IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ELVIA QUIROZ ZAPATERO, Individually and as the Administratrix of the Estate of Jose Luis Garcia-Hernandez,	)	
Plaintiff,	)	
v.	)	C.A. No. N15C-12-231 WCC
GEORGE & LYNCH, INC., ACCESS LABOR SERVICES, INC., CATERPILLAR, INC., AARON F. HARLEY, DELAWARE SOLID WASTE AUTHORITY,	)	
Defendants.	)	

Submitted: July 19, 2017
Decided: November 29, 2017

Defendants George & Lynch, Inc. and Aaron F. Harley's Motion for Summary Judgment – DENIED

MEMORANDUM OPINION

Timothy A. Dillon, Esquire, McCann & Wall, LLC, 300 Delaware Avenue, Suite 805, Wilmington, DE 19801. Attorney for Plaintiff.

Louis J. Rizzo, Jr., Esquire, Reger Rizzo & Darnall LLP, 1523 Concord Pike, Suite 200 Brandywine Plaza East, Wilmington, DE 19801. Attorney for Defendants.

CARPENTER, J.

Before the Court is George & Lynch, Inc.'s ("G&L") and Aaron Harley's ("Harley") (jointly "Defendants") Motion for Summary Judgment. For the foregoing reasons, the Court will deny the motion.

I. FACTUAL & PROCEDURAL BACKGROUND

On December 26, 2014, Jose Luis Garcia-Hernandez (the "Deceased" or "Hernandez") was crushed by a Caterpillar D6E LGP Crawler Tractor (the "Tractor") at Cherry Island Landfill (the "Landfill") in Wilmington, Delaware.[1] Hernandez suffered fatal bodily injuries from the Tractor and died the same day (the "Accident").[2] At the time of Accident, it is alleged that Harley, who was employed by G&L, was said to be operating and reversing the Tractor in a careless and unsafe manner.[3] Hernandez was "an outsourced employee who had been provided to George & Lynch by Access Labor Services, Inc./Countrywide HR ("Access Labor")."[4] Hernandez's initial hire date with Access Labor is unknown, but it is undisputed by both parties that he had been a temporary employee at the Landfill since 2006.[5]

When G&L needed workers at the Landfill, they would contact Access Labor.[6] Access Labor would provide workers pursuant to an oral agreement with

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[1] Compl. ¶ 9,11.
[2] *See id.* at ¶ 12.
[3] *See id.* at ¶ 11.
[4] Defs.' Mot. for Summ. J. at ¶ 4.
[5] Brooks Dep. 26:23–24; 27: 1–5, April 12, 2017. *See also* Pl.'s Ex. B.
[6] *See* Brooks Dep. 20:20–24; 21: 1–5.

G&L.[7] Each pay period, G&L paid Access Labor a contractually agreed-upon fee for employees provided by Access Labor and Access Labor paid its employees directly.

During Hernandez's employment at the Landfill, G&L would supervise and direct the work performed by Hernandez and if need be, instructed him on how to perform the work.[8] G&L supervised the day-to-day activities at the Landfill and was present throughout the day.[9] None of the Access Labor management was at the Landfill to supervise its employees,[10] and if a situation arose, G&L had the authority to discipline or request Access Labor to no longer send that employee to work at the Landfill.[11]

G&L supplied all safety equipment and devices necessary for work at the Landfill.[12] It also provided Access Labor employees with any tools and equipment needed to perform daily work activities.[13] Additionally, G&L provided classroom and on-site training to Access Labor employees. Hernandez completed annual training sessions on fire prevention/protection, waste screening, and operational

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[7] *See id.* at 21:13–14.
[8] Brooks Dep. 20:14–17.
[9] *Id.* at 24:14–24; 25:1.
[10] *Id.* at 22:21–24.
[11] *Id.* at 26:1–22.
[12] *Id.* at 23:9–14.
[13] *Id.* at 19:15–24.

procedures of the Landfill.[14] Participation in training was verified by sign-in sheets and confirmed by G&L at the 30(b)(6) deposition.[15]

After the Accident, G&L contacted Occupational Safety & Health Administration ("OSHA") regarding the workplace fatality and was compliant with their investigation.[16] The worker's compensation carrier for Access Labor, Countrywide HR, "accepted financial responsibility for the worker's compensation claim of Hernandez."[17]

The Deceased's spouse Elvia Quiroz Zapatero, individually and as administratrix of the estate of Jose Luis Garcia-Hernandez ("Zapatero" or "Plaintiff"), filed a wrongful death action against Defendants, Harley and G&L, as well as Access Labor, Caterpillar, Inc., and Delaware Solid Waste Authority on December 29, 2015 seeking judgment for personal injuries, pain and suffering, medical expenses, punitive damages, lost wages, and court costs. In response to the suit, Defendants G&L and Harley filed a Motion to Dismiss Plaintiff's Complaint. The Court denied Defendants' Motion to Dismiss on April 6, 2016, and discovery in the case proceeded. Defendants G&L and Harley now filed the instant Motion for Summary Judgment arguing they are entitled to immunity from suit as

[14] *See* Brooks Dep. at 13:12–24; 14:1–2.
[15] *Id.* at 14:4–24.
[16] *Id.* at 25:8–13.
[17] Defs.' Mot. for Summ. J. at ¶ 7.

Hernandez was a "borrowed servant" and thus they are entitled to rely upon the exclusivity provision under the Worker's Compensation Act ("the Act").

II. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[18] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[19] In reviewing a motion for summary judgment, the Court must view all factual inferences in a light most favorable to the non-moving party.[20] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[21] The Court must also determine whether any genuine issues of material fact exist.[22]

III. DISCUSSION

Before addressing the specific issues presented by this litigation, it is important to step back and appreciate the fundamental underpinning of the borrowed servant doctrine. In its simplest terms, the doctrine provides protection to companies that use agencies to obtain employees and pay a premium to that

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[18] Super. Ct. Civ. R. 56(c); *see also Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[19] *See Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).
[20] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[21] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[22] Super. Ct. Civ. R. 56(c); *see also Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

agency to provide benefits that they would otherwise have to provide. They get the protection because, even if the temporary agency purchases the benefit for the employee, the company in essence is paying through their contractual relationship for that benefit. As such, if they meet the employer-employee test outlined in *Lester C. Newton Trucking Company v. Neal* ("*Lester*")[23] and have paid a clearly defined premium to cover the cost of the benefit purchased by the third-party employer, in this case, the worker's compensation requirement, they get the benefit of the exclusivity provision of the Act. As such, the Court is required to review both the relationship with the injured individual and also the contractual understanding between the companies connected to this worker.

A. The *Lester* Test

The common law borrowed servant doctrine states that:

> an employee, with his consent, may be loaned by his general employer to another to perform specific services, and in that, in the course of and for the purpose of performing such services, he may become the employee of the specific employer rather than the employee of the general employer.[24]

[23] *Lester C. Newton Trucking Co., v. Neal*, 204 A.2d 393, 395 (Del. 1964).
[24] *See Volair Contractors, Inc. v. AmQuip Corp.*, 829 A.2d 130, 134 (Del. 2003).

Delaware Courts use the four-factor employer-employee test outlined in *Lester* to determine if a loaned employee is a borrowed servant.

The *Lester* employer-employee relationship test requires the Court to consider: "(1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages, and (4) who has the power to control the conduct of the employee when he is performing the particular job in question."[25] Such a determination is generally a question of law and the greatest weight is given to the issue of control.[26] However, control "must be more than merely pointing out the area where the operator is to work and the results which he is to accomplish."[27]

In the instant case, Defendant G&L does not dispute that only Access Labor hired Hernandez. There is little information regarding Access Labor's hiring process with Hernandez, but both parties agree he was working at the Landfill prior to G&L becoming the Landfill operator in 2012.[28] Additionally, G&L corporate designee, Leonard J. Brooks, stated that G&L never conducted any pre-job interviews or screenings of Hernandez that may have suggested G&L also hired him.[29] Factor number two is not as clear. G&L had the authority to reprimand

[25] *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 395 (Del. 1964).
[26] *Porter v. Pathfinder Services, Inc.*, 683 A.2d 40, 42 (Del. 1996); *see Hudson v. Tyson Food*, 2004 WL 1790141, at *3 (Del. Super. Ct. 2004) (citing *White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979).
[27] *Loden v. Getty Oil Co.*, 316 A.2d 214, 217 (Del. Super. Ct. 1974) (referencing *Brittingham v. American Dredging Co.*, 262 A.2d 255, 257 (Del. Super. Ct. 1970)).
[28] *See* Brooks Dep. at 13:12–24; 14:1–2.
[29] *See id.* at 12:3–11.

Access Labor employees and could advise Access Labor that an employee was no longer welcome on the job site. So clearly they could make the decision to terminate an Access Labor employee from continuing to perform work for them but it appears only Access Labor could actually fire the individual.[30]

In regard to factor three, there is no question that Hernandez received his paycheck from Access Labor. Access Labor would bill G&L $15.80 per hour for Hernandez's services and $23.70 per hour if he worked overtime.[31] On payday an Access Labor employee would come to the work site and issue checks to its employees. At no time was any money or check directly given to Hernandez by G&L.

As to the final factor of control, Defendants contend that they exercised control over Hernandez by regulating many aspects of Hernandez's employment at the Landfill. For instance, Defendants stated that G&L created Hernandez's work schedules, determined when he could take breaks, regulated overtime, and provided on-site supervision of his work.[32] Additionally, Defendants provided Hernandez with safety gear and tools as needed, as well as annual training sessions.[33] Finally, G&L also maintained a regular presence at the Landfill and was

[30] *See* Brooks Dep. at 26:1–22.
[31] Defs.' Ex. D.
[32] Defs.' Mot. for Summ. J. at ¶ 6.
[33] Brooks Dep. at 23:9–14; 24:1–13.

able to remove employees like Hernandez from the work site if their work was not satisfactory. Plaintiff does not dispute G&L's control over Hernandez's work at the Landfill.

Despite at most satisfying two of the four factors, G&L insists there is an employer-employee relationship and they are immune from suit pursuant to the exclusivity provision of the Act.[34] Plaintiff contends that all four factors of the *Lester* employer-employee relationship test must be satisfied for the borrowed servant doctrine to apply.

The Supreme Court in *Lester* stated that:

> whether or not an employer-employee relationship exists is always determined by the particular facts and circumstances of the case, but that in the last analysis the question is almost exclusively determined by the fact of which possible employer has the right to control and direct the activities of the employee in the performance of the act which caused his injury.[35]

Having found no Delaware case that specifically addresses this issue of whether all factors are required to be in G&L's favor, a fair reading of the Supreme Court *Lester* decision would lead to the conclusion that not all are required and clearly the issue of control is critical to the decision.

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[34] Defs.' Mot. for Summ. J. at ¶ 15 (stating that Hernandez was a "special employee/borrowed servant" of G&L and a co-worker of Harley at the time of the Accident, so Plaintiff cannot bring a wrongful death action against them.).

[35] *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 395 (Del. 1964).

Plaintiff also contends that Defendants' previous admissions that Hernandez was an Access Labor employee creates a significant issue of fact for the jury.[36] Specifically, Plaintiff argues that Defendants are engaging in "strategic choosing" to pick an employment classification for Hernandez, which provides the least exposure to the Defendants.[37] G&L argued during the OSHA investigation that Hernandez was an employee of Access Labor but now they claim Hernandez is a G&L employee to avoid wrongful death liability.[38] Plaintiff urges the Court to deny Defendants' Motion for Summary Judgment because Defendants' actions are an attempt to avoid liability and are against public policy.

While the Court sympathizes with the Plaintiff, the Court finds her "strategic choosing" argument legally unpersuasive. G&L's admission that Hernandez was an Access Labor employee is fundamentally immaterial to his borrowed servant status, as Hernandez can be an employee of both companies.[39] There are multiple Delaware court cases, which found admissions like G&L's to not be dispositive when determining a temporary employee's borrowed servant status. For example, in *Layne v. Gavilon Grain, LLC,* the plaintiff argued that defendant's documented admissions that plaintiff was an Access Labor employee weakened the existence of

[36] Pl.'s Resp. to Defs.' Mot. for Summ. J. at 6.
[37] *See id.*
[38] *See id.* at ¶ 7.
[39] *Richardson v. John T. Hardy & Sons, Inc.*, 182 A.2d 901, 902–03 (Del. 1962).

an employer-employee relationship.[40] The Court was unfazed by such admissions and found Layne to be a borrowed servant.

The Court finds that G&L had authority over all persons who were working at the Landfill on the day of the Accident. It is clear that after being hired by Access Labor and placed with G&L, Hernandez relied on G&L's control and not Access Labor's direction to meet his employment obligations. Hernandez reported to G&L, stayed at work as long as G&L needed him to be there, and did work as directed by G&L or its agents, Mr. Rowe or Mr. Rector.[41] Even though only two of the four factors of the *Lester* employer-employee relationship test can be satisfied by G&L, the Court is inclined to find that an employer-employee relationship existed between Hernandez and G&L. As the Supreme Court has indicated, the primary factor under *Lester* is the issue of control. Here G&L managed, supervised, trained and basically had a classic employer-employee relationship except for the providing of a paycheck. Their work environment clearly treated Hernandez as an employee and the hiring, paying and termination factors were administrative in nature and would not overcome the control factors mentioned above.

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[40] *See Layne v. Gavilon Grain, LLC*, 2015 WL 4153995, at *7 (Del. Super. Ct. 2015); *see* Pl.'s Resp. to Defs.' Gavilon Grain, LLC and Jair Cabreba's Mot. Summ. J. and Pl.'s Cross Mot. Summ. J. at 19 (arguing defendant's admissions that plaintiff was an Access Labor employee are support for summary judgment).

[41] Defs.' Mot. for Summ. J. at ¶ 6.

However, while G&L had to establish the borrowed servant employer-employee relationship criteria under *Lester*, their real motive here is to gain the exclusivity limitation under the Worker's Compensation Act. The Court believes it would be patently unfair to provide a party a shield to civil tort litigation if the relationship between the agency and the company who uses the agency to obtain workers reflected no premium to cover benefits that they would otherwise be required to provide. In other words, if the payment to the agency is simply to cover wages and a nominal administrative cost for the hiring agency, there is no reason to give a borrowed servant employer the benefits of the exclusivity provision under the Act. If so, they are getting a benefit which they paid nothing for and immunity when another party paid for worker's compensation benefits. The Court is simply unwilling to expand the exclusivity provision to this degree and unjustly prevent them from being held accountable for tortious acts committed at their worksite. As such, critical to the decision is the contractual relationship between the parties.

B. Contractual Agreement

Determining the relationship between Hernandez, Access Labor, and G&L is very important for Hernandez's borrowed servant status. The Court must ensure that if it allows the Plaintiff's wrongful death claim against Defendants to proceed,

the Plaintiff is not suing the party that has paid for Hernandez's worker's compensation benefits. Such a result would defeat one of the many purposes of the Act, "to relieve employers and employees of the expenses and uncertainties of civil litigation."[42]

Like the Superior Court in *Layne* and Supreme Court in *Porter v. Pathfinder Services, Inc.,* the Court must look to the agreement between G&L and Access Labor to help determine the true relationship between G&L and Hernandez. This case is not straightforward like precedent cases, because Hernandez's temporary employment at the Landfill was pursuant to an oral agreement between G&L and Access Labor. Thus, the Court has no written contract to review and can only rely on what evidence has been provided in discovery.

With respect to the relationship between G&L and Access Labor, the oral contract allegedly provided that Access Labor would supply temporary employees to G&L whenever it was contacted by G&L.[43] The parties stated that Access Labor's employees would be paid via Access Labor's payroll and[44] G&L did not provide Access Labor's employees any benefits.[45] Access Labor sent G&L

[42] *New Castle County v. Goodman*, 461 A.2d 1012, 1014 (Del. 1983); *see also Sorenson v. Colibri Corp.*, 650 A.2d 125, 129 (R.I. 1994) (holding that one of purposes of Worker's Compensation Act is to "curtail litigation by injured [or deceased] employees who elected to take advantage of its expedited procedure for obtaining compensation for work-related injuries.")
[43] Brooks Dep. at 20:15–24.
[44] *Id.* at 21:6–14.
[45] *Id.* at 21:15–18.

invoices for Access Labor's employee's services which were not broken down to reflect the cost of wages and benefits. There is no evidence to suggest that pursuant to the oral agreement, G&L paid a higher hourly rate to include worker's compensation insurance costs, and the Court cannot and will not speculate that Hernandez's hourly rate of $15.80 was inflated to compensate for Hernandez's worker's compensation insurance.

Neither G&L nor Access Labor have provided any semblance of evidence regarding their payment agreement. There are other means to demonstrate there was an added premium to the loaned employee's hourly rate. But instead of providing the Court some evidence of their relationship, G&L simply states, without support, that pursuant to an oral contract, Access Labor was to provide worker's compensation insurance. The Court in *Layne* was able to conclude there was borrowed servant status because the defendant provided the Court with evidence that it both controlled the plaintiff and indirectly paid for the plaintiff's salary and worker's compensation insurance.[46] Similarly, the Supreme Court in *Porter* found that the defendant paid the loaning employer at "a rate of 1.34 times his hourly rate" for the plaintiff's services to cover any fees and mandatory employment charges.[47]

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[46] *Layne v. Gavilon Grain, LLC*, 2015 WL4153995, at *6 (Del. Super. Ct. 2015).
[47] *Porter v. Pathfinder Services, Inc.*, 683 A.2d 40, 42 (Del. 1996).

Without any verification that G&L paid Access Labor a higher hourly rate in exchange for Access Labor providing worker's compensation insurance, the Court is unwilling to provide G&L with the benefit of the exclusivity provision under the Act. The Court believes that if G&L paid for Hernandez's worker's compensation via a higher hourly rate, Plaintiff's wrongful death claim would be contrary to public policy, as the Plaintiff would be suing the party that paid for his worker's compensation benefits. However, if G&L did not pay a premium to compensate for Hernandez's worker's compensation insurance, G&L would be inappropriately shielded from liability, because "[u]nlike tort claims acts, the point of workmen's compensation is to protect workers, not to shield employers [or third-party tortfeasors]."[48] Thus, based on the information provided to the Court, the Court finds summary judgment is not proper and the Motion is **DENIED**.

II. CONCLUSION

For the reasons discussed above, Defendants' Motion for Summary Judgment is **DENIED**.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[48] *Barnard v. State*, 642 A.2d 808, 819–20 (Del. Super. Ct. 1992).