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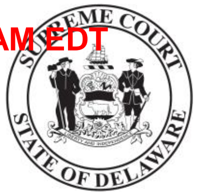

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWANA LAYNE (f/k/a Shawana Singleton), as Guardian Ad Litem and Next Friend to FRANK LEE LAYNE, JR., Plaintiffs Below, Appellants v. GAVILON GRAIN, LLC (d/b/a Peavey Company), JAIR CABRERA Defendants Below Appellees	)	No. 249, 2017 Court Below – Superior Court of the State of Delaware C.A. No.: N12C-12-057 EMD

CORRECTED OPENING BRIEF OF APPELLANT SHAWANA LAYNE AS GUARDIAN *AD LITEM* AND NEXT FRIEND TO FRANK LEE LAYNE, JR.

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NATURE OF THE PROCEEDINGS

This matter is Plaintiff's timely appeal from the Delaware Superior Court's July 10, 2015 Order granting Summary Judgment in favor of Defendant-Appellee Gavilon Grain, LLC and its employee, Defendant-Appellee Jair Irais "Hector" Cabrera ("Cabrera") (collectively "Gavilon"). The substance of this case involves a personal injury action arising out of a November 10, 2011 accident that occurred at a grain facility owned, possessed and controlled by Gavilon Grain, LLC. On that date, Frank Lee Layne, Jr. ("Layne"), an employee of Access Labor Services ("Access"), along with Cabrera, were using an aerial lift to perform welding work at the facility, when the lift tipped, causing Layne grievous physical injuries.

Suit was filed on December 6, 2012.[1] Plaintiff Shawana Layne was named as Mr. Layne's Guardian *ad Litem* and Next Friend, for the purposes of the litigation ("Plaintiff-Appellant").[2] Gavilon Grain, LLC and Cabrera were Defendants below and are the parties against whom this appeal was taken. After lengthy discovery, Gavilon and Cabrera filed a Motion for Summary Judgment, to which Plaintiff responded in opposition.[3] On July 10, 2015, the Superior Court

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[1] A38
[2] *Id.*
[3] A79-A80

entered an Order granting Summary Judgment in favor of Gavilon.[4] Plaintiff-Appellant timely appealed the Superior Court's ruling. This is Appellee's Opening Brief.

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[4] Attached hereto as "Exhibit A" is a copy of the Superior Court's Order.

SUMMARY OF ARGUMENT

The ultimate question in this matter is whether Layne's claims against Gavilon are subject to the exclusive remedy provision of Delaware's Workers' Compensation Statute.[5] As explained in detail below, for several reasons, Layne's injury falls outside the scope of Delaware's Workers' Compensation Statute and is not subject to the exclusive remedy provision.

I. The Superior Court erred as a matter of law in granting Gavilon's Motion for Summary Judgment because Layne was not a special employee of Gavilon at the time he was injured. Under the factors considered by the Court in *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393 (Del. 1964), the record clearly establishes that Access was Layne's employer as envisioned under Delaware's Workers' Compensation Law. Gavilon did not have the right to control and direct Layne in the performance of the act which ultimately caused his injury. Moreover, there is a genuine issue of material fact in this analysis, requiring this matter be remanded to trial for ultimate determination by a fact finder.

II. The Superior Court erred as a matter of law in granting Gavilon's Motion for Summary Judgment because Plaintiffs' injuries did not "arise … in the course of"

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[5] 19 Del.C. § 2304

Layne's duties at the Gavilon facility. Gavilon and Access entered into a contractual agreement that narrowly defined the scope of Layne's intended work and limited him to performance of unskilled, general labor only. Layne was injured when Gavilon requested that he perform skilled labor tasks – activity that was beyond the course of Layne's employment and thus, ultimately, beyond the reach of Delaware Workers' Compensation Law. At the very least, the question of whether Layne's injuries arose "in the course of" employment is a genuine issue of material fact inappropriate for determination by summary judgment and necessitating this matter be remanded for trial.

STATEMENT OF FACTS

This is a personal injury action arising out of a November 10, 2011 accident.[6] Prior to the date of the accident, Layne was hired by Access, a company engaged in the business of providing temporary labor services for contractors seeking skilled and/or unskilled temporary laborers.[7] Sometime thereafter, Access entered into a contract with Gavilon to supply unskilled "General Laborers" to the Gavilon grain facility located in Townsend, Delaware.[8] The contract provided that general labor would be supplied at an accepted hourly rate of $17.00/hour. The contract, and Client Safety Partnership Letter between Access and Gavilon, stated that Access general laborers would only work on jobs for which they were assigned and trained.[9] It further provided that use or operation of heavy machinery by Access' general laborers was prohibited without prior approval by Access.[10] It is undisputed that Layne was supplied by Access to Gavilon as an unskilled General Laborer.

On the date of the accident, Layne, along with Cabrera, were using an aerial lift to perform welding work in the area of a grain silo at the facility when the

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[6] A38
[7] A158-A171
[8] A154-A157
[9] A157
[10] A156

aerial lift tipped over.[11] As a result, Layne and Cabrera were thrown from the lift, falling approximately forty (40) feet to the ground.[12] As a result of the fall, Layne sustained catastrophic physical injuries, including traumatic brain injury, which left him permanently cognitively and physically disabled.[13]

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[11] A42
[12] *Id.*
[13] *Id.*

ARGUMENT

I. The Superior Court erred in granting Gavilon's Motion for Summary Judgment. As a matter of law, Layne was not a special employee of Gavilon at the time of the subject accident; summary judgment on this issue in Gavilon's favor was inappropriate

A. Question Presented

Whether Layne was a special employee of Gavilon at the time of the subject accident, such that Gavilon is entitled to the exclusive remedy defense under Delaware Workers' Compensation Law. This question was raised below in the briefing on Gavilon's motion for summary judgment, and further expounded upon during oral argument on that motion.[14]

B. Scope of Review

This Court reviews "the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no genuine

[14] A103, A117-A118, A296-A297

material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[15]

C. Merits of Argument

The statute at the center of the dispute is Delaware's Workers' Compensation Law.[16] Most pertinently, the statute establishes that the Workers' Compensation Law is the exclusive remedy for injured workers where certain factual provisions are met.[17] Specifically, the rule states:

> every employer and employee, adult and minor, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.[18]

Stated another way, where the applicable parties and injuries meet all the elements of the Workers' Compensation Law, an injured party is limited to the recovery outlined in the statute and generally may not bring suit under other common law theories of liability.[19] The threshold requirement for the applicability of the

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[15] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (interior quotations omitted).
[16] 19 Del C. § 2301, *et seq.*
[17] 19 Del.C. § 2304.
[18] *Id.*
[19] *Id.*

provisions of the statute is the existence of a proper employee-employer relationship.[20]

In this matter, Gavilon's filings in the course of the litigation create sufficient issues of material fact to render summary judgment on the issue of employee-employer relationship inappropriate. Specifically, in response to Plaintiff's factual averment that Layne was an employee of Access and acting within the course and scope of his employment with Access at the time of the accident in Plaintiff's Complaint, Gavilon's Answer concedes this fact.[21] Moreover, Gavilon previously agreed that the issue of Layne's employment presented factual issues. In response to Defendant MSP Equipment Rentals, Inc. ("MSP") Motion to Consolidate the Layne matter with the companion third party claim filed by Cabrera, Defendant Gavilon responded, at paragraph 4: "Furthermore, Gavilon Grain, LLC and Mr. Cabrera have asserted workers compensation statutory immunity defenses with respect to Plaintiff Layne's claims and therefore, a jury will likely be required to address factual issues as to Gavilon's control over Layne's work."[22]

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[20] *Id.*
[21] A55
[22] A77-A78

In *Morton v. Evraz Claymont Steel*, C.A. No.09C-08-245-JRS, Judge Slights was presented with a similar Motion for Summary Judgment focused on the issue of control in an employer-employee relationship. In denying Summary Judgment, Judge Slights relied on the previous positions adopted by the Defendant:

> In particular, the issue of control, I think, is somewhat in dispute, not to mention the positions that have been taken by Claymont Steel not only in the pleadings in this case, having admitted Mr. Morton's employment status with Mill Pro,..., viewing the evidence in the light most favorable to the non-moving party, the facts would suggest that Mr. Morton was, in fact, an employee of Mill Pro... I cannot find as a matter of law on an undisputed record that Mr. Morton is precluded from pursuing this action as a result of workman's compensation exclusivity provision...[23]

This is precisely the situation presented in this case. The admissions by Gavilon should be more than enough to preclude the entry of summary judgment in favor of Gavilon.

Still, even if this is not sufficient to deny summary judgment on this issue, the undisputed facts demonstrate that the Order granting summary judgment should be reversed. While there are certain factual scenarios where the existence of such a relationship is easy to discern, where there is more than one possible employer, a "special" employee-employer relationship may be found.[24] The

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[23] A248

[24] *Porter v. Pathfinder Servs., Inc.*, 683 A.2d 40, 42 (Del. 1996)

existence of a special employee-employer relationship requires a fact-specific inquiry into four particular questions.[25] In determining whether this relationship exists, the Court must consider: 1. Who hired the employee; 2. Who may fire the employee; 3. Who pays the employee's wages, and, most importantly 4. Who has the power to control the conduct of the employee in the act which caused his injury.[26] In this matter, the factors militate against a finding in Gavilon's favor.

i. Who hired the employee?

Per the testimony of Access' corporate designee, Dennis Yetman ("Yetman"), Access' business is to hire employees to be supplied as temporary laborers to contractors.[27] Individuals seeking employment with Access complete an application, among other employment forms.[28] In this instance, Layne was originally hired by Access sometime prior to 2006.[29] Layne subsequently completed an employment re-application for Access on August 31, 2009, two years prior to being assigned to work at the Gavilon facility.[30]

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[25] *Newton v. Neal*, 204 A.2d 393 (Del. 1964); A000215.
[26] *Id.*at 395.
[27] A188
[28] *Id.*
[29] A188-A189
[30] A189

As part of the interview and application process with Access, Layne completed a comprehensive job application and various other forms signed by Layne, including an Access Pre-Applicant Job Questionnaire, Employment Application, Applicant's Statement, Employment Experience and Job Skills Form.[31] He also completed authorization forms relative to release of criminal records and consent for drug screening, a detailed Policies and Procedures Checklist, General Safety Rules, and an IRS W-4 Employee's Withholding Allowance Certificate.[32] Access provided orientation and training programs to Layne which included a safety video and a written test all designed to ensure safety compliance.[33] Access maintained personnel files for its employees which contained, among other things, the foregoing documents.[34]

By contrast, Gavilon required no such application process for temporary labor, nor completion of similar application documents and materials.[35] Although Gavilon contends it maintained personnel files even on Access' employees, those materials were far less comprehensive than those contained in the Access

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[31] A158-A171
[32] *Id.*
[33] A192-A196
[34] A209
[35] A172-A187

personnel file.[36] In fact, the material in Layne's Gavilon employment file included only a one page, partially completed application which Gavilon's facility manager, James Engler ("Engler") admitted provided nothing more than contact information and had never been completed all the way.[37] These records clearly demonstrate Layne was hired by Access and then, more than two years later, assigned by Access to Gavilon pursuant to the contract.[38] Gavilon did not specifically request or choose Layne.[39] Layne was simply sent to the Gavilon site based upon Gavilon's request for unskilled General Laborers.[40]

Gavilon's contention that it "hired" Layne is belied not only by the above documents, but also their own employee's testimony. Engler agreed that Gavilon never hired Frank Layne directly, but instead, Layne was assigned to Gavilon through Access as a temporary employee.[41] Moreover, Engler was well aware of the difference between Access employees and Gavilon employees, testifying that in the time Layne was at the facility as an Access employee, Engler considered him

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[36] A172-A187
[37] A172, A226-A227
[38] A154
[39] A223-A225
[40] *Id.*
[41] A223-A225

for a full time position as a Gavilon employee.[42] However, Layne was never hired as a Gavilon employee; in truth, Gavilon never hired any Access-supplied laborer as a full-time, permanent Gavilon employee, instead relying on Access to unilaterally assign general laborers for use as temporary workers on an as-needed basis.[43]

Based upon the above, the first *Newton* factor clearly militates in favor of a finding that Layne was hired exclusively by Access.

ii. Who may discharge the employee?

Access was the only entity that was able to terminate Layne's employment. Access' Policies and Procedures Checklist, signed by Layne, states "I understand that I am an employee of this staffing company and only this staffing company or I can terminate my employment. When an assignment ends I must report to this staffing company for my next job assignment."[44] Yetman testified that Access had sole power and discretion to terminate Layne's employment.[45] Yetman further testified that hypothetically, had Layne or any other Access employee tested

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[42] A228
[43] A228
[44] A167
[45] AA192-A193

positive for using illicit substances on the job, it was only Access that had power to terminate Layne's employment.[46]

To be sure, Gavilon had the right to ***remove*** Layne from his temporary assignment at Gavilon if his work or conduct failed to meet certain standards. However, the right to remove a temporary laborer from one's property is a far cry from the right to terminate employment. Only the latter results in actual termination of employment and the consequences, such as permanent loss of a paycheck, associated therewith. Legally, Gavilon's rights with respect to Layne's removal did not exceed that of any property owner's rights to remove a trespasser.

Once again, testimony from Gavilon recognizes this fact. Engler specifically testified that Gavilon did not have the right to terminate Layne's employment with Access.[47] Engler agreed that had Gavilon dismissed Layne from the premises, Layne would have remained an employee of Access, who ultimately retained the right to assign Layne to another job site.[48] Engler agreed that Access also had the right and power to remove Layne from the Gavilon facility at any point.[49] Moreover, Engler recognized that Layne, himself, could personally choose

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[46] A191
[47] A229
[48] A231
[49] *Id.*

not to return to the Gavilon site if he was dissatisfied, without **any employment consequences**; Access would merely assign him to another job.[50]

There is simply no evidentiary support for Gavilon's contention that it could discharge Layne in the manner intended by case law or statute.

iii. Who pays the employee's wages?

Temporary workers, such as Layne, were paid directly by Access through a payroll company selected and paid for by Access.[51] The physical paystub employees received prominently displayed the Access name.[52] Access employees would generally return to the Access office on Fridays to pick up their paychecks directly from Access, or the paychecks would otherwise be mailed to employees directly by Access from the Access office.[53] Through its payroll company, Access processed all pre- and post-tax payroll withholdings, such as FICA, state, federal and local taxes and Medicare.[54]

Additionally, Access arranged for a pre-tax withholding from Layne's paycheck for safety equipment that Access supplied to Layne.[55] Layne paid a

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[50] *Id.*
[51] A204-A205
[52] A208
[53] A203, A246
[54] A190, A206
[55] A200, A206-A207

$5.00 pre-tax fee from his check toward the cost of the safety equipment supplied by Access.[56] Finally, Layne's post-accident lost wages were paid exclusively by Discover Property and Casualty Insurance Company, as the workers' compensation carrier for Access.[57]

Gavilon's argument that it was directly paying Layne's wages and paying the cost of various insurances and payroll taxes on behalf of Access is, at best, an overly liberal interpretation of the *Newton* third factor. Indeed, Access was paid $17.00 per hour for Layne's general labor services, a $7.00/hour surplus over his $10.00 hourly wage.[58] However, it is not as if $10.00 of the $17.00 was being held separately (segregated) for paying employees. To the contrary, neither Access nor Gavilon maintained a formal accounting of how the $17 hourly fee was applied on the basis of individual workers, and no "money trail" was kept to definitively establish the cost allocation of the $7.00 surplus across Access' profit, general overhead expenses, various insurance premiums, unemployment insurance and payroll taxes.[59]

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[56] A200, A206-A207
[57] A245
[58] A198, A211-A214
[59] A214-A218

Moreover, any contractual agreement between Gavilon and Access is irrelevant to the relationship that existed between Access and Layne. Access was the entity legally responsible for issuing Layne and other Access personnel their paychecks. Had Gavilon failed to pay Access for temporary labor services provided, Access remained legally obligated to pay its employees for their time. Likewise, if work was not available to Access employees, only Access had standing to contest an application for unemployment benefits brought by an Access employee.

The third *Newton* factor likewise demands a finding that Layne was not an employee of Gavilon.

iv. Who has the power to control the conduct of the employee when the employee is performing the particular job in question?

The Supreme Court of Delaware has clearly established that the fact-intensive *Newton* inquiry relies heavily on this fourth factor.[60] However, in looking to the last factor – the power to control an employee – the Courts recognize that the mere existence of the power to a control an employee in *some* capacities does not necessarily render a party an "employee" under the statute for

[60] *Newton* , 58 Del. at 60.

all conduct and for all injuries.[61] Instead, as explained in *Newton*, the court must look at the specific act that was being performed at the time of injury: "…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**."[62]

The crucial question in cases of disputed employment is not one of generic control, but rather: who had the **right to control** the employee in the activity he was doing at the time he was injured. The "right to control" with respect to Layne is entirely a creature of the contract Gavilon entered into with Access for general laborers.[63] It is solely from this contract that the scope of Gavilon's "right," or lack thereof, is defined. Thus, to determine Gavilon's power to control the activity of Layne in the performance of the job in question, the Court must look to the contract for guidance.

Pursuant to the contract, Access supplied only general labor to Gavilon.[64] General laborers were used for basic, fundamental tasks that didn't require extensive training; tasks such as sweeping, cleaning, moving debris, moving

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[61] *Id.*
[62] *Id.* at 59 (emphasis added).
[63] A154-A157
[64] A210

material and assisting with loading and unloading.[65] Under the contract, general laborers were billed by Access at $17.00 per hour and skilled laborers were generally billed at a higher rate, though not specified by the contract.[66] It is also undisputed that Layne was a general laborer placed by Access to perform only general labor jobs, billed at $17.00 an hour.[67] Accordingly, the scope of Gavilon's "right to control" is limited by the contract to control over unskilled, general labor activity.

As to the control of the remainder of Layne's employment, per the contract, Access specifically retained the right to control all activity beyond unskilled labor.[68] For example, Access had the absolute right to prevent an Access employee from operating/driving a motorized vehicle, operating heavy machinery or otherwise performing work beyond the scope of general labor tasks.[69] The Terms and Conditions document, at paragraph 2, mandated "Client [Gavilon] agrees not to authorize employee to operate or drive any motorized vehicle or operate any machinery without prior written approval from ACCESS SERVICE."[70] In other

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[65] A197
[66] A198
[67] A198, A210, A222
[68] A154-A157
[69] A156
[70] A156

words, Access 1. had to be notified of any of its employees' use of motorized equipment prior thereto and 2. had to approve of it in writing.[71]

Additionally, the jointly-executed Client Safety Partnership Letter dictated additional control Access retained over its employees.[72] The purpose of the document was to establish a safety agreement between Access and Gavilon and ensure any jobs assigned to Access employees were within the scope of "general labor" and matched the temporary employee's experience and qualifications.[73] The first bullet point on the Client Safety Partnership Letter states "Our [Access'] employee will only work on jobs for which they have been assigned and trained. **Any variance must be reported to our office before work begins**," again reserving the right to approve and veto work to Access.[74]

With respect to these provisions, Gavilon admitted they recognized Access' power to control any activities that exceeded the scope of the general labor assignment called for by the contract.[75] Again, Engler testified unequivocally that he understood both Access' realm of control over Access' employees and

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[71] *Id.*
[72] A157
[73] A199
[74] *Id.*
[75] A232-A233

Gavilon's obligations if Gavilon wished to exceed the scope of the agreement.[76] In other words, per the testimony of Mr. Engler, Gavilon knew that for activity outside the scope of their contract, Access retained the entirety of control over Layne.

Here, Layne was injured while performing "welding activity" in an aerial boom lift.[77] Though there is a substantial factual dispute as to the actual activity being performed,[78] it is undisputed that at the time of the injury Layne and Gavilon's direct employee, Cabrera were utilizing an aerial boom lift to perform repair work forty feet above ground level.[79] The boom was necessary to reach the area of repair and the arm of the boom was extended at the time of the accident.[80] Both men were occupying the "bucket" of the boom when the boom tipped over.[81] Access was never notified of, nor did it approve of, this work prior to the start of the project.[82]

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[76] A233
[77] A42
[78] The specific nature of the work being performed by Layne and the specific area where it was being performed have not been definitively established and remain in question. Likewise, the issue of whether Layne or Cabrera was operating the boom is unresolved.
[79] A42
[80] *Id.*
[81] *Id.*
[82] A217

Even if the court were to rely solely upon these undisputed facts, it is clear that all of these activities were outside the scope of the general labor agreement between Access and Gavilon.[83] The factual record confirms such activities were skilled labor tasks; tasks that were not contemplated by the contract.[84] Neither welding, nor the operation of heavy equipment or machinery was included in the general laborer classification.[85] Both operation of heavy machinery or equipment and welding were strictly skilled labor tasks.[86] General laborers were not to ride in articulating boom lifts.[87] Layne had no training from either Access or Gavilon that would render him competent for the activities performed on the date of the accident.[88]

Going back to the fourth *Newton* factor, the question is not whether Gavilon had the power to control Layne generally, but rather, whether Gavilon had the right to control Layne **in his performance of the skilled labor task in which he was involved at the time of the accident.**[89] The answer to that question is an unequivocal no. Gavilon's power to control Layne was limited only to those

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[83] A154-A157
[84] A201-A202
[85] A201-A202
[86] A201-A202
[87] A217
[88] A218-A221
[89] *Newton* , 58 Del. at 60.

general laborer tasks contemplated by the contract and for which Layne was assigned to Gavilon by Access.[90] For everything beyond that, Access retained the right to control its own employees and required notification and approval before such work would be permitted.[91] For activity beyond gèneral labor, Access was Layne's sole employer and thus, Gavilon cannot avail itself of the protection of Worker's Compensation Law.

Gavilon may argue that Layne's compliance with its daily direction is evidence of their power to control. However, that Gavilon improperly requested the work and Layne complied is irrelevant: the ultimate question is whether they had the **right to control** him in that activity.[92] They did not. Power to control is not a right to control as defined by the contract. This is best evidenced by the fact that, prior to Layne's compliance, the same work was requested of another Access employee.[93] The Access employee refused and this refusal was met *with absolutely no repercussion* from Gavilon.[94] Simply put, with respect to this incident, Gavilon had **no** right to control Layne and cannot justify a finding of a special employee status.

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[90] A201-A202
[91] A154-A157
[92] *Newton*, 58 Del. at 60.
[93] A240-A241
[94] A240-A241

Defendants' argument rests heavily on Gavilon's day-to day supervision and direction over Layne on the job site, generally. Gavilon contends that "Plaintiff's work at the Gavilon facility and the manner in which it was to be performed was within the exclusive control of Gavilon..." [95] Plaintiff concedes only that Gavilon had a right to supervise and direct Layne in the performance of the general labor tasks for which he was assigned. However, this was the limited extent of Gavilon's control. Engler's testimony and the signed contractual documents demonstrate that Access retained control to prohibit Layne from undertaking skilled labor tasks, including use of the aerial boom he was using in the performance of the job which catastrophically injured him.[96]

Even if the Court finds, as a matter of law, that Layne was a special employee of Gavilon at the time of the incident based upon the undisputed facts above, summary judgment for Gavilon is still inappropriate because there are substantial factual disputes that remain. To be sure, a determination of whether a party is an employer for the purposes of the Worker's Compensation Statute is a question of law for the court.[97] However, that analysis is heavily fact intensive and

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[95] A93
[96] A154-A157, A227-A228
[97] *Newton* , 58 Del. at 60.

here, there is a genuine issue of material fact with respect to the nature of work Layne was performing at the time of the incident.

This factual dispute requires consideration of conflicting witness testimony. Engler testified Layne had performed general welding for Gavilon prior to the accident.[98] Engler testified that at the time of the accident, Layne was on the boom lift merely to assist Cabrera, who was performing welding activity on a transition between two conveyors which was leaking grain.[99] Layne's testimony on the issue is different. Layne testified that Engler told him to "go up there and weld a door or something that needed to be fixed up there or something like that."[100] Layne further testified that he was told to "fix one of the doors on the top of one of them big things."[101] Layne cannot recall whether he or Cabrera, or both, were going to perform the weld.[102] Cabrera further testified that on occasions prior to the date of the accident, Layne had operated the aerial lift thus creating an issue as to whether he may have operated the lift on the date of loss.[103]

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[98] A234-A235
[99] A234-A235
[100] A238-A239
[101] *Id.*
[102] *Id.*
[103] A243-A244

Importantly, this dispute is material to the Court's determination of Layne's employment because the nature of Layne's work at the time he was injured is the central component of the legal determination of "control" under *Newton.* It is the specific nature of this work that determines whether Layne was performing general or skilled labor at the time of the incident. The resolution of this fact determines whether Gavilon was operating outside the scope of its contract with Access and ultimately who had the right of final control. Summary judgment's impropriety on this issue is further compounded by the fact that the dispute turns on the credibility of witness testimony – a matter that is squarely within the province of the jury. With this factual dispute remaining, this matter cannot be resolved by summary judgment.

Defendants argue that the Supreme Court's decision in *Porter v. Pathfinder Services,* 683 A.2d 40 (Del. 1996) "controls this case" and is in some way dispositive of the issue at hand. In *Porter*, the Plaintiff, who was an electrical contractor, sought placement by Casey Employment Services for temporary employment as an electrical technician.[104] After a five month assignment on a full time basis for Pathfinder, Porter was injured in an automobile accident in a vehicle owned and operated by Pathfinder on a trip returning to the Pathfinder shop for a

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[104] *Porter v. Pathfinder Services*, 683 A.2d 40 (Del. 1996)

meeting.[105] In granting summary judgment in favor of Pathfinder, the Superior Court found there was no material fact in dispute as to the determinative issue that Pathfinder alone exercised control over Porter's work at the time of his injury.[106]

The facts in *Porter* are inapposite to those in this matter. In *Porter*, the plaintiff was very clearly within the scope of the control of his employment- he was riding in a company-owned car to a work safety meeting at a company facility.[107] There was no relevant retained authority by the temp agency in *Porter.* Moreover, in *Porter*, there was absolutely no underlying factual dispute.[108] The parties agreed with where Porter was and what he was doing at the time of the incident.[109] The only question that remained was legal in nature.[110] Accordingly, the Court properly determined that Pathfinder had the power to control Porter in the performance of the particular activity.[111]

Here, unlike *Porter,* Access undeniably retained control over certain aspects of Layne's employment.[112] Layne's performance of any skilled labor task was an

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[105] *Id.* at 41.
[106] *Id.* at 42 (*emphasis added*).
[107] *Id.* at 41-42.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] A154-A157

activity for which Access specifically retained control.[113] As such, Gavilon did not have the "right to control" Layne in the performance of that work. Additionally, unlike *Porter,* this case has extensive factual disputes that go to the heart of the employer-employee question. Those disputes render summary judgment in this case inappropriate. Gavilon's suggestion that *Porter* should somehow force this Court's hand in its favor, where the only factual similarity of this case with *Porter* is the involvement of a temporary labor agency, is completely without support.

Based upon the *Newton* factors, Gavilon was not Layne's special employer for the activities in which he was engaged at the time of the incident. They were not empowered to control the activity he was performing at the time of the incident because it was outside the scope of its contract with Access. At the very least, the factual disputes underlying the nature of the work being performed by Layne should be sufficient to overturn summary judgment and remand this case for trial.

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[113] *Id.*

II. The Superior Court erred in granting Gavilon's Motion for Summary Judgment. Plaintiffs' injuries did not "arise ... in the course of" Layne's duties at the Gavilon facility, and accordingly, Layne's injuries fall outside the Delaware Workers' Compensation Statute's exclusive remedy provision.

A. Question Presented

Whether the accident that occurred in this matter could be said to "arise… in the course of" the scope of Layne's contractually specified duties at the Gavilon facility, considering Layne was assigned to the site as an unskilled laborer by his employer, Access and at the time of the incident, Layne was performing skilled labor clearly outside the scope of the temporary employment contract. This question was raised below in the briefing on Gavilon's motion for summary judgment, and further expounded upon during oral argument on that motion.[114]

B. Scope of Review

This Court reviews "the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues

[114] A103, A120, A293, A297, A308-A310, A343

of fact in dispute and that the moving party is entitled to judgment as a matter of law."[115]

C. Merits of Argument

Notwithstanding Plaintiff's argument *supra*, even if Gavilon is deemed to be a special employer under the Workers' Compensation Act, the exclusive remedy provision of the statute is inapplicable because this injury did not arise in the course of Layne's employment at the Gavilon facility.

As discussed above, the statute at the center of the dispute is Delaware's Workers' Compensation Law.[116] More specifically, for an injury to fall within the statute's purview, it must constitute, in relevant part: "personal injury or death by accident **arising out of and in the course of employment**, regardless of the question of negligence and to the exclusion of all other rights and remedies."[117] Stated another way, an injured employee's means of redress is limited exclusively to the Workers' Compensation Law only where an employee-employer

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[115] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (interior quotations omitted).
[116] 19 Del. C. § 2301 et seq.
[117] 19 Del.C. § 2304 (emphasis added).

relationship existed between the injured party and potential defendant and the injury or death **both** arose out of **and** in the course of employment.[118]

Delaware courts recognize this provision as containing two distinct requirements: "The term 'arising out of' employment refers to the origin and cause of the injury; the term 'in the course of' employment refers to the time, place and circumstances of the accident."[119] Both elements must be met for the workers' compensation exclusivity defense to be applicable.[120] Resolution of "[q]uestions relating to the course and scope of employment are highly factual and must be resolved under a totality of the circumstances test." [121] Unsurprisingly, whether an injury arises out of and in the course of a plaintiff's employment "is **essentially a question of fact.**"[122]

For an injury to "arise out of" employment, the injury must "[arise] from a situation which is an incident or has a reasonable relation to the employment, and

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[118] *Id.*

[119] *Barnes v. Panaro*, 238 A.2d 608, 608 (Del. 1968).

[120] *Rose v. Cadillac Fairview Shopping Ctr. Properties (Delaware) Inc.*,668 A.2d 782 (Del. Super. 1995), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996).

[121] *Stevens v. State*, 802 A.2d 939, 945 (Del. Super. Ct. 2002)

[122] *Davis v. University of Del.*, 233 A.2d 159, 160 (Del. Super. 1967), *rev'd on other grounds*, 240 A.2d 583 (Del. 1968).

that there be some causal connection between the injury and the employment."[123] As to the latter requirement, and more pertinently to this case, an incident is considered to have arisen "in the course" of employment, where the activity in question is one the "employee may reasonably do or be expected to do within a time during which he is employed and at a place where he may reasonably be during that time."[124]

In consideration of these two distinct requirements, Delaware Courts have demonstrated that the applicable analysis is not merely perfunctory, with all workplace incidents meeting these standards.[125] To the contrary, case law has established that the scope of an injured party's employment can be narrowly tailored, such that certain activities will fall outside the course of employment *even if the injuries occur on property and during an employee's shift.*[126] For example, the court in *Dravo Corp. v. Stosnider,* 45 A.2d 542 (Del. 1967) spelled this out explicitly:

> Just as an employer is only liable for injuries arising out of or in the course of the employment, so such an employer may, by proper rules clearly and unequivocally brought to the employee, so limit the scope or sphere of employment that a violation of such rules may put an

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[123] *Rose*,668 A.2d at 786.
[124] *Id.*
[125] *Dravo Corp. v. Stosnider*, 43 Del. 45 A.2d 542, 546 (Del. Super. 1945).
[126] *Id.*

employee beyond the range or scope of the employment, so that any resulting injury may not be said to have arisen out of or in the course of the employment...[127]

As previously discussed, Layne's relationship with and defined duties at the Gavilon facility were defined by the contract between Gavilon and Access. By virtue of this, the course and scope of Layne's "employment" at the facility was specifically governed by the duties, rights and limitations outlined in the contract between Gavilon and Access.[128] It is undisputed that that the contract between Gavilon and Access specifically provided that Layne was to be utilized as a general, unskilled laborer.[129] Yetman, as the corporate designee for Access explained "general labor" as follows:

Q. What does that mean by its terms? What's the – and when you say general labor, what do you mean?

A. I mean, it can encompass unskilled—any kind of unskilled work along the lines of manual labor, sweeping, cleaning, moving debris, moving material, assisting with, you know loading, unloading, things along those lines.[130]

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Q. Okay. So am I understanding your testimony correctly that general labor are more basic, fundamental tasks that don't require extensive training?

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[127] *Dravo*, 45 A.2d at 546.
[128] A154-A157
[129] A210
[130] A197

A. Correct.[131]

Moreover, the contract firmly established that those Access general laborers were limited to engaging in unskilled work **only.**[132] The contract required Gavilon to call Access if skilled work or skilled workers were required.[133] Gavilon also agreed to "indemnify, defend and hold ACCESS SERVICE harmless for any and all claims, damages and expenses… arising out of employees **change in job duties**."[134] Gavilon agreed "not to authorize employee to operate or drive any motorized vehicle or operate any machinery without prior written approval from ACCESS SERVICE."[135] Finally, the narrowed scope of the General Laborers' employment is expressly laid out in Access' "CLIENT SAFETY PARTNERSHIP LETTER": "Our employees will only work on jobs for which they have been assigned and trained. Any variance must be reported to our office before work begins."[136] Simply, Gavilon and Access agreed that the course and scope of

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[131] A197
[132] A154-A157
[133] A154
[134] A156
[135] A156
[136] A157

employment for all Access general laborers at the Gavilon facility was limited solely to unskilled work.[137]

On the day of the accident, Gavilon specifically directed an Access general laborer to perform skilled labor that was outside the scope of the contracted labor agreement. Though there is a factual dispute as to what specifically Gavilon directed Layne to perform that day, it is generally agreed that Gavilon wanted an Access general laborer in a motorized aerial lift bucket to, at the very least, assist with a welding project.[138] Gavilon first requested that another Access employee perform the task, who refused out of safety concerns.[139] Upon his refusal, the same request was made of Layne who complied.[140]

As a preliminary matter, the documentary evidence from Gavilon and Layne's testimony clearly demonstrate that this level of work was clearly beyond Layne's skill level.[141] Layne had never had safety training on aerial lifts and their associated hazards, aerial lift fall protection, aerial lift welding, fire prevention,

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[137] A157
[138] The factual disputes were outlined in detail above in Section I of Plaintiff's brief on page 25.
[139] A240-A241
[140] A240-A241
[141] A158-A171, A197-A198

"fireboxing," or any other skilled work.[142] Layne simply did not receive training relative to the work he was performing on that date.[143] Gavilon's placement of Layne in a job in which he had not been trained was in violation of the express terms of the contract and beyond the course of Layne's employment.[144]

Yet, even if Layne had had sufficient experience, *his work still clearly exceeded the bounds of the scope of employment as negotiated between Gavilon and Access.* Mr. Yetman's testimony established that use of an aerial lift and welding were all activities for skilled laborers, and thus outside the scope of the general labor agreement.[145] Moreover, the use of motorized equipment by general laborers without prior approval by Access was something specifically and expressly prohibited by the written agreement.[146] There were very clear provisions within the Access agreement that narrowed the course of Layne's employment to exclude higher risk, skilled labor situations, with the intention of protecting the safety of its employees.[147] Again, use of Layne for skilled labor situations was a violation of the agreement and beyond the course of Layne's employment.

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[142] *Id.*
[143] *Id.*
[144] A154-A157
[145] A201-A202, A217
[146] A154
[147] A154-A157

Certainly, work that is beyond the express, contracted terms of Layne's assignment is not work Layne "may reasonably do or be expected to do within a time during which he is employed and at a place where he may reasonably be during that time."[148] Thus, even if Gavilon can be deemed to be a special employer under the Workers' Compensation Law, the exclusive remedy provision of the statute is inapplicable because this injury did not arise in the course of Layne's employment at the Gavilon facility. Because Layne's injury does not meet the requirements of 19 Del. C. § 2304, Plaintiff cannot be limited to workers' compensation as his exclusive remedy against Gavilon.

At the very least, the unresolved issue of whether Layne's injuries arose in the course of his employment removes this matter from determination on summary judgment. Delaware case law on this matter is unequivocal: this issue is a question of fact that cannot be resolved in summary judgment.[149] Since this, by definition, raises a genuine issue of material fact with respect to Gavilon's liability, this case must be remanded for trial to resolve this question.

Gavilon may argue that if they are deemed a special employer for the purpose of the Workers' Compensation Act, their control over Layne was absolute

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[148] *Rose*,668 A.2d at 786.
[149] *Davis,*233 A.2d at 160 (Del. Super. 1967).

and any directions provided to him would render the conduct "in the course of his employment." This, however, is not supported by the case law or the facts. The court in *Dravo* specifically explained that the course of employment may be narrowed such that certain employment conduct is excluded for the purposes of Workers' Compensation applicability.[150] In this matter, there was a very clear contracted agreement between Access and Gavilon that did just that – narrowed the scope of employment to unskilled labor only.[151] If Gavilon wanted to hire temporary labor that was sufficiently skilled to perform any and all tasks at the Gavilon facility, they should have negotiated the agreement as such and paid the increased price. Gavilon should not be permitted to disregard the terms of the contract when unfavorable and use the agreement as a shield for its own benefit and protection.

Finally, this situation raises a number of public policy concerns for workers, temporary employment agencies, and worker's compensation insurers alike. Permitting companies to use temporary labor beyond their assigned skill set not only endangers the workers by exposing them to dangerous and unsafe work situations without training, but allows companies to abuse graduated pay scales,

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[150] *See Dravo*, 45 A.2d at 546.
[151] A154-A157

where skilled labor is charged at a higher rate. It further permits companies to consciously avoid third party, negligence-based claims by exercising unfettered control within the workplace. In this scheme, companies can choose to risk using unskilled labor for skilled tasks, knowing that ultimately, they will be protected under the temporary labor agency's worker's compensation (rather than their own), regardless of whether they are acting outside the scope of the temporary labor agreement. This would undoubtedly drive up Workers' Compensation insurance premiums, as it would force insurance companies to write policies for and accommodate risks they cannot fully analyze or predict.

State law, case law, and public policy collectively demonstrate that Layne's injuries arose outside the course of his employment as established by the contract between Access and Gavilon. Accordingly, Layne's injury does not fall within the Workers' Compensation Act exclusive remedy provision as it pertains to Gavilon. At the very least, whether Layne's injury occurred in the course of his "employment" with Gavilon is a genuine issue of material fact that is inappropriate for determination by way of summary judgment. The Superior Court ruling upholding summary judgment should be overturned and this matter should be remanded for trial against Gavilon.

CONCLUSION

Based upon the foregoing, this Honorable Court should vacate the Superior Court's July 10, 2015 Order entering summary judgment, and remand this matter for trial.

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