EFiled: Oct 16 2017 05:07PM EDT
Filing ID 61249221
Case Number 249,2017

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.,	)	No. 249,2017
Plaintiff Below/Appellant,	)	
v.	)	
GAVILON GRAIN, LLC (d/b/a Peavey Company), JAIR CABRERA,	)	
Defendants Below, Appellees.	)	

APPELLEES GAVILON GRAIN LLC AND JAIR CABRERA'S ANSWERING BRIEF

Respectfully submitted,

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Dated: October 16, 2017

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NATURE OF PROCEEDINGS

This litigation arises out of a work place accident that occurred on November 10, 2011 during the scope and course of Frank Lee Layne's ("Layne") employment at Gavilon's premises, located at 402 Main Street, Townsend, DE (hereinafter "Gavilon facility").[1] As a result of the accident, Layne applied, received, and accepted worker's compensation benefits through the worker's compensation insurance placed by Access Labor Service, Inc. ("Access") and funded essentially by Gavilon.[2]

Five separate Superior Court actions were filed relating to the same aerial lift accident. The instant matter was the second filed action. The first filed action, *Discover Property and Casualty Insurance Company, Individually and a/s/o Access Service, Inc. and Frank Layne, Jr. v. Gavilon Grain LLC*, C.A. No. N12C-10-042 EMD filed on November 4, 2012, was a subrogation matter, which sought reimbursement of workers' compensation benefits paid to Layne pursuant to an insurance policy issued by Discover Property and Casualty Insurance Company ("Discover Property") to Layne's nominal employer, Access. Discover Property alleged claims of breach of contract and negligence against Gavilon. On July 13, 2015, the Superior Court in and for New Castle County (the "trial court") dismissed Discover Property's claims of negligence holding that the claims were

[1] A0042 ¶ ¶30 -31.
[2] B340

barred by the exclusive remedy provision of the Workers' Compensation Act because Layne was Gavilon's special employee.[3] Subsequent to the dismissal of the negligence claim, Layne settled the instant third party personal injury suit with the two remaining defendants, MSP Equipment Rentals, Inc. and Genie Industries, Inc. As part of the settlement, Discover was reimbursed for the worker's compensation benefits pursuant to its rights under 19 *Del.C.* §2363 based on an agreed upon compromise of the total lien amount minus its proportionate share of litigation expenses.[4] As to the limited remaining hotly contested contractual issues, the parties were able to amicably agree to a resolution of the remaining issues.

A second filed action, *The Ohio Casualty Insurance Company, as subrogee of MSP Equipment Rentals, Inc. v. Gavilon, LLC, et al.*, C. A. No. N13C-07-117 DCS filed on July 11, 2013, was another subrogation matter, which sought reimbursement of property damage benefits paid to and for M.S.P. relating to the damaged Genie S-85 lift involved in the accident in question pursuant to an insurance policy issued by Ohio Casualty. Ohio Casualty alleged claims of breach of contract against Gavilon and negligence against Gavilon, Cabrera, and Terex.

[3] *Discover Property and Casualty Insurance Company v. Gavilon Grain, LLC, d/b/a Peavy Company LLC*, 2015 WL 5157470 (Del. Super. 2015).
[4] Pursuant to *Keeler v. Hartford Mutual Insurance Company*, 672 A.2d 1012 (Del. 1996) (holding that Plaintiff was required to pay a share of costs of litigation of third party claim proportionate to the amount of its recovery).

The parties were able to amicably agree to a resolution of all claims in this minor property damage matter. No appeal to this property damage action followed.

A third filed action, *Jair Irais Cabrera and Bereniseruiz Martinez v. MSP Equipment Rentals, Inc., et al.*, C. A. NO S13C-11-009-THG filed on November 8, 2013, was a personal injury action seeking compensatory and punitive damages against M.S.P. and Terex through claims of strict liability, negligence, breach of express, and implied warranties. M.S.P. filed a Third Party Complaint seeking indemnification against Gavilon based on a breach of contract claim. Pursuant to Gavilon's Motion to Dismiss, M.S.P.'s Third Party Complaint was dismissed by the trial court on September 9, 2014.[5] The remaining parties amicably settled all outstanding claims. No appeal of the *Cabrera* personal injury action followed.

Although these exact claims were previously adjudicated or already pending in the trial court, a fourth action, *M.S.P. Equipment Rentals, Inc. v. Gavilon Grain, LLC*, C. A. NO. N14C-08-033 MMJ filed on August 5, 2014, sought declaratory judgment requesting the trial court to declare that Gavilon is responsible for the defense and indemnification of M.S.P. in relation to the *Layne* and *Cabrera* personal injury actions. Pursuant to Gavilon's Motion to Dismiss, M.S.P.'s Complaint was dismissed by the Court on June 9, 2015.[6] M.S.P. appealed the

[5] *Cabrera v. MSP Equip. Rentals, Inc.*, 2014 Del. Super. LEXIS 706.
[6] *MSP Equip. Rental, Inc. v. Gavilon Grain, LLC*, 2015 WL 3613153 (Del. Super. 2015).

decision. In the 351, 2015 appeal, this Court by Order, dated February 18, 2016, affirmed the dismissal "on the basis of and for the reasons assigned by the Superior Court in its Order of June 9, 2015."[7]

This instant personal injury action was filed on December 2, 2012. Mrs. Layne, as guardian ad litem and next friend to her husband Frank Layne (hereinafter "Layne"), asserted claims against Gavilon Grain LLC and Jair Irais "Hector" Cabrera (hereinafter "Gavilon" and "Cabrera"), M.S.P. Equipment Rentals, Inc., the lessor of the subject aerial lift, and Terex/Genie, the aerial lift manufacturer.[8] Layne asserted claims of negligence, gross negligence, and recklessness against Gavilon and a claim for vicarious liability with regard to the alleged negligence of Cabrera in operating the subject aerial lift.[9] The trial court set a bifurcated discovery deadline in relation to the applicability of the workers compensation issue as August 29, 2014.[10]

On September 19, 2014, after the expiration of the discovery deadline set for this issue, Gavilon and Cabrera moved for summary judgment on the basis that there was no material issue of fact as to Layne's status as a "borrowed servant"

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[7] *MSP Equipment Rental, Inc. v. Gavilon Grain d/b/a Peavy Grain*, No. 351, 2015 (Del. February 18, 2016)(ORDER).

[8] A38-50. For purposes of this Answering Brief, while Ms. Layne brought the negligence claim against various defendants as guardian *ad litem* and next friend, Gavilon and Cabrera will refer to Plaintiff below as "Layne" since it was Mr. Layne's injuries that gave rise to the instant matter.

[9] *Id*.

[10] B1-B3.

pursuant to his special employment relationship with Gavilon and Cabrera, a co-employee of Layne, was acting in the course and scope of his employment with Gavilon when the accident occurred.[11] On October 3, 2014, Layne filed his Opposition to Defendants Gavilon and Cabrera's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment.[12] On October 17, 2014, Gavilon and Cabrera filed their Reply brief and Opposition to Layne's Summary Judgment.[13]

On March 16, 2015, the Court heard oral arguments on the Motion for Summary Judgment and Cross Motions. At the argument, the parties agreed that the issue of whether Layne was a "borrowed servant" was ripe for adjudication.[14] The trial court reserved its decision.

While Layne had initially agreed that no further discovery was needed as to this issue,[15] Layne later requested the trial court to delay issuing a formal ruling on Gavilon and Cabrera's pending summary judgment motion, citing the need for the parties to supplement the record with Gavilon facility manager, James Engler's second deposition testimony, which was based solely on liability issues and taken

[11] A79-A97.
[12] A98-A121.
[13] A122-A132
[14] A291:21-A292:1; A33:1-3.
[15] *Id.*

on May 29, 2015, and Cabrera's then scheduled deposition on June 29, 2015.[16] On June 22, 2015, over the objection of Gavilon and Cabrera, the trial court granted Layne's leave to file supplemental briefing to include Engler's additional testimony.[17] On June 25, 2015, Layne filed his Supplemental Brief in Support of Opposition to Defendants Gavilon and Cabrera's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment.[18] On June 29, 2015, Gavilon and Cabrera filed their Reply Brief to Layne's Supplemental Opposition Brief.[19]

On July 10, 2015, upon thorough review of all pleadings, relevant deposition transcripts, and applicable well established, uncontroverted case law, including Delaware Supreme Court precedents, Judge Davis properly and correctly concluded that Layne's claims against Gavilon LLC and Cabrera were barred by the workers' compensation exclusivity provision.[20]

On June 15, 2017, Layne appealed the decision.[21] As the Court is aware, this is Layne's fourth application of appeal regarding the trial court's July 10, 2015 Opinion. In the 413, 2015 appeal, Layne improperly attempted to directly appeal the interlocutory July 10, 2015 decision only to then voluntarily dismiss the action after being issued a Notice to Show Cause for his failure to comply with Supreme

[16] B4-B6.
[17] B7.
[18] A133-A137.
[19] A138-A143.
[20] *See* Exhibit A to Appellant's Opening Brief.
[21] B11-B14.

Court Rule 42.[22] In the 414, 2015 appeal, this Court refused the interlocutory appeal and "concluded that the application for interlocutory review does not meet the requirements of Supreme Court 42(b)." [23] In the 31,2016 appeal, this Court issued another Notice to Show Cause and upon review of the responses held that that appeal must be dismissed yet again due to Layne's non-compliance with the provisions of Rule 42 since the Order was still not final as proceed distribution issues in regards to the settlement of co-defendants remained.[24]

[22] B8-B10.
[23] *Layne v. Gavilon Grain, LLC,* 146 A.3d 1051 (Del. 2015).
[24] *Layne v. Gavilon Grain, LLC,* 133 A.3d 559 (Del. 2016).

SUMMARY OF ARGUMENT

I. Denied. Based on the undisputed facts of this straightforward case that Gavilon had the right to control the means and methods of Layne's employment on the date of the accident, that an employee-employer relationship existed between Layne and Gavilon, and the trial court properly granted summary judgment, holding that Layne was a special employee of Gavilon triggering the Worker's Compensation exclusivity provision.

II. Denied. Layne waived any challenge to the trial court's grant of summary judgment based on whether the accident occurred in the scope of his employment since it was not raised in the trial below court. In the alternative, there is no dispute as to whether the accident occurred within the scope and course of Layne's employment since Layne has applied, received, and accepted worker's compensation benefits, judicially admitted that the accident occurred in the scope and course of his employment, and the accident occurred on Gavilon facility while Layne was performing a Gavilon specifically directed work duty to the benefit of his special employer, Gavilon.

STATEMENT OF FACTS

This litigation arises out of an accident that occurred during the scope and course of Layne's employment at the Gavilon facility on November 10, 2011.[25] The Gavilon facility was primarily used for grain storage and distribution.

Layne was a temporary worker, who came to work as a general laborer for Gavilon through a temporary employment agency, Access.[26] Pursuant to a temporary services contract for the supply of temporary labor to the Gavilon facility, Layne reported to Gavilon daily and Gavilon directed the day to day employment activity of Layne on the Gavilon premises. [27]

Gavilon facility manager James Engler ("Engler") interviewed Layne the first day he reported to the Gavilon facility to discuss his work background and skill set to ensure that he could perform the tasks that would be assigned by Gavilon so as to approve his hire at the facility.[28] The interview was the same interview that Gavilon would have conducted of anyone who they were considering for full time employment.[29] Layne also completed an employment

[25] A42 ¶ ¶ 30-31.
[26] B16-B19.
[27] A154-157.
[28] B47-B48.
[29] B32-B33; B47-B48.

application with Gavilon, which was to provide Gavilon with general information about himself.[30]

Although Gavilon need only demonstrate it had the right to control Layne's work at the Gavilon facility to prevail on this application, the record demonstrates that Gavilon, in fact, exercised this right of control each and every day Layne worked for Gavilon. Gavilon directed Layne when to work, when to take lunch, when to take breaks, and whether he was permitted to work overtime.[31] Engler, as well as other senior Gavilon employees, including Cabrera, directed Layne on what work to perform each day and, if need be, instructed Layne on how to perform the work.[32] Gavilon directly supervised Layne's day-to-day activities at the Gavilon facility.[33] Furthermore, Layne unequivocally admitted that he would do anything Engler assigned him to do, stating, "Whatever Jim, Jim wanted done and Jim told us, do you know what I mean, instructed us to do it, we did it and got it done."[34]

Gavilon had the authority to discipline, fire and/or discharge Layne from his work tasks at the Gavilon facility.[35] Gavilon had the authority to direct Layne to

[30] B30-B31.
[31] B73-B74; B75; B85-B86.
[32] B35-B37; B65-B66; B75-B76; B81; B86-B89 .
[33] B22-B23; B43-B44; B048.
[34] B88.
[35] B24; B63; B77; B80.

comply with all internal Gavilon necessary work procedures and safety requirements for any particular work task he was assigned with Gavilon.[36]

Gavilon supplied Layne with all the necessary tools and equipment to perform his daily work activities.[37] Gavilon also provided or otherwise made available all necessary safety equipment and devices for Layne's assigned work tasks.[38]

Gavilon provided both written and on-the-job training to Layne at the time of his hire. Specifically, Layne completed Gavilon designed and presented training programs including General Awareness level 1, General Awareness level 2, restricted access, hot work, bin entry and lockout/tagout training.[39] Gavilon also provided Layne with general safety awareness training as well as safety training specific to hazards and conditions of the Gavilon facility such as exposure to grain dust.[40] Layne followed Gavilon procedures and could not work in the operational areas of the Gavilon facility without completing General Awareness level 1 and 2 training.[41] Layne's training with Gavilon consisted of classroom instruction, written materials and video presentation, which was followed by written question and answer tests where any incorrect answers would be reviewed by a Gavilon

[36] B25-B26; B60-B62.
[37] B034; B082-B084.
[38] B64-B65.
[39] B37-B39; B49-B59; B92-109; B110-B167; B168-B241; B242-284; B285-B339
[40] B92-B109.
[41] B93-B94.

supervisor to ensure the subject matter was properly understood.[42] Completion of the Gavilon work task training/orientation and safety training is mandatory and a necessary prerequisite for all employees working for Gavilon at its facility as directed by Gavilon.[43]

Access, essentially a paper employer, did not maintain any physical presence at the Gavilon facility nor did it oversee the day-to-day work activity of Layne for Gavilon. Access would appear at the Gavilon facility approximately once per month to observe Layne and other Access workers assigned to the facility.[44] Layne was only provided limited general training by Access at the time of his initial hire. This limited training consisted of general work place orientation in an industrial environment and safety instruction.[45] Access never provided training to Layne that was specific to the work he performed at the Gavilon facility. Indeed, Layne admits that any training or instruction provided by Access relative to this work assignment at the Gavilon facility was simply being told to follow the direction and instruction of his admitted Gavilon supervisors.[46]

Although Layne's paycheck for the work performed at the Gavilon facility was processed by Access, Gavilon paid Access for Layne's services, kept track of

[42] B39; B49-B59; B93- B95; B99-B107.
[43] B38-B39.
[44] B72.
[45] B27-B28.
[46] B78-B79.

Layne's daily hours, and submitted them to Access for payment in accordance with Layne's assigned hourly rate.[47] Access billed Gavilon $17 per hour for Layne's placement at the Gavilon facility.[48] The $17 hourly rate paid by Gavilon was used by Access to reimburse Layne for his $10 hourly wage.[49] A portion of Gavilon's $17 per hour payment was used to pay for Layne's medical benefits, workers compensation insurance, FICA, and Social Security contribution.[50] In essence, Gavilon ultimately paid the workers' compensation premium attributable to Layne.

Layne had been working at the Gavilon facility for approximately three months prior to the accident.[51] At the time of the accident, Layne and his Gavilon co-employee Cabrera were attempting to access a conveyor belt on top of a grain silo located on the facility premises to perform general maintenance and repair which included welding.[52] Engler, the Gavilon facility manager, directed Layne to assist Cabrera with this welding and maintenance task.[53] Engler's authority over Layne was so complete in fact that Engler could direct Layne as to which side of the silos to work, and whether to use a wrench or a socket wrench to remove bolts

[47] B20-B21.
[48] A212:11-14.
[49] A212:15-19.
[50] A212:9 –A216:1.
[51] B35.
[52] B39-B42; B66- B70.
[53] A241:11-13.

during the work.[54] Engler could also direct Layne and Cabrera exactly how to pass materials from the basket of the lift onto the catwalk.[55]

Engler had the same authority over Cabrera,[56] who trained, directed, and supervised Layne's work activities in general and specifically with regard to this welding task.[57] At the daily toolbox meeting prior to the accident, Engler specifically told Layne and Cabrera that Layne would be Cabrera's helper, and that Cabrera was going to direct Layne's activities within the scope of the project.[58]

Additionally, all of the tools, safety devices, and other equipment necessary to perform this maintenance task, including the subject articulating boom lift that Layne and Cabrera occupied, the welding equipment, personal protective equipment, and safety lanyards were supplied by Gavilon.[59] The welding maintenance work was conducted as part of the Gavilon Hot Work Program, which required all workers participating in such tasks to comply with the hot work policies and procedures which included direction regarding necessary personal protective equipment and management supervision and inspection of the work. As part of his new hire training, Layne received specific instruction and training

[54] B91.
[55] B91.
[56] B90.
[57] B66-B70; B86.
[58] B90.
[59] B45-B46; B63-B65; B69-B70.

regarding the Gavilon Hot Work Program, which included the completion of a written examination.[60]

As a result of the accident, Layne applied for, received, and accepted worker's compensation benefits through the worker's compensation insurance placed by Access and funded essentially by Gavilon.

[60] B95; B108.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT. AS A MATTER OF LAW, THE EXCLUSIVE REMEDY PROVISION OF DELAWARE'S WORKERS' COMPENSATION ACT BARS ALL CLAIMS AGAINST SPECIAL EMPLOYER AND CO-EMPLOYEE, GAVILON AND CABRERA, BROUGHT BY SPECIAL EMPLOYEE LAYNE.

A. Question Presented

Whether Layne's claims against Gavilon and Cabrera are barred by the Worker's Compensation exclusivity provision when the evidence shows that there was an employee-employer relationship between Gavilon and Layne, Gavilon's special employee.

B. Scope of Review

The standard of review of the trial court's grant of summary judgment is *de novo* with respect to the legal issue of whether Gavilon was a special employer of Layne.[61]

C. Merits of Argument

Since the undisputed facts establish a classic "borrowed servant" relationship between Gavilon and temporary employee Layne, summary judgment was properly entered immunizing Gavilon and Layne's co-employee Cabrera from liability in this action. Gavilon not only had the right to control but actively

[61] *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).

controlled the means and methods of Layne's work at the Gavilon facility, which is the most important factor to the special employee analysis.[62]

The Delaware Workers' Compensation Act provides that recovery under the Act is the exclusive remedy available to employees injured when acting in the course and scope of their employment. The Act states that "[e]very employer and employee ... 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." [63] Under Delaware law, an employee is "every person in service of any corporation (private, public, municipal or quasi-public), association, firm or person, excepting those employees excluded by this subchapter, under any contract of hire, express or implied, oral or written, or performing services for a valuable consideration, ... excluding any person whose employment is casual and not in the regular course of the trade, business, profession or occupation of his employer."[64]

The existence of an employer-employee relationship is an issue of law.[65] Generally, an employee can consent to be loaned to another employer by his general employer "to perform specific services, and that, in the course of and for

[62] *See Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 395 (Del.1964).
[63] 19 Del.C. § 2304; *see Kofron v. Amoco Chems. Corp.*, 441 A.2d 226 (Del.1982).
[64] 19 Del.C. § 2301
[65] *Porter v. Pathfinder Servs.*, 683 A.2d 40, 42 (Del.1996).

the purpose of performing such services, he may become the employee of the specific employer" and therefore be the "specific employer's employee while at the same time remaining, generally speaking, the employee of the employer who loans his services."[66]

In *Lester C. Newton Trucking Co. v. Neal*, the Delaware Supreme Court adopted four criteria that courts must consider to determine whether a worker is an "employee" under the Act: "(1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages; and (4) who has the power to control the conduct of the employee when [s]he is performing the particular job in question."[67] The fact that one factor weighs more in the favor of one party as opposed to another is not dispositive.[68] The right to control the performance of the work is the overriding factor that must be given the greatest weight in determining employment, which allows for 2 employers, for purposes of the Act.[69]

Porter v. Pathfinder Servs., 683 A.2d 40 (Del.1996), is instructive on this issue and controls this case. In *Porter*, the plaintiff Thomas Porter ("plaintiff") worked for a temporary employment agency, Casey Employment Agency

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[66] *Volair Contractors, Inc. v. AmQuip Corp.*, 829 A.2d 130, 134 (Del. 2003).
[67] *Porter*, 683 A.2d at 42 *citing Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 395 (Del.1964); *see also Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1099-110 (Del.2006) (reciting the *Lester C. Newton* factors and acknowledging it is the test that courts are to utilizes in cases involving two or more alleged employers)
[68] *Criswell v. McFadden*, 2007 WL 1034942 (D. Del. 2007).
[69] *See Porter*, 683 A.2d at 42.

("Casey"), as an electrical technician. Casey furnished temporary employees to various employers, but was not engaged in the electrical contracting business.[70] Casey assigned Porter to work as an electrical technician at Pathfinder. Porter continued to perform services as an electrical technician for Pathfinder on a full-time basis until he was injured in a motor vehicle accident. At the time of the accident, Porter was a passenger in a vehicle owned by Pathfinder and driven by Thomas Sadler, a co-employee with Pathfinder. Sadler and Porter were returning to the Pathfinder shop for a safety meeting and were otherwise within the course and scope of their employment.[71]

Similar to the circumstances here, the plaintiff in *Porter* was required to report each work day to the Pathfinder facility, was supervised by Pathfinder employees, Pathfinder employees and management were solely responsible for the day-to-day supervision of his work, and he was required to follow Pathfinder's work place policies and procedures.[72] Pathfinder provided Porter with all necessary tools, equipment and materials he needed to perform his daily work. Pathfinder directed Porter's work schedule including when he could leave work for the day. Pathfinder also maintained the discretion to hire, discipline or fire Porter from his work assignment at the Pathfinder facility.

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[70] *Id.* at 41.
[71] *Id.*
[72] *Id.* at 41-42.

Pursuant to the temporary services contract executed between Pathfinder and Casey, Pathfinder paid Casey for Porter's services at a rate of 1.34 times the hourly rate in which Porter was compensated by Casey. The surcharge or markup over the Porter's hourly rate was used to cover Casey's fee and mandatory employment charges, including workers compensation insurance premiums. Porter received worker's compensation benefits from Casey as a result of the accident.[73]

Pathfinder and Porter's co-employee Sandler moved for summary judgment raising the exclusivity provision of the Delaware Worker's Compensation Act as a complete bar to Porter's claim given his status as a special employee of Pathfinder. The Superior Court granted the motion for summary judgment finding that there was no material issue of fact "as to the determinative issue that Pathfinder alone exercised control over Porter's work at the time of his injury ….."[74] On appeal, the Delaware Supreme Court affirmed the Superior Court's decision, holding that the court "correctly found that an employer-employee relationship existed between Porter and Pathfinder and that Porter was the special employee of Pathfinder as a matter of law."[75] The Supreme Court rejected Porter's claim that the terms and conditions of the temporary employment contract between Casey and Pathfinder which identified Casey as the "employer" controls the issue. The Court stated that

[73] *Id*. at 41.
[74] *Id*. at 42.
[75] *Id*.

the language of the contract, and particularly those sections that identify Casey as the employer, "must be construed in its context as a whole" finding that the language was not "not intended either to preclude an implied contract of hire between Porter and Pathfinder or to constitute a waiver by Pathfinder of its rights under the Workers' Compensation Act."[76] *Porter* should also be instructive as to Layne's "either/or" misconception that because Access was Layne's general employer he could not have been a special employee of Gavilon.

Layne's reliance on *Morton v. Evrax Claymont Steel*, C.A. No. 09C-08-245, a case allegedly similar to the one at hand, is of no importance since Layne fails to include any facts about the case and only includes a conclusory statement made by the Superior Court, which merely states that there was a material issue of fact that prevented summary judgment being entered in that case, from a ten page pre-trial hearing transcript.[77]

Similarly, Layne's contentions that material issues of facts exist due to Gavilon's Answer and response to a co-defendant's Motion to Consolidate Cases for Trial is simply incorrect. Gavilon's admission that Access was Layne's general employer does not preclude the Court from finding that Gavilon was a co-

[76] *Id.*

[77] A247-250. Even if Layne had included the facts of *Morton*, as found by the trial court, the decision is inapposite since unlike in this case, in *Morton*, the employment agency had established a long history of supervising plaintiff. Here, there is no evidence that Access, other than occasionally visiting the facility, ever supervised Layne.

employer or a special employer of Layne, especially when viewed in the full context of this issue. It is quintessential in these types of situations that there will be a primary employer as well as a special employer. By definition, without the designation of more than one employer, there would be no concept of a "borrowed servant" or special employee. Layne ignores that the Answer to the same exact averment further stated that Layne was "working at the direction of Gavilon Grain, LLC."[78] Additionally, Gavilon and Cabrera included as an affirmative defense that Layne's claims were barred by the exclusivity remedy provisions of 19 *Del. C.* §2304, putting all parties on notice as to Gavilon and Cabrera's position.[79]

The response to a co-defendant's Motion to Consolidate Cases for Trial, filed on September 17, 2014, merely flagged the very issue *sub judice*. The Response noted, prior to the filing of summary judgment, should the trial court not have granted summary judgment, a jury would then have had to address the issue as stated by Gavilon and Cabrera's letter. At that point, while Gavilon and Cabrera anticipated filing for summary judgment, a party may not assume it would be granted, leaving a possibility of prejudice should the trial court have consolidated the cases prior to adjudication of the summary judgment. As stated above, as established by the Answer and the request and grant of a bifurcated scheduling order, the parties were on notice of Gavilon and Cabrera's challenge to Layne's

[78] A51-A60.
[79] *Id*.

ability to bring a claim against them pursuant to the exclusivity remedy provisions of 19 *Del. C.* §2304. There are no material issues of fact that would preclude summary judgment.

Porter controls as the facts there are nearly identical to those presented here. Put simply, just as in *Porter*, Layne's special employer Gavilon directed, supervised, and controlled Layne's day-to-day work activities at the Gavilon facility. Layne's work at the Gavilon facility and the manner in which it was to be performed was within the control of Gavilon, the overriding factor in the special employee analysis.[80]

1. The Undisputed Evidence Confirms that Gavilon Had the Right to Control Layne's Work, the Most Important Factor in the *Lester-Newton* Analysis.

Any suggestion that Gavilon did not possess the right to control Layne's daily work tasks with Gavilon, including those he was performing at the time of the accident, is not supported by the record. The undisputed record is replete with evidence of Gavilon's control over Layne's work at the Gavilon facility. Layne concedes that Gavilon had the right to direct, supervise, and control his day-to-day general labor work activities at the Gavilon facility. Clearly, it was Gavilon that had control over Layne's work at its facility on a daily basis, including on the day of the accident.

[80] *Id.* at 42.

However, Layne attempts to convolute the issue of "control" and artificially create an issue of fact where one does not otherwise exist as a means to avoid summary judgment. To this end, Layne engages in a tortured reading of the fourth factor of the "right of control" under the *Lester-Newton* analysis by defining such right as being only a "power" to control as opposed to a right defined by the actual exercise or "ability" to control. Layne fails to cite to any Delaware case law or other persuasive authority in support of such a narrow interpretation of what constitutes control. The determination of the right of control for purposes of establishing a special employment relationship is not as confusing or complex as Layne suggests nor is the determination of control limited to an innate "power" given by contract. The "right" of control in the temporary employment context can be bestowed in several ways including, but not limited to, the terms and conditions of a governing contract, the course, custom and practice between the parties, and/or through the actual exercise of control.[81]

Here, not only did Gavilon have the right to control Layne's daily assigned work tasks at the Gavilon facility, it demonstrated such right by exercising control over Layne by directing when, where, and how he was to perform his assigned

[81] *Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 WL 728827, * 14 (Del.Ch.1994); *E.I. duPont Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, *16 (De.Super.2013).

work tasks. This exercise of control included the very Gavilon directed work task in which Layne was engaged when the accident occurred.

Access and Gavilon possess a shared right of control over Layne. Simply because Layne is directed to perform a task that may exceed his general labor assignment, a point not conceded by Gavilon, that does not mean that such a task is not under the control of Gavilon. In other words, Access's "power" to prohibit Layne from performing a work task assigned by Gavilon that goes beyond his general labor assignment does not negate Gavilon's right and exercise of control over Layne as he is engaged in performing the directed task. While the right of control is ultimately a shared one between Access and Gavilon, there is no misunderstanding as to the Layne's understanding when he testified that Gavilon had broad near absolute control.[82]

Assuming, *arguendo*, that Layne's analysis in defining the right of control as one of "power" versus "ability" in the context of a general labor and a skilled labor task at the Gavilon facility is correct, which it is not, Layne's attempt to distinguish the task he was performing at the time of accident as being beyond his general labor assignment is without merit. Layne was not performing work beyond his general labor assignment **when the accident occurred**. There is no evidence in

[82] B88.

the record that Layne was actually performing a skilled labor task at the time of the boom lift tip-over.

The undisputed facts demonstrate that Layne was instructed by Gavilon to assist his co-employee Cabrera with the repair of a transition between two grain conveyors.[83] The conveyor transition that needed to be repaired was located at such a height that an aerial boom lift was required. There is no evidence that Layne was operating the boom lift. Standing as a passenger in a boom lift operated by another full-time Gavilon employee is not a work task beyond Layne's general labor assignment. Indeed, the same contract language cited by Layne in his opening brief only prohibits Access worker's to "operate or drive" a motorized vehicle or machinery.[84] There is no prohibition against riding as a passenger in such machinery when operated by others. Thus, Layne's inability to recall at deposition whether he was directed to assist with the welding task (general labor) or perform it himself (skilled labor) is immaterial even under the special employment analysis fashioned by Layne. The accident occurred while Layne was engaged in a general work task not prohibited under the contract and which was performed at the direction and control of Gavilon.

Even if Layne's work on the day of the accident exceeded the scope of work under the contract, which it did not, that fact is not probative as to whether Layne

[83] B39-B41.
[84] A156.

was a borrowed servant or special employee of Gavilon. Regardless of who was controlling the lift, it is clear from the record that it was Gavilon through the direction of Engler and Cabrera, who directed the task, supervised the task, and provided the tools to complete the task. There is no dispute from these facts that Gavilon controlled Layne. Additionally, as cited by the trial court, under Restatement (Second) of Agency, Comment d:

> Where servant obeys temporary employer. The servant may depart from the service of the general employer as to a given act either in accordance with the agreement between the general employer and the other, or **in spite of it**. The fact that he obeys the temporary employer as to the act does not necessarily cause him to be the servant of such employer. If, however, the temporary employer exercises such control over the conduct of the employee as would make the employee his servant were it not for his general employment, the employee as to such act becomes the servant of the temporary employer. If the employee does the very act directed by the temporary employer, the latter is responsible for having directed it, and the first employer is responsible as matter if the act is within the scope of his general employment.[85]

In other words, under the Restatement (Second) of Agency, if Gavilon directed Layne to do work outside of the scope of the agreement with Access, Layne would be deemed as a Gavilon employee and not an Access employee.

Layne's attempt to distinguish *Porter* from the facts of this case by applying the same general labor versus skilled labor analysis must also be rejected. *Porter*

[85] Restatement (Second) of Agency §227, cmt. d(emphasis added).

controls as the facts there are nearly identical to those presented here.[86] The plaintiff in *Porter* was injured not while performing a specific electrician task for which he was assigned as a temporary employee, but riding in a car to attend a safety meeting. Here, Layne was injured while a passenger in a boom lift that was being positioned to perform a routine maintenance task. Layne was not performing a skilled labor task or otherwise serving outside of his temporary employment assignment when the boom lift tipped over.

Just as in *Porter*, Gavilon was responsible for the "day-to-day supervision" of its temporary employee's work. Layne fails to demonstrate how those same facts are not present here. Layne continues to point to terms of the temporary services contract that purportedly restricts Layne's work to only general labor assignments as a means to remove the "power" of control from Gavilon. This asserted fact, even if true, does not distinguish this case from *Porter* as Layne's injury did not occur outside of his temporary employment assignment with Gavilon. Similar to *Porter*, once Layne arrived at the temporary assignment with Gavilon, his original employer, Access, did not instruct him regarding the performance of his work. In fact, Access had no substantial contacts with Layne other than providing his paycheck and making periodic visits to the Gavilon

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

facility once every few months.[87] Instead, Layne's work at the Gavilon facility and the means, method and manner in which it was to be performed, regardless of its designation as a general or skilled labor task, was within the exercised control of Gavilon.

Layne mistakenly asserts that because Access was his general employer, he could not have been a special employee of Gavilon. However, one does not preclude the other. In *Porter*, the Court held that Porter was a special employee of the temporary employer, so as to be subject to the exclusive remedy provision of the Workers' Compensation Act. The Court did not find that Porter's status as an employee of the temporary agency and a special employee of the temporary employer were mutually exclusive; but rather to the contrary that Porter was both an employee of the temporary agency **and** a special employee of the temporary employer at the same time. Such is the case here.

This record overwhelmingly demonstrates the *Lester-Newton* criteria for control over Layne's work assignments at the Gavilon facility, including at the time of the accident, such the trial court properly determined a special employment relationship existed as a matter of law.

2. Gavilon Had The Right To Hire And Discharge Layne From The Gavilon Facility.

[87] Note that the record is unclear as to whether any Access representative visited the Gavilon facility after Layne was first assigned and prior to the accident.

Layne incorrectly contends that the right to hire and discharge him is a right that is mutually exclusive as between the general employer Access and the temporary employer Gavilon. The right to hire and terminate can be a shared right between multiple employers depending upon the context of the specific employment relationship.

Here, Gavilon does not dispute that Access, as the general employer, initially hired Layne as part of its temporary labor force with the intent that Layne would be assigned to any number of temporary employment assignments, including Gavilon. Gavilon also recognizes that Access had the right to discharge Layne from its temporary labor force. However, Gavilon possessed the same right to hire and discharge in the context of Layne's temporary work assignment at the Gavilon facility.

Layne cannot dispute that Gavilon had the right to approve or reject Layne as a proposed temporary employee at the Gavilon facility. Indeed, Gavilon facility manager Engler interviewed Layne the first day he was assigned to the Gavilon facility to discuss his work background and skill set to ensure that he could perform the tasks that would be assigned by Gavilon so as to approve his hire at the facility.[88] Additionally, Engler's interview of Layne did not differ from interviews Engler performed with potential full-time Gavilon employees.

[88] B24; B63; B77.

Nor can Layne dispute that Gavilon had the authority to discipline, fire and/or discharge him in conjunction with the performance of his daily assigned work tasks at the Gavilon facility.[89] The evidence clearly demonstrates a shared right with regard to the right to hire and terminate Layne – Gavilon's right being specific to the temporary work assignment at its facility and Access' right being general with regard to Layne's employment as part of its larger temporary employee workforce.

Moreover, Gavilon's right to hire and discharge Layne is the same right recognized in *Porter*.[90] Just like Layne, the plaintiff in *Porter* was a temporary employee assigned through a temporary employment agency similar to Access. The *Porter* Court's discussion of the temporary employer's right of discharge was limited to the temporary employment assignment, not his employment with the temporary employment agency as Layne suggests.

Additionally, the terms of the temporary employment agency contract to the extent it identifies Access as the employer is of no moment. In fact, the very same argument was addressed and rejected by this Court in *Porter*. The relevant language in the Access contract provides that any employee placed with Gavilon or any other client of Access is an employee of Access. Just as in *Porter*, the sole purpose of the "employee" designation in the contract was to ensure that any

[89] *Id.*
[90] *Id.*

temporary employee cannot be directly hired by a client before that employee completes 750 hours with the client or Access is paid a separate conversion fee. As the Court stated in *Porter*, the intent of such a provision is to protect the employment agency "from not receiving its fee for a minimal period," not to preclude the finding of a special employment relationship for purposes of the exclusivity provision of the Workers' Compensation Act.[91]

Indeed, the preceding sentence to the Access contract expressly acknowledges the same limited contractual intent of protecting the temporary employment agency's fee entitlement in stating that Access "incurs substantial recruiting, administrative and marketing expenses in connection with the temporary employee."[92] Accordingly, this provision of the contract is not relevant to the analysis of whether a worker is a special employee; how the parties chose to identify themselves in a contract does not impact this analysis. Rather, the *Lester Newton* factors control.

Because Gavilon had the authority to approve the hire and assignment of Layne to the Gavilon facility and had the discretion to terminate his temporary employment assignment, the first and second elements of the *Lester-Newton* analysis also favor a finding of a special employment relationship with Gavilon.

3. Gavilon Paid Layne's Wages And Benefits.

[91] *Id.*
[92] A156.

The record is clear that Gavilon paid Layne's wages and worker's compensation insurance premium. Access assumed nothing more than an administrative role in processing Layne's paycheck and benefits funded by Gavilon. Access President Dennis Yetman confirms that Layne's wages and benefits were directly funded through monies paid by Gavilon. Gavilon paid Access a $17.00 per hour rate for Layne's services. This hourly rate payment of $17.00 was used by Access to pay Layne's $10.00 per hour wage as well as to pay for Layne's medical benefits, workers compensation insurance, FICA and Social Security contribution.[93]

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[93]In this regard, Yetman unequivocally testified as to the allocation of the $17.00 per hour charge billed to Gavilon:

> Q. Well, the client's paying $17 an hour?
> A. As a billed rate to Access, yes.
> Q. Right. And that $17 was comprised of a $10 payment to the worker, correct?
> A. I'm not sure if it's broken down in those specific legal terms, but that $10 that we paid him came from that – came from that funds, yes.
>
> ***
>
> Q. It paid the unemployment compensation insurance, correct?
> A. Yes.
> Q. It paid the FICA, correct?
> A. Yes.
> Q. It paid the workers' compensation insurance, correct?
> A. Yes.
> Q. It paid Social Security contribution, correct?
> A. Yes.
> Q. And there was some markup or profit to Access?

Additionally, the plain reading of the contract between Access and Gavilon shows that the surcharge covers Access' fee and mandatory employment charges, stating:

> … takes care of our worker's Federal, Delaware State & Delaware Local taxes, as well as FICA, Unemployment, Workers' Comp. and General Liability Insurance. We bill you weekly and payment is due net ten days from the date of the invoice.[94]

Thus, Access assumed nothing more than an administrative role in processing Layne's paycheck and benefits; Gavilon was responsible for funding Layne's wages, worker's compensation insurance premium and other employment benefits. Layne cannot hide from this fact. As was in *Porter*, the mere fact that Gavilon paid Access instead of paying Layne directly is not disposive of the four part test. This manner of funding a temporary worker's wages is typical in the temporary employer services industry and has been recognized by Delaware Courts as being sufficient to satisfy the third element of the *Lester-Newton* analysis in favor of finding a special employment relationship.[95]

A. Correct.

A214-A216.

[94] A154.

[95] *See Porter*, 683 A.2d at 41 (holding that wage payment element of *Lester-Newton* test satisfied in favor of temporary employer where surcharge for plaintiff's hourly rate paid by temporary employer used to fund plaintiff's hourly wage and mandatory employment charges including workers' compensation premiums); *Criswell v. McFadden*, 2007 WL 1034942 at *2 (finding third element of *Lester-Newton* criteria satisfied where plaintiff's check issued by direct

Therefore, Gavilon satisfies all four (4) of the *Lester Newton* criteria for establishing an employer-employee relationship so as to apply the exclusivity provision of the Workers' Compensation Act, which provides the exclusive remedy available to employees injured when acting in the course and scope of their employment, and all of Layne's claims against Gavilon and Cabrera should be barred.[96]

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employer, but temporary employer responsible for funding plaintiff's hourly rate, payroll taxes, and worker's compensation expenses through hourly rate surcharge contained in temporary services agreement).

[96] 19 Del. C. §2304.

II. LAYNE HAS WAIVED ANY ARGUMENT OF WHETHER THE ACCIDENT OCCURRED OUTSIDE OF THE DELAWARE WORKERS' COMPENSATION STATUTE.

A. Question Presented

Did Layne waive any arguments as to whether his injuries fell outside the Delaware Workers' Compensation Statute when he failed to raise the issue before the trial court?

B. Scope of Review

Assuming that this Court finds that despite Layne's waiver of this issue, it should nevertheless be reviewed, this Court's review of the trial court's decision on summary judgment should only be reviewed for plain error.[97] Under the plain error standard, in order for reversal to be warranted, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[98] Moreover, this Court's review should be "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[99]

C. Merits of Argument

[97] *Grace v. State*, 658 A.2d 1011, 1014 (Del. 1995).
[98] *Id.*
[99] *Id.*

Layne failed to preserve this argument for appeal.[100] "It is the basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court. Parties are not free to advance arguments for the first time on appeal"[101] Pursuant to Delaware Supreme Court Rule 8, "only questions fairly presented to the trial court may be presented for review…"[102] While Del. Sup. Ct. R. 8 provides a narrow exception "if [this Court] finds that the trial court committed plain error requiring review in the interests of justice,"[103] Layne fails to identify why the grant of summary judgment should be reversed under the plain error standard. Additionally, as stated by this Court in an earlier opinion this year:

> It is axiomatic that an appellate court will generally not review any issue not raised in the court below. This rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.[104]

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[100] Layne's citations as to the record where he allegedly preserved the issue relates only as to his arguments regarding whether Gavilon could be considered a special employer under the *Lester Newton* factors.
[101] *Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202, 1208 (Del. 1997).
[102] Del. Sup. Ct. R. 8.
[103] *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012).
[104] *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017), *citing to 5 AM. JUR. 2D Appellate Review* § 618 (2016) (citations omitted).

While Layne presented similar arguments as to whether Gavilon can be considered a special employer under *Lester Newton*, Layne never raised the issue as to whether the accident failed to arise in the course of Layne's employment. As understood from his Opening Brief, Layne attempts to bring this new argument as an alternative argument should this Court agree with the trial court's finding that Gavilon was Layne's special employer. Layne never raised any alternative arguments below and opposed summary judgment based solely as to Gavilon's possible designation as a special employer. As further evidence of Layne's failure to previously raise the issue, Layne's reliance on the cited cases for this argument contained in his Opening Brief were never included and/or disclosed prior to the filing of his current brief.

Since Layne did not raise this argument in the trial court, it should not be raised for the first time at the appellate level in an attempt to reverse the trial court's grant of summary judgment to Gavilon and Cabrera.

III. LAYNE'S INJURY OCCURRED WITHIN THE SCOPE AND COURSE OF HIS EMPLOYMENT.

A. Question Presented

Did Layne's injury fall outside of the Delaware Workers' Compensation Statute's Exclusivity Remedy Provision when it is undisputed fact that Layne has applied, received, and accepted benefits through the Workers' Compensation scheme, Layne judicially admitted that the accident occurred during the scope and course of his employment, and there is a no evidence to support that the accident occurred outside his employment?

B. Scope of Review

To the extent that this Court finds that Layne did not waive this issue, the standard of review of the trial court's grant of summary judgment is *de novo*.[105]

C. Merits of Argument

Inconceivably, Layne attempts to argue that his accident did not arise out of his employment when it is uncontested that he applied, received, and accepted substantial benefits pursuant to 19 *Del. C.* § 2304 in relation to the accident in question. By statutory definition, Layne's application, receipt, and acceptance of benefits under 19 *Del. C.* § 2304 indisputably displays Layne's position that the accident occurred in the scope and course of his employment. Additionally, Layne

[105] *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).

admitted that the accident occurred with the scope and course of his employment in his Complaint by stating:

> At all times relevant hereto, while Frank Lee Layne, Jr. was performing work at the Gavilon/Peavey facility, he was an employee of Access Service, Inc. and **was in the course and scope of his employment** with the same.[106]

This statement should be deemed a judicial admission.[107] The Court has held that judicial admissions "are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court."[108] Due to Layne's judicial admission, there can be no material issue of fact as to whether his injury occurred in the scope and course of his employment.

Even if the Court examines the issue further, there is no evidence that disputes that Layne's injuries occurred within the course and scope of his special employment relationship with Gavilon. One of the primary purposes of the Workers' Compensation statute is to compensate an injured employee promptly, regardless of fault and without the need of litigation.[109] In exchange for the benefit of prompt compensation, the employee loses the right to bring a personal injury

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[106] A42 at ¶31 (emphasis added).

[107] This Court in *Merritt v. UPS* has stated: Voluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.*, statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court) are termed "judicial admissions." 956 A.2d 1196 (Del. 2008)(citations omitted).

[108] *Id.*

[109] *Histed v. E.I. DuPont De Nemours & Co.*, 621 A.2d 340, 343(Del. 1993).

suit against his employer and co-workers for his or her work-related injuries.[110] Accordingly, an employee's action against an employer "for work-related injuries based on any degree of negligence, from slight to gross, are within the exclusive coverage of the Workmen's Compensation Law and may not be maintained under common law."[111]

Under Delaware's Workers' Compensation statute, in order for an injury to be compensable, an injury must arise "out of and in the course of employment."[112] The requirements of "arising out of" and "in the course of" must both be established for the injury to be compensable pursuant to the Workers' Compensation Act.[113] While the term "arising out of" employment refers to the "the origin of the accident and its cause,"; the term "in the course of" employment "relates to the time, place, and circumstances of the accident."[114] The court in Dravo stated:

> It is sufficient if the injury arises from a situation which is an incident or has a reasonable relation to the

[110] *Hill v. Moskin Stores, Inc.*, 53 Del. 117, 165 A.2d 447, 451 (Del. 1960).
[111] *Kofron v. Amoco Chems. Corp.*, 441 A.2d at 231. *See also Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157, 158 (Del. 2000) (holding that an employee may not maintain a tort action against an employer absent a showing of an intent of the employer to injure the employee).
[112] 19 *Del. C.* §2304.
[113] *Dravo Corp. v. Strosnider*, 45 A.2d 542 (Del. Super. 1945).
[114] *Id*. at 260-261.

> employment, and that there be some causal connection between the injury and the employment.[115]

In this case there is no doubt whatsoever that there was a causal connection between Layne's injuries and his employment. The accident occurred after Engler, the Gavilon facility manager, directed Layne to assist Cabrera with this welding and maintenance task.[116] While performing such Gavilon directed task, a Genie S-85 articulating boom lift, occupied by Layne and Gavilon co-employee Cabrera, tipped over causing injuries to both Layne and Cabrera.[117] The accident occurred during work hours on Gavilon premises. Simply put, Layne was performing an action in furtherance of the business of Gavilon at the instruction of Gavilon at the time of the accident.

While Layne belabors on the contract, as stated above, in more detail, there is no evidence in the record that Layne was performing a prohibited work task, not otherwise subject to the control of Gavilon. Standing as a passenger in a boom lift operated by another full-time Gavilon employee is not a work task beyond Layne's general labor assignment. Layne received safety training and equipment in fall protection from Gavilon, which was certainty applicable to his job task at the time of the accident. Indeed, Layne was wearing a Gavilon supplied fall protection lanyard to secure himself in the lift basket. Even if, the activity is considered

[115] *Id*. at 261.
[116] A241.
[117] A42 ¶¶ 32-34.

prohibited, the activity had always been subject to the control of Gavilon. The reach of the Workers' Compensation Act is broad and certainly envelopes this activity.

As to the cases cited by Layne in an attempt to narrow the scope of injuries covered under the Workers' Compensation, all of the cases are easily distinguishable because none of the cases deal with a claimant, who applied, received, and accepted Workers' Compensation benefits and then sought declaration that the accident occurred outside the scope and course of employment in order to avoid portions of the statutorily mandated scheme. Additionally, the anticipated argument that Access' workers' compensation carrier and not Gavilon's carrier paid the workers' compensation benefits to Layne is of no import since again that exact scenario would occur in any special employer scenario.

As to Layne's alleged public policy concerns, the rationale behind broad workers' compensation coverage and the concomitant immunity to special employers drives this point home. Does Layne mean to suggest this accident is outside the workers' compensation scheme? Accepting that narrow read of entitlement to the benefit is itself against public policy. Gavilon's status as a special employer renders it statutorily liable, albeit in a reserve status, if Layne's general employer Access defaults on its obligation to provide workers'

compensation benefits for Plaintiff's injuries that occur during the course and scope of employment.[118]

In return for this reserve status, Gavilon as the special employer has the same immunity under the Workers' Compensation Act that is afforded to Access as the general employer. Certainly, if Access was unable to provide workers' compensation benefits to Layne for his injuries, Gavilon would be estopped from asserting that it is not liable for the payment of benefits because it did not have the "power" to direct Layne to perform a work task that may have technically exceeded the scope of the general labor assignment under the temporary services contract. Gavilon would be liable for the payment of workers' compensation benefits as Layne's special employer because Gavilon and Gavilon alone directed and instructed Layne to perform the accident related work task proving that it possessed the right of control over Plaintiff when the accident occurred. This is the quintessential *quid pro quo* whereby the reserve employer is liable for scheduled benefits without any determination of fault receiving tort immunity in return.

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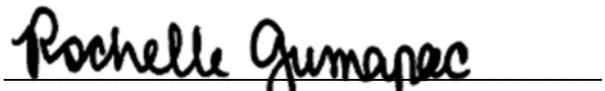
[118] *See* 19 *Del.C.* §2354(a) evidencing that the Workers' Compensation Act recognizes a situation may arise where an injured employee is in "the joint service of 2 or more employers." *See also Shamis v. Moon*, 81 A.3d 962 (Pa.Super.2013)(rationale for "borrowed servant" doctrine under Pennsylvania law is to ensure the worker has coverage for workers' compensation benefits, in exchange the borrowing employer enjoys the immunity under the Workers' Compensation Act from the employee's tort claims).

CONCLUSION

Based on the foregoing, Defendants/Appellees Gavilon Grain LLC and Jair Cabrera respectfully request this Honorable Court to affirm the grant of its Motion for Summary Judgment, dismissing all of Layne's claim against them.

Respectfully submitted,

WHITE AND WILLIAMS LLP



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Dated: October 16, 2017