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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM WELLER, Appellee Claimant-Below, Appellant, v. Morris James, LLP, Appellant Employer-Below, Appellee.	)	No. 200,2018 On Appeal from the Superior Court of the State of Delaware in and for New Castle County C. A. No. N17A-08-005 FWW

APPELLEE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Morris James, Appellee and Employer-Below ("Employer"), is a Delaware law firm that has employed William Weller, Appellant and Claimant-Below, ("Claimant") as a bankruptcy paralegal since 2002.[1]

On June 10, 2015, Claimant injured himself playing softball after work in a game sponsored by the Wilmington Lawyer's League ("the League").[2] Employer is not affiliated with the League, and its employees created and ran the softball team.[3]

On August 27, 2015, Claimant filed a Petition with the Industrial Accident Board (hereinafter "the Board") seeking to have his softball injury recognized as a compensable industrial work accident.[4] Employer disputes that softball is within the course and scope of Claimant's job as a bankruptcy paralegal.

On December 16, 2015, the Board heard the merits of the parties' dispute.[5] The parties presented evidence about the softball games' origin, organization, coordination, location, timing, and financial funding, as well as Claimant's employment services, compensation, job performance and expectations.[6]

On April 18, 2016, the Board issued a decision finding the softball game compensable after applying a four-factored test from *Larson's Workers'*

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[1] Appendix to Appellant's Opening Brief (hereinafter "A-__") at 17-18.
[2] A-31-32, 66.
[3] A-56, 64, 66, 76, 99-102.
[4] A-6.
[5] A-4.
[6] A-68-72, 92-106.

Compensation Law[7], and relying on two substantive findings: (1) that Employer demonstrated a "modicum" of initiative over the softball event because it signed routine paperwork required by a third party to secure a softball field; and (2) that Employer "probably obtains a benefit through increased productivity[.]"[8]

On May 12, 2016, Employer appealed the Board's decision, contending that it applied the wrong *Larson's* test and advocating for a three-factored test adopted by *State v. Dalton* (the "*Dalton* test").[9] Employer also challenged the sufficiency of the evidence upon which the Board relied to support its conclusions.[10]

On March 16, 2017, the Superior Court agreed with Employer that the three-factored *Dalton* test applied, and remanded the case for the Board "to apply the correct legal standard to its factual findings."[11] In doing so, the Superior Court cautioned that intangible benefits like increased employee efficiency should not bring recreational events within the course and scope of one's employment.[12]

On May 25, 2017, the Board heard oral arguments to address a dispute about the scope of evidence permissible on remand, and subsequently issued an Order limiting new evidence to issues that were "problematic" on appeal.[13]

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[7] 2 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §§22.01 - 22.05 (LEXIS Publishing 2001) (hereinafter "*Larson's*").
[8] A-168-69.
[9] Appendix to Appellee's Opening Brief (hereinafter "B-__") at 20-22.
[10] B-22-23.
[11] A-188.
[12] A-187-88.
[13] A-189, 240.

On May 31, 2017, the remanded proceedings commenced.[14] Claimant moved to re-argue the limiting Order, and introduced new evidence on all prior topics. [15]

On August 1, 2017, the Board issued its second decision purportedly applying the *Dalton* test, but still finding for Claimant on three grounds: (1) some softball participants felt pressured to play even though all witnesses agreed their participation was voluntary; (2) Employer's instructions to submit workers' compensation claims for softball-related injuries (and a prior carrier's mistaken acceptance of a past claim) made softball part of Claimant's employment even though the Workers' Compensation Act obligates all employers to report injuries regardless of compensability; and (3) Employer derived a direct and substantial benefit through increased productivity and participation of vendors on its team, even though the Superior Court instructed the Board to disregard the "increased productivity" issue, and the "vendor" issue was based on speculation made by Claimant's counsel during closing arguments.[16]

On August 31, 2017, Employer appealed the Board's adverse findings.[17]

On March 29, 2018, the Superior Court agreed with Employer and reversed the Board's decision.[18] In doing so, it held that the Board legally erred in its

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[14] A-243.
[15] A-246-53, 262-350.
[16] A-412-13.
[17] B-98.
[18] Exhibit A to Appellant's Opening Brief (hereinafter "Ex. A at __") at 11-23.

interpretation and application of the *Dalton* test, and that there was insufficient factual evidence to support the test when properly applied. [19]

On April 20, 2018, Claimant appealed.[20] On 6/4/18, he filed his Opening Brief. As the Opening Brief did not assert that vendor participation provided Employer with a benefit, this issue is waived under *Del. Supr. Ct. Rule* 14(b)(vi)(A)(3).

This is Employer's Answering Brief seeking to affirm the Superior Court's reversal of the Board's Decision.

[19] *Id.* at 11-23.
[20] A-518.

SUMMARY OF THE ARGUMENT

This is Employer's summary in accordance with *Del. Supr. Ct. Rule* 14(b)(iv).

Employer denies Claimant's main proposition. The Industrial Accident Board's decision to expand a bankruptcy paralegal's job to include voluntarily playing softball after work was legally and substantively erroneous because it misinterpreted a freestanding legal test outlined in *State v. Dalton*, lost sight of the fundamental course and scope inquiry, and lacked the requisite degree of evidentiary support.

1. Denied. Course and scope decisions involving the application of freestanding legal tests require *de novo* review, and the Superior Court correctly held that the Board misinterpreted the second *Dalton* factor.

2. Denied. The Superior Court correctly interpreted the second *Dalton* factor and properly determined that there was no substantial evidence to support the test.

a. Employer admits the Board found the stated holding (i.e., that it exerted pressure which brought softball into the orbit of employment), but Employer denies that it was the origin of such pressure and, alternatively, denies that this constitutes sufficient evidence to satisfy the requisite legal test.

b. Employer admits the Board found the stated holding (i.e., that its prior workers' compensation carrier paid for a different employee's softball

injuries), but denies that this constitutes sufficient evidence to satisfy the requisite legal test.

c. Denied. Public policy supports reversing the Board's decision and affirming the Superior Court's decision so that employers are not discouraged from supporting benevolent initiatives.

3. Denied. Course and scope decisions involving the application of freestanding legal tests require *de novo* review, and the Superior Court correctly held that benefits involving increased productivity secondary to enhanced morale are not sufficient to satisfy the *Dalton* analysis.

STATEMENT OF FACTS

Morris James (hereinafter "Employer") is a local law firm with an employee-created softball team that participates in recreational games sponsored by the Wilmington Lawyers League ("the League"), an outside entity.[21] Sometime in the late 1970's, a group of Employer's employees decided to create a company softball team to participate in the League.[22] The employees are exclusively responsible for all aspects of the team's organization and management.[23]

William Weller (hereinafter "Claimant") has been a bankruptcy paralegal for Employer for fifteen years.[24] He served as the softball team's manager for many years in the past, but was not the team manager at the time of his injury.[25] In the two years that Claimant did not manage the softball team, there was no difference in his pay, bonuses or employment incentives.[26]

On June 10, 2015, Claimant injured his left Achilles heel while running between bases during a League softball game.[27] *After* the injury occurred, a co-worker, Sherry Perna, suggested that Claimant try running his claim through the firm's workers' compensation insurance plan.[28] Ms. Perna does not know anything

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[21] A-56, 66.
[22] A-56.
[23] A-56, 95, 99-109.
[24] A-18.
[25] A-40.
[26] A-40, 68-70.
[27] A-31.
[28] A-97-98.

about workers' compensation insurance.[29] She offered this suggestion in her capacity as Claimant's friend.[30]

Carole Folte is Employer's Human Resources Manager.[31] She has always regarded softball as a purely social activity involving a group of individuals inside the firm.[32] However, she told Claimant to submit a workers' compensation claim because: "[w]henever I hear an employee state that they believe there's a Workers' Comp issue I send it to our carrier, and let the carrier decide on the facts of the situation whether or not it is warranted."[33] Claimant later learned that Employer's workers' compensation carrier denied his claim, but that the firm's health and disability insurance carriers would cover all of his medical bills and lost wages.[34]

The sole dispute on appeal is whether or not the Board erred in finding that Claimant's injury occurred within the course and scope of his employment.

Employer does not view Claimant's participation in softball as part of his paralegal duties.[35] Employer did not discuss his participation in recreational activities when Claimant was hired, nor does it consider his participation when assessing salary increases or bonuses.[36]

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[29] *Id.*
[30] A-95, 99.
[31] A-17.
[32] A-123.
[33] A-120.
[34] A-43, 50, 97-99.
[35] A-68, 70-71, 79-80, 117-19, 277-78.
[36] *Id.*

The League dictates game times, locations and participation requirements.[37] Games and practices are held off-site, and after work.[38] Employer allows its employees to coordinate softball events (and other personal matters) during work hours, as long as they do not spend excessive time doing so.[39] At the beginning of the softball season, the team's acting softball manager or "coach" sends an email to all firm employees asking who is interested in softball.[40] Based on employees' responses, the coach creates a special distribution so that uninterested employees are not bothered with softball-related communications.[41]

At its employees' request, Employer pays for supplies like equipment, team jerseys, field rental fees, water, and post-game celebrations.[42] The Board previously held this degree of financial contributions insignificant, and this conclusion was never appealed.[43] Employer also signs any contracts that third party softball field owners require as a condition of field use (a.k.a., "Hold Harmless" agreements).[44] The Board initially found this fact significant but, on remand, did not cite it as a basis for finding softball within the course and scope of Claimant's employment.[45]

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[37] A-44, 100, 300, 312.
[38] A-52, 103
[39] A-38, 49, 73-74, 111.
[40] A-85, 101-02, 323-24.
[41] A-46-47, 85, 101-02, 277, 323.
[42] A-105-08.
[43] A-168; B-08.
[44] A-105, 110, 328-330.
[45] A-412-13.

The only benefit Employer gets from its employees' participation in softball stems from increased morale.[46] Employer does not charge softball admission fees or membership dues to generate revenue.[47] Employer's clients and prospective clients do not attend softball events.[48] Employer does not get any business as a result of the softball games.[49] Employer's name appears on the softball team's uniforms simply as a means of identifying the teams and players.[50]

Tom Herweg, Employer's former executive director (now retired) postulated that enhancing morale, camaraderie and goodwill enhanced employee productivity.[51] Employer's Chief Financial Officer denied that any such employee productivity produced a measurable financial benefit.[52] An equity partner who Claimant called as his witness similarly denied that any increase in employee productivity translated into an economic benefit.[53]

A few softball team members are not even Employer's employees.[54] One is a lawyer from another firm in town; one is a Wilmington Police Department officer; and three others are vendors.[55] Some of the vendors are personal relatives or friends

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[46] A-67, 75, 80-81, 113, 278-79, 285-87.
[47] A-76.
[48] A-75-77, 279.
[49] A-103, 278-79, 333.
[50] A-56.
[51] A-80-81.
[52] A-113, 333.
[53] A-285-87.
[54] A-269, 327-28, 336, 339-40.
[55] *Id.*

of participating employees.[56] The only testimony concerning a potential vendor benefit from these vendors' participation came from Sherry Perna, who succeeded Tom Herweg as Employer's Executive Director.[57] On cross examination, Claimant's counsel asked Ms. Perna if Employer financially benefited from having vendors on its softball team.[58] Ms. Perna denied this, stating: "[w]e're not getting clients from them. We're paying them. They're not paying us so how is that a benefit to the firm?"[59]

Employer never announced to its employees that softball injuries would be covered by workers' compensation insurance.[60] Only one other employee, Teresa Atwell, sustained past softball injuries that were covered by a prior workers' compensation insurance carrier.[61] Ms. Atwell testified that she did not expect workers' compensation coverage.[62] She submitted workers' compensation claims because someone told her to do so, *after* the injuries occurred.[63] Other employees who sustained softball injuries just used their health insurance.[64]

Ms. Atwell does *not* regard playing softball as part of her job.[65]

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[56] A-269, 339-40.
[57] A-322, 327-28, A-336, 339-40.
[58] A-337.
[59] *Id.*
[60] A-272-73, 281, 297-300.
[61] A-90-91, 98, 121, 297-99.
[62] A-297-300.
[63] A-289-99.
[64] A-98-99, 282.
[65] A-301.

Ms. Atwell was the *only* employee whose softball injuries were paid by a workers' compensation carrier.[66] When Ms. Folte called the firm's prior carrier to ask why Ms. Atwell's injuries were covered, the carrier said it was a mistake because they did not occur within the course and scope of employment.[67]

Employer does not provide its employees with any compensation or incentives to play softball.[68] While Claimant testified that he felt pressured to play, he also loved the encouragement.[69] He knew that he did not have to play softball if he did not want to.[70] The heads of his legal department did not play.[71] He enjoyed his time with the softball team from a social perspective.[72]

Of the seven testifying witnesses, only two (Teresa Atwell and Jamie Dawson) claimed that they sometimes felt pressured by *teammates* to play softball because they were female, and the League required a certain number of female participants on the field at all times.[73] Both witnesses understood that this was a

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[66] A-90-91, 98, 121, 308.
[67] A-120-23.
[68] A-68-70, 102-03, 117-18, 301, 315.
[69] A-46.
[70] A-48.
[71] A-86, 274.
[72] A-38.
[73] A-296-97, 300, 303, 305, 308-09, 311-14.

League rule, not a team rule.[74] They felt pressure because they did not want their team to forfeit the game.[75] They enjoyed playing softball.[76]

Ms. Atwell and Ms. Dawson knew that their compensation and roles with Employer would be the same regardless of their choice to play softball.[77] All witnesses, including Ms. Atwell and Ms. Dawson, agreed that their participation was voluntary and that Employer did not require them to play.[78]

Claimant has not played softball since his 2015 injury. He remains a bankruptcy paralegal at Morris James.

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[74] A-300, 312
[75] A-47-48, 268, 296, 301-02, 324-26.
[76] A-301-, 310.
[77] A-301, 315.
[78] A-45, 55, 99-01, 314.

ARGUMENT I

In reversing the Board's decision that a bankruptcy paralegal was within the course and scope of his employment while voluntarily playing softball after work, the Superior Court correctly held that the Board legally erred by misinterpreting the Dalton test, and losing sight of the fundamental course and scope inquiry.

A. Question Presented

Whether the Board's decision to expand a bankruptcy paralegal's job to include voluntarily playing softball after work is subject to *de novo* review when it misinterprets a freestanding legal test and loses sight of the fundamental course and scope inquiry.

B. Scope of Review

To receive workers' compensation benefits, a claimant "must prove by a preponderance of the evidence that [he] suffered a personal injury resulting from an accident occurring within the course and scope of [his] employment."[79] This determination involves "a mixed question of law and fact."[80] Accordingly, on appeal, a reviewing court must examine "the record for errors of law and determine

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[79] *Histed v. E.I. du Pont de Nemours & Co.*, 621 A.2d 340, 343 (Del. 1993).
[80] *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002) (citing *Histed v. E.I. du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993)).

whether substantial evidence is present on the record to support the Board's findings of fact *and conclusions of law*."[81]

Questions of law are subject to *de novo* review.[82] When reviewing the Board's application of a non-codified legal doctrine or principle, the reviewing court "need not accord 'due weight' to the Board's legal determination because the doctrine is a matter of common law, not the interpretation of a statute regularly administered by the Board."[83]

Questions of fact are reviewed under the "substantial evidence" standard.[84] However, "*[s]ome* evidence, or *any* evidence, may be insufficient to support the factual findings of the Board."[85]

C. Merits of Argument

Whether a softball game is compensable under Delaware's Workers' Compensation Act depends upon whether or not the game occurs within the course and scope of employment.[86] Delaware Courts have specifically commented on

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[81] *Dixon v. Delaware Veterans Home*, 2013 WL 422885 at * 3 (Del. Super.) (citations omitted) (emphasis added).
[82] *Stevens*, 802 A.2d at 944.
[83] *Id.*, 802 A.2d at 944 (citing 1 Richard J. Pierce, Jr., *Administrative Law Treatise*, § 3.3, at 144 (4th ed. 2002) (quotations omitted).
[84] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).
[85] *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977) (emphasis in original). *See also*, *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 912 (Del. 1967); *Nardo v. Nardo*, 209 A.2d 905, 911-12 (Del. 1965).
[86] *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005) (citing *Histed v. EI DuPont de Nemours & Co.*, 621 A.2d 340, 343 (Del. 1993)).

softball cases in the past. In 1999, in the case of *Nocks v. Townsend's, Inc.*, the Superior Court held that, when an employer sponsors the entire recreational event, four factors should be examined to determine scope of employment: the event's time and place; the degree of employer initiative in bringing the game to fruition; the degree of employer financial funding; and the benefit that the employer gains from the event.[87]

In 2005, This Court, in *State v. Dalton*, held that, when an employer sponsors a company team but does *not* sponsor the entire event, the following three factors should be examined: (1) whether the event occurred "on premises during a lunch or recreational period as a regular incident of employment"; (2) whether the employer, "by expressly or impliedly requiring participation, or by making the activity part of the employee's services," brought the activity "within the orbit of employment"; or (3) whether the employer derived a "substantial direct benefit from the activity, *beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life.*"[88]

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[87] 1999 WL 743658 at *3 (Del. Super.) (citing 2 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §22.04[4][b]-[d] (LEXIS Publishing 2001) (hereinafter "*Larson's*").

[88] 878 A.2d 451 at 455 (*Larson's* §22.01) (hereinafter the "*Dalton* factors" or "*Dalton* test") (emphasis added).

The three-factored *Dalton* test applies to the case at bar, and is disjunctive. The first factor is moot because games and practices are held off-site and after work. Thus, this appeal involves the second and third factors.

However, all *Dalton* factors should be reviewed in the appropriate "course and scope" context. In 2013, This Court authored *Spellman v. Christiana Care Health Services,* a course and scope decision addressing an employee's "going and coming" from work.[89] While *Spellman* did not discuss recreational activities like softball games, and while Employer does not assert that *Spellman* overrules the cases cited above that specifically deal with softball games, *Spellman* must be taken into account when analyzing course and scope issues because, as commented upon in what is probably the most cited national treatise in workers' compensation law, "[c]onsistency is maintained by applying the same distinction [in going and coming cases] to recreation cases[.]"[90]

In *Spellman*, This Court expressed concern that applying "freestanding rules of law… [causes] adjudicators, when deciding the 'scope of employment'" issue, to lose sight of the "more fundamental inquiry[.]"[91] The Court cautioned the Board to focus on "a more fundamental inquiry, namely, whether, under the totality of the circumstances, the employment contract between employer and employee

[89] 74 A.3d 619 (Del. 2013).
[90] *Larson's* §22.03[1].
[91] *Spellman*, 74 A.3d at 625.

contemplated that the employee's activity at the time of injury should be regarded as work-related and therefore compensable."[92] Therefore, in light of This Court's cautionary comments in *Spellman*, the proper analysis in cases involving recreational activities requires factors to be reviewed under a modified "totality of the employment circumstances test" with an eye towards the employment contract.[93]

Claimant argues that, once the Board identified the correct *Dalton* factors, the Superior Court's review was limited to assessing the sufficiency of the underlying factual evidence. However, unlike questions concerning workers' compensation benefit entitlement (such as disability, permanent impairment, disfigurement and medical treatment), the *Dalton* test is not codified or otherwise regularly administered by the Board. Therefore, under *Stevens*, the review standard is *de novo*.

In the case at bar, the Board lost sight of the overall inquiry: whether the employment agreement between Claimant, a bankruptcy paralegal, and Employer, a law firm, contemplated an after-hours, recreational, and voluntary softball activity as part of his employment. Softball was not part of Claimant's job as a bankruptcy paralegal.[94] Claimant's game participation was not a condition of his hire, and it never served as a basis for any raises, bonuses or other incentives throughout over

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[92] *Id.*
[93] *Id.* at 626.
[94] A-68-69, 79-80, 117-119.

fifteen years of employment.[95] Even Claimant conceded that, in the years in which he chose not manage the softball team, there was no difference in his employment role or pay.[96]

ARGUMENT II

The Superior Court correctly reversed the Board's decision that increased productivity constitutes a direct and substantial benefit for purposes of satisfying the third *Dalton* factor because This Court previously exempted efficiency benefits from the *Dalton* analysis.

A. Question Presented

Whether the Board erred in relying on increased efficiency to find that Employer derived a direct and substantial benefit from softball given the fact that This Court, in *Dalton*, expressly held that intangible values of morale and efficiency should be excluded from consideration.

B. Scope of Review

See Scope of Review for Argument I.[97]

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[95] *Id.*
[96] A-37.
[97] *Supra*, at 14-15.

C. Merits of Argument

Claimants can meet their burden to show that non-company sponsored recreational activities are within the course and scope of their employment if they can prove one of three *Dalton* factors. The first factor addresses the event's time and place, and is not applicable to this case because softball was held off-premises and after hours. The second factor is discussed later.[98] The third factor requires claimants to prove that their employer "derives a substantial direct benefit from the activity[.]"[99]

Substantial, direct benefits include advertising, publicity and monetary gain[100]; intentional advertising to a targeted customer base[101]; increasing revenue by charging game admission fees[102]; and advancing business objectives.[103]

Substantial, direct benefits *cannot* be "the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."[104] This exception is important because "[c]ontroversy is encountered… when the benefit asserted is the intangible value of increased worker efficiency and

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[98] *Infra*, at 26-40.
[99] *Dalton*, 878 A.2d 451 at 455 (citing *Larson's*).
[100] Ex. A at 14-15 (citing *Ostrowski v. Wasa Elec. Servs., Inc.*, 960 P2d 162, 171 (Haw. Ct. App. 1988) and *Larson's* at §22.05[1]).
[101] *Nocks*, at *5 (quoting *Larson's* §22.04[4][d]). *See also*, *Tobias v. Stormco Co.*, 282 A.D. 1087 (N.Y.S. 1953).
[102] *Holst v. New York Stock Exch.*, 252 A.D. 233, 299 (N.Y. 1937).
[103] *Dalton*, 878 A.2d at 453-54.
[104] *Dalton*, 878 A.2d 451 at 455 (citing *Larson's*).

morale...[because] such benefits...result from every game the employee plays whether connected with his work or not."[105] "Accordingly, the majority view is that morale *and efficiency* benefits are not alone enough to bring recreation within the course of employment."[106]

This Court already adopted the majority view by embracing the main *Larson's* factors in their entirety, including the efficiency and morale exception.[107] In doing so, This Court highlighted the requirement that "a worker's injury be work-related" for benefit entitlement to attach.[108]

In the case at bar, the benefit at issue is a postulated increase in employee productivity as a result of having fun. The testimony in question came from Employer's former Executive Director, Tom Herweg[109], as follows:

> MS. GREENBERG: What benefit does Morris James derive from supporting these games?
>
> THE WITNESS: I think it's just morale, camaraderie, there's some exercise, promote health. But we get so many people that aren't playing that just go because it is a fun event to be at.[110]

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[105] *Larson's* at § 22.05[3].
[106] *Id.* (emphasis added).
[107] *Dalton*, 878 A.2d at 455 (clarifying that the test is whether "the employer derives substantial direct benefit from the activity *beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.*") (quoting *Larson's* §22.01) (emphasis added).
[108] 19 *Del. C.* §2304; *Spellman*, 74 A.3d at 626.
[109] Mr. Herweg has since retired. A-322. He was replaced by Sherry Perna. *Id.*
[110] A-75.

Later, one of the Board Members responsible for deciding the case's outcome asked Mr. Herweg if enhancing morale, camaraderie and goodwill would enhance the firm's ultimate productivity.[111] Mr. Herweg answered in the affirmative.[112] Thus, the "productivity" to which Mr. Herweg referred was clearly the intangible value of increased worker efficiency stemming from a natural consequence of morale, and the Superior Court was correct to conclude that the Board should have disregarded it because This Court already exempted efficiency and morale benefits from the "employer-benefit" analysis.[113]

Claimant argues that the Board's questions to Mr. Herweg were intended to investigate whether there were benefits beyond those of morale, and that Mr. Herweg's responses should be re-interpreted in this context. This is a perplexing proposition, as Claimant cannot presume to know the Board's intent. In Employer's view, the Board's questions drew no such distinction, nor did Mr. Herweg's responses.

Claimant notes that, in answering the Board's questions about efficiency benefits, Mr. Herweg referred to increased productivity as his "hope" or "goal." Claimant asks This Court to construe his aspiration as a binding admission that productivity was a pointed objective that Employer endeavored to achieve, and that

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[111] A-81.
[112] *Id.*
[113] *Dalton*, 878 A.2d at 455.

any associated benefit must, therefore, be both direct and substantial for purposes of satisfying the third *Dalton* factor. Employer disagrees. The Superior Court properly recognized Mr. Herweg's testimony as aspirational when viewed in its proper context. There is no evidence that Employer has employee productivity issues, or otherwise coordinates softball games with a specific intent to correct such a deficiency. The firm's Chief Financial Officer, who prepared all financial statements for Employer, testified that softball did not increase financial productivity.[114] Eric Monzo, Esquire, one of Claimant's bosses and an equity partner, testified that "productivity" in his mind is measured by billable hours, and he saw no increase from that perspective.[115] Thus, the productivity at issue in this case *was* aspirational, and naturally resulted from employees' happy and healthy lifestyle just as Mr. Herweg said.[116] As This Court previously exempted benefits like these from the *Dalton* analysis, the Superior Court's finding on this issue should be affirmed.

Claimant expresses concern that exempting increased productivity from the *Dalton* analysis would burden claimants with having to prove its "realization," but this argument should be rejected. As an initial matter, claimants always bear the

[114] A-113, 333.
[115] A-285-87.
[116] A-75.

burden to prove their case by a preponderance of the evidence.[117] In the case at bar, Claimant selected, and called, six witnesses, including himself. All six witnesses had an opportunity to identify what benefit they thought Employer derived from softball. Had anyone thought that Employer used softball to advertise its name, entertain clients, or generate income (from charging admission fees, for example) presumably, they would have said so and this alone may have been sufficient to show a direct and substantial benefit without proof of realization. However, no one identified any such benefit.

Lastly, Employer disagrees with Claimant's contention that increased efficiency is akin to the type of business-specific goal promoted in *Dalton*. In *Dalton*, the Delaware State Police sought to use softball to improve community relations in order to facilitate police cooperation and crime reporting.[118] This goal should not be understated. Current news broadcasts highlight serious problems that police face with community resentment, and the impact of this sentiment on individuals' health, safety and wellbeing. Social events like softball enable the Delaware State Police to provide forums for positive police interaction. Thus, the promoted business goal in *Dalton* was to improve community relations so that police

[117] *Histed,* 621 A.2d at 343.
[118] *Dalton*, 878 A.2d at 455.

can execute their job responsibilities as efficiently and safely as possible. This vital objective is unique to the police.

Unlike the employer-specific objective in *Dalton*, the alleged benefit at issue here is a generalized hope of increased employee efficiency as a result of having fun. This type of aspiration is common to all employers, and would naturally result from a happy and healthy lifestyle regardless of employer involvement. The Superior Court correctly focused on whether Employer sought a direct and substantial business-specific benefit through softball such that its endeavors expanded the employment arrangement with Claimant. It was correct to find no such evidence. Employer does not use softball games to advertise its legal services.[119] Its clientele and prospective clientele do not attend or participate in games, and it does not get business from softball.[120] And, Claimant's value to Employer is his paralegal skills, regardless of his participation in softball.[121] Therefore, the Superior Court correctly found no substantial evidence to support the third *Dalton* factor because softball provides no added value to Employer's business, and the Court's decision in this regard should be affirmed.

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[119] A-75-77.
[120] A-75-77, 278-79.
[121] A-277-78.

ARGUMENT III

The Superior Court properly held that the Board committed legal error when it misapplied the second *Dalton* factor and eliminated the mandatory participation component.

A. Question Presented

Whether the Board erred in evaluating whether Employer took any act to bring softball within the sphere of an employment related activity when the *Dalton* test contemplates a specific act that rendered the activity mandatory.

B. Scope of Review

See Scope of Review for Argument I.[122]

C. Merits of Argument

The second *Dalton* factor addresses whether "the employer, by expressly or impliedly *requiring* participation, or by *making* the activity part of the services of the employee, brings the activity within the orbit of employment."[123] This is a cause-and-effect test that requires the employer to take some act which, consequently, leaves the employee with little or no choice but to participate in the activity, lest he face an employment consequence. This lack of choice expands the employment contract for purposes of making the disputed activity part of the employee's service.

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[122] Supra, at 14-15.
[123] *Dalton*, 878 A.2d at 455 (citing *Larson's*) (emphasis added).

For example, the paramilitary State Police in *Dalton* used senior commanding officers to solicit subordinates' participation in softball charity events. To make the participation mandatory, the employer awarded "participation credits" needed for future promotions. Accordingly, This Court held that:

> the State Police [employer] brought charitable events such as this one into "the orbit of employment" for troopers, within the meaning of the second *Larson* factor, by soliciting volunteers through requests from superior officers, *and* by creating a promotion system that effectively requires attendance at charity events.[124]

In the case at bar, there was no mandatory component because *all witnesses agreed that their participation in softball was voluntary.* Eric Monzo, Esquire, testified that he played softball because he wanted to, and not because he felt required.[125] Teresa Atwell testified that she regarded her participation as voluntary and not mandatory.[126] Jamie Dawson testified that she regarded her participation as voluntary, and that she did not feel required to play.[127] Sherry Perna testified that her participation was voluntary and that she did not feel required to play.[128]

Nor did Employer have any employment-based mechanism which would make softball an expressly or impliedly necessary part of the firm's business services. Employer does not hire, fire, promote or demote employees because of

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[124] *Id.*, 878 A.2d at 456 (emphasis added).
[125] A-275.
[126] A-301.
[127] A-314.
[128] A-327.

their athletic abilities or softball interests.[129] Bonuses and incentives are strictly based on billable hours.[130] Job duties and compensation are the same regardless of participation.[131] Therefore, the Superior Court was correct to find no substantial evidence to support the type of mandatory participation contemplated by *Dalton*.

While Claimant argues that he received an employment incentive in the form of enhanced prestige because the Executive Director acknowledged his participation in softball as "nice" during an annual review, a vague reference to prestige is not the type of incentive that *Dalton* contemplates, particularly when it is not corroborated by anyone or linked to anything objectively significant.[132] Presumably, there are numerous other ways to achieve prestige. Clearly, unlike *Dalton*, Employer did not implement an employment related consequence for declining to play softball.

Contrary to Claimant's argument, the Superior Court correctly held that the Board improperly watered-down the second *Dalton* factor when it, instead, examined whether *any* type of employer action brought softball within the sphere of something employment related. This modification ignores the importance of the "mandated participation" requirement, and creates an ineffective, elastic test that

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[129] A-68-70, 79-80, 117-19, 277-78.
[130] A-79-80.
[131] A-71-73, 80, 277-78, 301, 315.
[132] As a practical matter, employers should have the freedom to acknowledge nice acts or activities without expanding the employment contract. *See, e.g.*, A-118 (Ms. Folte testifying about other personal causes that employees cite in their annual reviews). Certainly, it would have been curious for the Executive Director to condemn or condone Claimant's participation in softball, which seems to be the only alternative that Claimant's argument leaves Employer.

undermines the fundamental course and scope inquiry by rendering all recreational activities compensable by sheer virtue of employer involvement. As the Superior Court correctly noted, mere consent to allow employees to display the company name on team uniforms would render the game compensable, even though courts have specifically rejected this notion in the past.[133] An employer who encourages employees to participate in cancer walks to support a recently diagnosed co-worker would face liability for a sprained ankle under the Board's modified test because its encouragement and co-worker connection would bring the activity into the sphere of something employment related. Thus, the Superior Court was correct to observe that this modified test is too elastic to determine whether activity is truly within the employment's course and scope.

Claimant argues that the Board's modified test is not too elastic because courts use similar phrases in tort law when analyzing the *respondeat superior* doctrine. However, tort law is distinguishable from workers' compensation law because it determines employer liability to a third person, whereas workers' compensation law governs liability between an employer and employee for which there is an existing contractual employment arrangement. Additionally, *respondeat superior* focuses on

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[133] *Nocks* at *1, *5 (Del. Super.) (citing *Smith v. Union Bleachery/Cone Mills*, 280 S.E.2d 52, 53 (S.C. Supr. 1981). While *Nocks* applied a slightly different *Larson's* test that applies when an employer sponsors the recreational activity, it would be incongruous to find company-named uniforms insignificant in the context of an employer-sponsored event, and yet reach an opposite conclusion for an employer who does *not* sponsor the event.

conduct for purposes of assigning fault in relationship to an event, whereas the course and scope analysis focuses on the event in relationship to the employment.[134] Accordingly, the most cited national treatise in workers' compensation law encourages adjudicators to "make a clean break with tort thinking" when it comes to applying tort law to workers' compensation principles.[135] Therefore, using similar phrases in different legal contexts does not create the inconsistency alleged by Claimant, and the Superior Court's decision should be affirmed.

a. Subjectively-Felt Pressures to Play Softball

On appeal, Claimant argues that the Superior Court failed to consider whether Employer made softball part of his employment because some employees felt "pressured" to play, and team participants sometimes asked prospective employees about their softball interests in interviews. However, personal, subjective feelings of pressure and perceived beliefs do not satisfy the cause-and-effect nature of the *Dalton* test. *Dalton* examines what action the employer took, *and* whether that action left employees with little or no choice but to participate lest they suffer an employment consequence, like foregoing a promotion (as cited in *Dalton*).

Assuming, *arguendo*, that This Court feels compelled to examine the pressures in this case, it should reject Claimant's attempt to equate "pressure" to

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[134] *Larson's* at §1.03.
[135] *See Larson's* at §§ 1.02, 1.03.

solicitation by superior officers in a paramilitary establishment, as discussed in *Dalton,* for three reasons. First, Employer's softball-related communications came from fellow teammates and *not* from the firm's executive hierarchy in their official capacities (i.e., the employer itself).[136] Employees originally created the softball team, and employees remain exclusively responsible for all aspects of its organization and management.[137] The fact that seasoned softball participants asked prospective employees about softball during interviews or after their initial hire amounted to nothing more than casual conversation.[138] Unlike the employer in *Dalton* who demonstrated a "top-down" systematic method of communicating an employer-driven expectation, softball communications came from fellow teammates and the elected softball coach.[139] Thus, communications to participants were not made on behalf of the firm, as they were in *Dalton.*

Although Claimant makes much of the fact that the softball coach at the time of his injury was Employer's C.F.O., this fact is entirely coincidental and irrelevant

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[136] A-82, 98-99, 268-69, 277, 296, 303, 305, 313-14, 323-24.

[137] A-56, 95, 99-109. In his Opening Brief, Claimant claims that the C.F.O. testified that Employer entirely controls softball events. This claim is contrary to the testimony offered in this case, and Employer's counsel was unable to locate the testimony cited by Claimant on the stated page (A-112). While answering questions about her role as the softball coach, the C.F.O., Sherry Perna, clarified that *she*, in her capacity as softball coach, controlled all aspects of the team. A-95. She further stated that, when Claimant served as softball coach, *he* was the one in control. *Id.* Thus, the employees, *not* Employer, controlled all aspect of the team.

[138] A-283-284, 289-90, 303.

[139] A-85, 101-02, 277, 283-84, 288-90, 296, 323.

to the pertinent analysis.[140] It was the softball team, and *not* Employer, who selected the coach, and anyone could be selected regardless of firm "rank."[141] Claimant himself served as softball coach in the past.[142]

The second distinction between the pressures described in *Dalton* and those alleged in the present case is the existence of consent. In the case at bar, employees who received softball communications *voluntarily consented* to receive them. At the start of the season, the softball coach sent an e-mail inviting employees to play, and specifically asked if anyone wished to be removed from the distribution list.[143] Anyone who answered in the affirmative was removed, as requested.[144] Thus, witnesses like Teresa Atwell and Jamie Dawson, who testified about feeling "pressured," were contacted about playing softball *because* they voluntarily consented to be contacted. Claimant personally loved the fact that softball was encouraged.[145] Therefore, unlike the employer in *Dalton* who systematically communicated participation expectations to all employees, Employer's team members limited their communications to those individuals who said they wanted to

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[140] Claimant and Sherry Perna, the C.F.O., did not have a superior-subordinate relationship because Ms. Perna was not Claimant's boss on a professional level and, socially, they were good friends. A-95.
[141] A-100, 275.
[142] A-40, 274-75.
[143] A-85, 277, 82, 323. Of the 168 employees who receive the initial email, only 70 are on the softball distribution list. A-324.
[144] A-85, 101-02, 277, 323-24.
[145] A-46.

play. In short, the contact was a consequence of the *employees'* expressed interest and consent, and not the *employer's* goal-oriented expectations or interest.

The third and final distinction between the pressures described in *Dalton* verses those at issue in the present case is that these pressures lack the requisite link to the contracted-for employment service. While two of Claimant's five witnesses (Ms. Atwell and Ms. Dawson) testified that they personally felt pressured to play in a few games in order to meet the League's gender participation requirements[146], their concern centered on team forfeiture. Thus, their concern and resulting obligations extended to the *team*, as opposed to Employer. When Ms. Dawson later asked to be removed from the softball communication list, her request was honored and there was no employment consequence.[147] This certainly refutes the fact that she felt obligated or pressured *by Employer* to play softball and, as the Superior Court correctly observed, enables the employee, not the employer, to define the orbit of

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[146] The League required a certain number of female players on its team. A-296-97, 303, 311. Since Claimant is not female, this same type of pressure did not apply to him. Nor was there evidence that Claimant, the subject of litigation, was exposed to pressure. Ex. A at 21. While Claimant testified that he felt pressure to join the softball team and become its softball coach when he first joined Morris James, at the time of the accident, he had already relinquished his coaching position and was a well-established bankruptcy paralegal. A-18, A-40. He also loved receiving encouragement to play. A-46. The Board did not find the type of pressure described by Claimant at the first Hearing sufficient to constitute an employer-initiated action which expanded the scope of his employment. A-167-69. Claimant did not testify at the second Hearing. *See, generally*, A-262-320. Therefore, as the Superior Court properly notes, there was no actual evidence that Claimant was exposed to the requisite degree of pressure, as contemplated by *Dalton*, at the time of his injury. Ex. A at 21.

[147] A-315, 319-20.

employment regardless of the employer's actual involvement.[148] Therefore, the Superior Court was correct to find that these pressures do not satisfy the *Dalton* test, and its decision should be affirmed.

b. Prior Workers' Compensation Claims and Employee Expectations

Claimant also argues that he should receive workers' compensation benefits because: (1) he received post-injury instructions to submit a claim; (2) a different employee mistakenly received coverage in the past; (3) Employer signed field-use liability agreements; and (4) a few employees considered softball to be a work event. Despite the foregoing, the main inquiry is whether substantial evidence exists to conclude that Employer expanded Claimant's job as a bankruptcy paralegal to include playing softball. Post-injury instructions to submit claims, prior payments, signatures on standard premises-use agreements, and misunderstandings about workers' compensation law have no effect in this analysis and risk creating the very "checklist" that This Court in *Spellman* sought to avoid.

Assuming, *arguendo*, that these arguments have merit, the Superior Court was correct to deem post-injury claim reporting instructions irrelevant to the course and scope analysis. As the Board is [or should have been] aware, employers are statutorily obligated to submit claims whenever an employee reports a work-related

[148] Ex. A at 21.

injury, even if the employer disagrees or disputes the claim. Section 19 *Del. C.* § 2362(a) states that:

> An employer or its insurance carrier shall within 15 days after receipt of knowledge of a work-related injury notify the Department and the claimant in writing of: the date the notice of the claimant's alleged industrial accident was received; whether the claim is accepted or denied; if denied, the reason for the denial; or if it cannot accept or deny the claim, the reasons therefor and approximately when a determination will be made.

In the case at bar, Employer's actions follow Section 2362(a)'s mandatory reporting requirements. Carol Folte, Employer's human resources manager, testified that she always tells employees to submit claims for their injuries, and she relies on the firm's insurance carrier to determine whether or not reported claims will be accepted or denied.[149] In Claimant's case, Ms. Folte told Claimant to submit his claim to the insurance carrier, who then promptly notified him of denial.[150] Similarly, when Ms. Atwell (the *only* employee who had a softball claim accepted under a prior workers' compensation carrier's plan) was told to submit a claim, it was the insurance adjuster who determined what, if any, benefit to pay.[151]

Ms. Folte did not know why the prior insurance carrier covered Ms. Atwell's claims, so she investigated this issue and learned it was a mistake.[152] Contrary to

[149] A-120-23.
[150] A-43.
[151] A-295.
[152] A-121-23.

Claimant's argument, this testimony was not speculative: Ms. Folte investigated the circumstances of the past payment and testified about what she had learned.[153] Most significantly, Employer was never asked, and never agreed, that softball was within the course and scope of its employees' employment.[154] It seems disingenuous for Claimant to attempt to force Employer to accept his claim due to a past payment made to someone else, and yet object to the true circumstance of that payment.

The important context regarding this issue is that Employer's reporting processes simply follow the Act's mandatory reporting requirement, and cannot be construed as affirmative acts which expand the scope of employees' services within the meaning of the second *Dalton* factor. The Superior Court succinctly and definitively addressed this issue when it accepted Ms. Folte's testimony and observed that "it would be a curious result indeed if the prior mistakes of a third party, no longer involved in any way with any party here, were to define for Morris James the orbit of Weller's employment."[155] The Court's findings in this regard should remain upheld.

Claimant argues that the actions of a past carrier should be imputed to Employer because statutory definitions equate "employer" to "insurance carrier" for purposes of interpreting the Workers' Compensation Act. However, it would be

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[153] A-122-23.
[154] A-67-68, 71, 93, 98-99, 120-23.
[155] Ex. A at 23.

wrong to apply statutory definitions to entirety out-of-context situations in order to expand the consequences of a prior carrier's mistake and "create" an employee-employer relationship where none otherwise exists. As stated by the Superior Court, a prior carrier's payment "provides no support for, and in fact is irrelevant to" the applicable *Dalton* factor, which examines whether *the employer* took a cause-and-effect action that mandated employee participation in the recreational event.[156] Employer had no coverage policies relating to softball, and regardless of whether a past payment was mistakenly made, or whether it was intentionally made as a cost-saving alternative to litigation by an entity other than Employer, Claimant's job responsibilities did not include playing softball and he remained free to participate, or choose not to participate.

Claimant also asserts that Employer brought softball within the orbit of employment both through its instructions to submit workers' compensation claims, and through its failure to affirmatively dispel misunderstandings of insurance coverage. As an initial matter, Employer fails to see why the existence of workers' compensation coverage, specifically, would make any difference to an employee when Employer provides health insurance and disability plans that cover all injuries

[156] Ex. A at 22.

regardless of when and how they occur.[157] However, assuming, *arguendo*, that the actions and inactions asserted by Claimant are true, they still do not satisfy the *Dalton* test because employees remain free to choose not to play softball.

Claimant next argues that the Superior Court failed to appreciate the significance of "Hold Harmless" agreements, but this issue seemingly settled itself following the remanded proceeding. As background, the Board initially found that Employer's signature on a third party's standard premises-use agreement demonstrated a "modicum" of employer control over softball, even though these "Hold Harmless" contracts only address liability of softball field owners, and Employer merely signs the contract in such a way as to enable the owners to match up the required contract with the required prepayment.[158] While Claimant argues that Employer's agreement to sign these contracts manifests a willingness to accept liability for his injuries, there is no evidence that these contracts were written, designed or otherwise intended to govern anything other than liability of the softball field's owner.[159] There was no evidence that these contracts impacted the nature of Employer's relationship with its workers, or otherwise obligated Employer (or any other signatory, for that matter) to provide workers' compensation coverage.[160]

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[157] A-98-99, 298. Moreover, while Ms. Dawson testified that she stopped playing softball when she learned there would be no associated workers' compensation coverage, other players including Ms. Atwell kept playing. A-294.
[158] A-105-10, A-168.
[159] B-95-97.
[160] *Id.*

After the remanded proceeding, which included clarifying evidence about the Hold Harmless agreements, even the Board no longer cited these documents as a basis for finding in Claimant's favor. Therefore, the Superior Court did not err by agreeing with the Board's implicit concession that the procedural coordination of paperwork has no bearing on the course and scope analysis.

Lastly, while Claimant argues that the Board's award should be upheld because some witnesses thought softball was a work event, such a mistaken belief does not dictate the outcome of the course and scope test. Many people who make workers' compensation claims believe their injury to be work related, but that does not make it so. The main *Dalton* inquiry, as established by *Larson's* and as previously endorsed by This Honorable Court, is whether the employer undertook some act to require participation, or make it part of the employee's contracted-for service. All witnesses testified that their participation in softball was voluntary.[161] Thus, the Superior Court's finding that the record lacks sufficient evidence to establish the second *Dalton* factor should be affirmed.

c. Public Policy

Claimant argues that his request for workers' compensation coverage should be honored as a matter of public policy because he played softball with an expectation of coverage. However, mistaken expectations of coverage are not

[161] A-45, 55, 99-01, 314.

determinative to the course and scope analysis. Softball was never a basis for Claimant's employment contract with Employer. Claimant was, and still is, a bankruptcy paralegal. All of his medical bills were paid by Employer's health insurance carrier, and Claimant received more in wage loss benefits through Employer's short and long term disability plans than he would have received through workers' compensation coverage, given maximum statutory compensation rates.[162]

As a matter of public policy, and in specific response to Claimant's argument that he detrimentally relied on an expectation of coverage, Employer made no offer or promise to provide workers' compensation coverage for softball injuries, nor did it have an incentive (or "bargained-for benefit") to do so because Employer derived no direct business benefit from the game.[163] Unilateral expectations of coverage are not enforceable, and would have a chilling effect on benevolent initiatives in corporate America which are truly voluntary in nature and serve to improve life in general. Thus, public policy tends to support an application of the course and scope analysis consistent with the Superior Court's underlying decision so that insurance carriers can accurately set premiums and employers can continue to support recreational activities that benefit employees.

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[162] A-37, 123-25.
[163] *Supra*, at 20-25.

CONCLUSION

In reversing the Board's decision that a bankruptcy paralegal's job includes voluntarily playing softball after work, the Superior Court properly performed a *de novo* review and correctly held that the Board legally erred by misinterpreting the *Dalton* test and losing sight of the fundamental course and scope inquiry.

The Board erred in maintaining that increased productivity remained a substantial, direct benefit for purposes of satisfying the third *Dalton* factor because it relied on the exact same "morale and efficiency" benefit that the Superior Court cautioned it to disregard. This Honorable Court already exempted this type of efficiency benefit from the course and scope analysis and the Board's failure to accept this legal exemption constitutes reversible error.

Evidence of personal, subjectively-felt pressures by two teammates did not bring a softball game within the "orbit of employment" within the meaning of the second *Dalton* factor because Employer did not proffer any incentives to participate in softball; all internal communications remained localized to a sphere of individuals who expressed interest in softball and consented to related communications; and the subjectively-felt obligations described by the two team members related to their softball team, not their employment.

Evidence of past workers' compensation coverage was not legally sufficient to find course and scope to exist because it did not reflect an affirmative act taken

by Employer to expand the employment relationship. Employer never agreed that softball was part of anyone's employment. It merely instructed employees to submit claims pursuant to the Workers' Compensation Act's mandatory reporting requirements, and deferred to its insurance carrier to make a compensability determination.

Unilateral expectations of coverage are neither determinative nor enforceable, and would have a chilling effect on benevolent initiatives by corporate America.

For the foregoing reasons, Employer-Appellant respectfully requests that the Board's decision remain reversed, and the decision of the Superior Court be AFFIRMED.