Cal.2d 275, 70 Cal.Rptr. 393, 444 P.2d 65, 75 (1968) (“since the liability of a surety is commensurate with that of the principal, where the principal is not liable on the obligation, neither is the guarantor”)). In *Milwaukee Bd. of School Directors v. BITEC, Inc.*, 321 Wis. 2d 616 (Ct. App. 2009), the court analyzed a surety’s liability under a performance bond for post-completion obligations that were not specifically listed in the bond. In finding that the surety was liable, the court articulated that “The rule in Wisconsin is that a surety’s obligation is derived from its principal and the liability of the surety is measured by the liability of the principal.” *Id.* at 622.

Additionally, in the following cases, each court recognized a surety's liability is generally directly tied to the liability of its principals. *In re Kemper Ins. Companies*, 819 N.E.2d 485 (Ind. Ct. App. 2004); *City of Ferndale v. Florence Cement Co.*, 269 Mich. App. 452, 712 N.W.2d 522 (2006); *Fidelity & Guaranty Ins. Co. v. Blount*, 63 So. 3d 453 (Miss. 2011); *Wright Way Const. Co., Inc. v. Harlingen Mall Co.*, 799 S.W.2d 415 (Tex. App. Corpus Christi 1990), writ denied, (May 1, 1991); *Board of Sup'rs of Fairfax County v. Southern Cross Coal Corp.*, 380 S.E.2d 636 (1989); *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005). This rule is a natural cornerstone for the Restatement's extension of the doctrine of fraudulent concealment based on a principal's conduct to a surety.

Granite Re may view application of the fraudulent concealment doctrine here as unjust. But as the Restatement acknowledges, a "choice must be made between two innocent persons, the obligee and the secondary obligor. The choice is made in favor of the obligee so long as it cannot reasonably be expected to discover the principal obligor's default." As one court noted, "The Restatement section reflects the rule generally prevailing throughout the country." *Vill. of Herkimer v. Am. Sur. Co. of New York*, 18 A.D.2d 94, 96 (1963) (citing See cases collected in 37 C. J., Limitations of Actions, § 365, p. 980; 54 C. J. S., Limitations of Actions, § 208, p. 229; 50 Am. Jur., Suretyship, § 184, p. 1024.). Here, Appellant Funds request the Court makes the same choice. Holding otherwise, such as the district court did, could not be settled with surety

law. For instance, there is no cause of action against a surety until a claim exists against the principal. *Id.* Following this basic tenant and applying the district court's ruling, Appellant Funds were barred from bringing any action against Granite Re prior to discovery of the fraud by EnviroTech and barred once the fraud was revealed. This does not fall in line with the equitable principles of barring protection of an individual's fraud in society and the justice system. *Schmucking*, 183 Minn. at 40.

There is no policy, rule, doctrine or other basis to bar applying the fraudulent concealment doctrine here. The district court's analysis failed to consider the unique and correlative relationship between a principal and its surety. Without a sufficient consideration of this relationship, the district court committed reversible error in holding the doctrine is wholly inapplicable here.

C. Appellant Funds acted with Due Diligence in Discovering EnviroTech's Fraud

In its Motion for Summary Judgment, Granite Re further requested relief based on Appellant Funds' alleged failure to establish all elements necessary under the doctrine of fraudulent concealment.¹ Under Minnesota law, there is "no categorical definition" of what establishes fraudulent concealment. *Hemmerlin-Stewart v. Allina Hospitals & Clinics*, 2005 WL 2143691 (Minn. Ct. App. Sept. 6, 2005) (unpublished). Minnesota Courts have concluded that "(1) '[t]he party

¹ The district court did not rule on this issue, however as this Court's review is plenary Appellant will address this argument.

claiming fraudulent concealment has the burden of showing that the concealment could not have been discovered sooner by reasonable diligence [,]" and (2) "the concealment must be fraudulent or intentional.' *Id.* (citing *Collins v. Johnson*, 374 N.W.2d 536, 541 (Minn. Ct. App.1985), *review denied* (Minn. Nov. 26, 1985)).² "[T]he requirement of reasonable diligence imposes an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of action for fraud." *Klehr*, 87 F.3d at 237 (citing *Buller*, 518 N.W.2d at 542) (other citation omitted). *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 685 (Minn. Ct. App. 2010). There is no duty to investigate a fraud if a party has no reason to suspect. *Id.* As explained below, under the above governing standards, Appellant Funds could not have discovered EnviroTech's fraud by exercise of ordinary diligence.

As set forth in the factual section above, EnviroTech fraudulently concealed the existence of their causes of action. It is undisputed that EnviroTech submitted payroll records that did not reflect all hours worked covered under the CBA or all payments to certain employees for hours worked on the High Bridge Project. These same undisputed facts show that the individuals of EnviroTech actively and fraudulently concealed their improper payroll practices. As described above, these employees did not appear on

² The only contested issue below was whether the record establishes undisputed facts that Appellants exercised reasonable diligence in discovering EnviroTech's fraudulent conduct.

EnviroTech's payroll register during the time period relating to the sign in / sign out sheets, and likewise did not appear on the fringe fund reports during the referenced time period. App. 151-54, 166-69. Not until the auditor reviewed the sign-in / sign-out forms and pieced all the documents together was it revealed that EnviroTech has defrauded the Funds out of \$246,352.00 in fringe benefit contributions. App. 165-69. Once alerted of the potential fraud, Appellant Funds immediately investigated these issues and sought legal enforcement.

Granite Re will likely argue the Collection Policy's terms calling for an audit "approximately every two years" is not reasonable. Defendant and Third-Party Granite RE, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment, filed November 15, 2011, 16-17. This argument is irrelevant here since it is preempted under ERISA and cannot be raised in connection with a state law claim. Under ERISA section 514(a), 29 U.S.C. § 1144(a), ERISA supersedes "any and all State laws insofar as they may now or hereafter relate to an employee benefit plan." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 202, 208 (1985). "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). As the Supreme Court noted, "the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (quoting *Alessi*, 451 U.S. at 523). Moreover, the phrase "relate to" has been given "its broad common-sense meaning," so any law with a

“connection with or reference to” such a plan is preempted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). In other words, ERISA preempts all state statutory and state common law which directly or indirectly relate to the administration of employee benefit plans. *Pilot*, 481 U.S. at 47; *Gibson v. Prudential Ins. Co.*, 915 F.2d 414, 417 (9th Cir.1990). Given that the Collection Policy is part of the Plan's administration it certainly “relate[s] to” the Plan. Thus, any argument concerning the reasonableness is solely restricted to federal court.

Second, Granite Re will also argue that the Appellant Funds should have discovered the fraud within the statutory deadline by demanding an audit in 2009. A review of the record disputes this contention. Appellant Funds were tied up in over two years of discovery disputes with EnviroTech in an effort to expose the fraudulent scheme employed by EnviroTech. See Affidavit of Joshua A. Dorothy dated November 15, 2011, Ex. T. Appellant Funds did properly complete audits of the payroll records, however, thousands of hours worked by covered individuals were not on any of the payroll documents provided and had not been reported. App., pp. 166-169. Appellant Funds had to initiate legal action and also file numerous discovery motions in federal court to gain access to documents. See Affidavit of Joshua A. Dorothy dated November 15, 2011, Ex. T.

In the alternative, if this Court finds that the record is unclear as to the undisputed facts supporting a conclusion concerning the Appellant Funds'

diligence in discovering the fraud, the district court's decision should be reversed and the case remanded for further proceedings. *Klehr*, 875 F. Supp. at 1349 (applying Minnesota law) (Generally, "fraudulent concealment and a plaintiff's due diligence are questions of fact unsuited for summary judgment.").

III. Conclusion

Based on the foregoing, the Appellant Funds respectfully request that this Court reverse the district court in its entirety and enter judgment in favor of the Appellant Funds. In the alternative,

Respectfully submitted,

Date: 7/30/12

ANDERSON, HELGEN, DAVIS & NISSEN, PA

By: 

Pamela Hodges Nissen (Atty. Reg. No. 259810)
Rebecca A. Peterson (Atty. Reg. No. 392663)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: (612) 435-6363
Email: phn@andersonhelgen.com

FELHABER, LARSON, FENLON & VOGT, P.A.
Ruth S. Marcott (Atty. Reg. No. 176825)
444 Cedar Street, Suite 2100
St. Paul, MN 55101
Telephone: (651) 312-6034
Email: rmarcott@felhaber.com

Attorneys for Appellant Funds

CERTIFICATE OF LENGTH

This certifies that this brief complies with the word count and length limit requirements of Minn. R. Civ. App. P. 132.01, subd. 3. This brief was typed using Microsoft Word 2007. This brief contains 10,500 words, is less than 45 pages excluding table of contents pursuant to Minn. R. Civ. App. 132.01, subd. 3, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a).

A handwritten signature in black ink, appearing to read 'P. H. Nissen', written over a horizontal line.

Pamela H. Nissen, Atty. Reg. No. 259810