EFiled: Oct 31 2017 12:06PM EDT
Filing ID 61301385
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
Plaintiffs Below, Appellants	)	Court Below – Superior Court of the State of Delaware
v.	)	C.A. No.: N12C-12-057 EMD
GAVILON GRAIN, LLC (d/b/a Peavey Company), JAIR CABRERA	)	
Defendants Below Appellees	)	

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

Jeffrey M. Gentilotti (#3392)
Robin P. Moody (#4865)
BIFFERATO GENTILOTTI LLC
4250 Lancaster Pike, Suite 130
Wilmington, DE 19805
(302) 429-1900
Attorneys for Appellant-Plaintiff Shawana Layne
as Guardian *ad Litem*
And Next Friend to Frank Lee Layne, Jr.

October 31, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

ARGUMENT

I. The Superior Court erred in granting summary judgment. At the very least, there are genuine issues of material fact that require determination by a fact finder, rendering the issue of whether there was a special employee-employer relationship inappropriate for determination on summary judgment.

As demonstrated by the number pages that both Appellees and Appellant have dedicated to this issue, there is substantial disagreement as to the material facts that are necessary to complete the *Newton* factor review. In the interest of brevity, Appellant will not rehash the same argument advanced in his Opening Brief as to the merits of each parties' *Newton* analyses. However, Appellant would be remiss in failing to highlight that the substance of these disagreements demonstrates the extensive factual disputes that remain which render Summary Judgment inappropriate.[1]

To be sure, the question of the existence of a special employer-employee relationship is ultimately a determination of law.[2] Yet, even when recognizing this legal truism, Delaware Courts recognize that the analysis is highly dependent upon factual questions.[3] In *White v. Gulf Oil Corp.*, (which was cited specifically in the

---

[1] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776 (Del. 2012)
[2] *Porter v. Pathfinder Services, Inc.*, 683 A.2d 40, 42 (Del. 1996)
[3] *Richardson v. John T. Hardy & Sons, Inc.*, 182 A.2d 901, 902 (Del. 1962)

Porter case, which Appellees contend is controlling), the Court recognized that, in reference to the legal question presented by the *Newton* test:

> Each particular case must, out of necessity, depend on its own facts, and ordinarily no one characteristic of the relation is decisive. All of the characteristics must be considered. **Consequently, in a majority of the cases the question becomes one of fact.**[4]

In keeping with this, the Supreme Court in *White* was only able to affirm a prior ruling from the lower court because it found there were no outstanding questions of fact relevant to the *Newton* analysis.[5]

In this matter, unlike *White,* the facts relevant to the *Newton* analysis are heavily disputed. The parties disagree on facts that are fundamental to that inquiry, including:

1. Who paid Mr. Layne;[6]
2. Who could hire and fire Mr. Layne;[7]
3. The extent of involvement Gavilon had in the selection of Mr. Layne for work at the facility;[8]
4. The specific work Layne was performing at the time of the incident;[9]

---

[4] *White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979) (*emphasis added*) (quoting *Gooden v. Mitchell*, 21 A.2d 197, 201 (Del. Super. 1947)).
[5] *Id.* at 49, 53.
[6] Contrast Pages 32-35 of Reply Brief with Pages 20-22 of Opening Brief.
[7] Contrast Pages 29- 31 of Reply Brief with Pages 15-20 of Opening Brief.
[8] Contrast Pages 29- 31 of Reply Brief with 15-20 of Opening Brief.
[9] Contrast Pages 23- 29 of Reply Brief with 22-29 of Opening Brief.

5. and, critically, the scope of Gavilon's control over Mr. Layne and whether the work being performed at *the time of the incident* was within that scope.[10]

Appellees attempt to brush off these key factual disputes, alleging that the Appellant is artificially creating factual issues that do not exist. However, Gavilon is only able to dismiss these disputes based upon its own circular and legally untenable characterization of the *Newton* "right to control" element. Gavilon suggests because Mr. Layne merely did what Gavilon requested that he do, Gavilon had the "right to control" what Mr. Layne was doing at the time of the accident.[11] Even at first blush, this argument is illogical – if this were permitted to stand, the *Newton* "right to control" factor would be reduced to just to an analysis of "control" and be rendered largely meaningless. Moreover, the practical implications of this reading would dangerously expand the scope of the "special employer" relationship, and suggest that virtually any party could become a "special employer," so long as they requested someone perform a task and the person ultimately complied.

Appellees contend that there is case law to support their argument. In their brief, Appellees cite two **unpublished** opinions, *Abex Inc. v. Koll Real Estate Group, Inc., and E.I. DuPont Nemours and Co. v. Medtronic Vascular Inc.,*

[10] Contrast Pages 23- 29 of Reply Brief with 22-29 of Opening Brief.
[11] Page 24 of Reply Brief.

arguing that both opinions support the contention that the "actual exercise of control" *per se* establishes the "right to control" for the *Newton* analysis in a temporary employment context.[12]

However, neither of these unpublished opinions remotely stand for this proposition. Neither of these cases have *anything* to do with temporary employment or an application of the *Newton* factors. *Abex Inc.* was a declaratory judgment suit seeking resolution of a tax dispute and the parties' respective fiduciary obligations.[13] *E.I. DuPont Nemours and Co.* involved claims of breach of contract, fraudulent misrepresentation and negligent misrepresentation.[14] Neither of these opinions remotely approach supporting Appellees' bold assertion that "[t]he 'right' of control in the temporary employment context can be bestowed … through the actual exercise of control."[15] There is no such supporting case law in Delaware. To the contrary, Delaware case law has clearly established that it is the **right to control** the individual in the performance of the act that caused his injury, not the mere control itself, that is the relevant inquiry in the *Newton*

---

[12] Page 24 of Reply Brief, citing *Abex Inc. v. Koll Real Estate Group Inc.*, 1994 WL 728827, * 14 (Del. Ch. 1994); *E.I. DuPont de Nemours & Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, *16 (Del. Super. 2013).
[13] *Abex Inc.*, 1994 WL 728827, * 14.
[14] *E.I. DuPont de Nemours & Co.*, 2013 WL 261415 at *1.
[15] Page 24 of Reply Brief.

analysis.[16] Appellants contend that the time is ripe for this Court, given the contested facts of this case, to re-visit the control element of the *Newton* analysis (relied upon in *Porter*) in order to protect temporary laborers from the shield of workmen's compensation immunity. Simply put, public policy and ensuring the safety of temporary laborers demands a closer look at the control test in the context of the facts of this case.

Notwithstanding the merits of Appellant's argument against the existence of the special employer-employee relationship, there are very clearly genuine issues of material fact with respect to whether Gavilon had the right to control the work that Layne was performing at the time of the incident and thus can be deemed a "special employer" as a matter of law. These questions of fact render a summary judgment determination of this issue inappropriate and require this matter be remanded for ultimate determination by a fact finder.[17]

[16] *Newton*, 204 A.2d at 395.
[17] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.*P., 36 A.3d 776 (Del. 2012)

II. Appellant has not waived his argument as to whether the accident occurred outside the scope of the Delaware Workers' Compensation Statute. This Argument was presented to the Superior Court and is otherwise fairly subsumed within the broader issue presented in Appellees' Reply Brief as to whether the Exclusive Remedy Provision of the Delaware's Workers' Compensation Act bars claims against Appellees.

Appellant's argument addressing the question of whether his work fell within the scope of his employment with Gavilon was presented to the Superior Court[18] and is otherwise fairly subsumed within the issue on appeal of whether "the Exclusive Remedy Provision of the Delaware's Workers Compensation Act Bars All Claims against Gavilon and Cabrera."[19]

Pursuant to Delaware Supreme Court Rule 8 "only questions fairly presented to the trial court may be presented for review."[20] This issue was clearly raised at the trial court level in both briefing and oral argument.[21] Notwithstanding this presentation, this argument is one that would be fairly subsumed within and derivative of the broad issue of this appeal as framed by Appellees in their own brief – namely, whether Appellees are entitled to the Protections of the Exclusive

[18] A103, A129, A297, A308-310, A343.
[19] Page 36 of the Reply Brief.
[20] DE Sup. Ct. R. 8.
[21] A103, A129, A297, A308-310, A343.

Remedy Provision in Mr. Layne's claims against them.[22] As described in both Appellant and Appellees' briefs, the applicable provision of Delaware's Worker's Compensation Act known as the Exclusive Remedy Provision states:

> every employer and employee, adult and minor, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident **arising out of and in the course of employment**, regardless of the question of negligence and to the exclusion of all other rights and remedies.[23]

Where a party seeks to enforce the Exclusive Remedy provisions, they are obliged to meet the two required elements of the statute and where applicable, the common law principles developed to address those elements.

In support of their contention of waiver, Appellees cite a number of cases where an appellant attempted to present issues that constituted wide departures from those presented by the party in the trial court. For example, in *Shawe v. Elting*, the court refused to consider new constitutional arguments that were raised for the first time at the appellate level.[24] Appellant's argument constitutes no such departure, but focuses on the same Exclusive Remedy argument and looks only to the same plain statutory language that has been at the forefront of the issues considered throughout this appeal.

---

[22] Page 36 of the Reply Brief
[23] 19 *Del. C.* § 2304 (emphasis added).
[24] *Shawe v. Elting*, 157 A.3d (Del. 2017)

Notwithstanding the record below wherein this issue was fairly presented, Appellant's argument that the Exclusive Remedy provision is inapplicable because Mr. Layne's accident did not arise in the course of his employment is well within the scope of the issue of whether the Exclusive Remedy provision is applicable to Mr. Layne's claims against Gavilon, generally. Whether or not all the statutory elements of the Exclusive Remedy provision have been satisfied is an argument that is logically subsumed within the matters that were briefed and argued at length and has been properly preserved on the written and oral record.[25]

[25] A103, A129, A297, A308-310, A343.

III. Even if Gavilon can be said to be a "Special Employer" of Mr. Layne, Mr. Layne's injury did not arise in the course of Mr. Layne's "Special Employment" with Gavilon.

Even if Gavilon could be established as a special employer, the contractual limitations on the scope of Mr. Layne's "special employment" are such that the skilled nature of the work that was being performed at the time of the incident falls outside of that scope and accordingly, cannot be subject to the Exclusive Remedy Provision.[26]

The thrust of Appellee's position on this issue is that the relationship between Mr. Layne and Access Labor somehow undermines Appellant's argument. However, Appellees' rebuttal argument demonstrates a fundamental lack of understanding of the argument actually presented. It is Appellant's argument that ***even if Gavilon is deemed to be Layne's "special employer" under the*** **Newton** ***factors,*** the Exclusive Remedy provision does not apply because his injury did not arise in the course of his "special employment" ***with Gavilon***.

The relationship between Mr. Layne and Gavilon was fundamentally different than that between Mr. Layne and Access Labor. Access Labor was Mr. Layne's general employer.[27] Mr. Layne applied for and interviewed with Access

---

[26] 19 *Del. C.* § 2304.
[27] A188-A189.

Labor.[28] His physical paychecks contained the Access Labor name.[29] He was assigned to work sites by Access Labor.[30] If he were dismissed from Gavilon, he would remain an employee of Access Labor.[31]

By contrast, Access Labor had the absolute right to control and limit the scope of Mr. Layne's duties at the Gavilon facility.[32] Access Labor deemed Mr. Layne an unskilled general laborer for the purposes of his presence at the site.[33] Gavilon could not use Mr. Layne for tasks beyond the boundaries clearly established by Access Labor through its employment contract.[34] In other words, the scope of Mr. Layne's employment with Access Labor was much broader than the scope of any relationship Mr. Layne had with Gavilon. That Mr. Layne was within the scope of his broadly-defined employment with Access at the time of his accident is of no consequence as to whether his accident fell within the more narrowly defined scope of his relationship with Gavilon.

Accordingly, Mr. Layne's relationship with Access Labor at the time of the incident, his collection of worker's compensation benefits from Access Labor's

---

[28] A188-A189.
[29] A208.
[30] A188-A189
[31] A192-A193.
[32] A157-A171
[33] *Id.*
[34] *Id.*

insurance carrier, and whether Mr. Layne was acting within the scope of his employment with Access Labor for the purposes of Worker's Compensation are likewise wholly irrelevant. The only relationship to consider under this argument is the relationship between Mr. Layne and Gavilon. Pursuant to that limited relationship and narrow scope of his temporary assignment, Layne's injury does not fall within the Workers' Compensation Act Exclusive Remedy Provision with respect to Gavilon. At the very least, as discussed in Appellant's Opening Brief, whether Layne's injury occurred in the course of his "employment" with Gavilon creates a genuine issue of material fact that is inappropriate for determination by way of summary judgment. The Superior Court ruling upholding summary judgment should be vacated and this matter should be remanded for trial.

CONCLUSION

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

BIFFERATO GENTILOTTI LLC

/s/ Jeffrey M. Gentilotti
Jeffrey M. Gentilotti (#3392)
Robin P. Moody (#4865)
4250 Lancaster Pike, Suite 130
Wilmington, DE 19805
(302) 429-1900
(302) 832-7540
Attorneys for Appellant-Plaintiff
Shawana Layne as Guardia *ad Litem* and Next Friend to Frank Lee Layne, Jr.