No. 21-CV-564

District of Columbia Court of Appeals

RENE ZELAYA,

Appellant,

v.

ALFRED STRANGE,

Appellee.

On Appeal from the
Superior Court of the District of Columbia (Civil Actions Branch)
No. CAB3299-13

BRIEF FOR APPELLANT

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PARTIES AND COUNSEL

The following listed parties and counsel appeared in the trial court and are appearing in this Court.

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No intervenors or amici curiae appeared below and none so far have appeared herein.

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Statement of Jurisdiction

The Court has jurisdiction of this appeal under D.C. CODE § 11-721(a)(1) because it is from a final order granting summary judgment that disposes of all parties' claims.

Statement of the Issue

In this action under the D.C. Industrial Safety Act ("ISA") by Plaintiff-Appellant Rene Zelaya to recover for the severely disabling and disfiguring injuries that he sustained while working on a construction project overseen by Defendant-Appellee Alfred T. Strange, review of the trial-court order granting Mr. Strange's motion for summary judgment presents one straightforward issue:

The ISA imposes on every manager having control of any worksite a duty to furnish a safe workplace. As the construction manager in charge of this worksite, Mr. Strange was, among other things, responsible for administering the construction contract, observing the work, and monitoring safety. He was authorized to stop and obligated to require correction of, as here, observed dangerous work. Did Mr. Strange have control of the worksite sufficient to owe a statutory duty?

Statement of the Case

This is a tort action by Mr. Zelaya seeking recovery of compensatory damages for the catastrophic injuries that he suffered, including the above-the-knee amputation of a leg and substantial loss of use of an arm, because of a high-voltage electric shock that he sustained while working on a construction project superintended by the District of Columbia's construction manager, Mr. Strange. Mr. Zelaya's initial tort action against the District (No. 2012-CAB-004298) was dismissed for lack of presuit notice, and this Court affirmed that ruling.[1] He then brought this action against Mr. Strange, who was a project engineer for the District of Columbia Department of Transportation ("DDOT"), and against the District of Columbia Water and Sewer Authority ("DC Water") alleging that they breached duties owed to Mr. Zelaya under the ISA and the common law. (Appendix ("A") 1-10.) Mr. Strange filed a motion to dismiss, which Judge Neal E. Kravitz denied. (A 479-80.)

Defendants moved for summary judgment on the basis that they did not owe any duty of care to Mr. Zelaya and that, as a matter of law, Mr. Zelaya was contributorily negligent. Ultimately, Judge John M. Campbell granted the motions.

[1] *Zelaya v. District of Columbia*, No. 12-CV-1767, Mem. Op. and J. (D.C. Dec. 27, 2013).

On February 5, 2021, this Court issued an unpublished Memorandum Opinion and Judgment (A 482-94) affirming summary judgment as to DC Water and as to Mr. Zelaya's common-law claims against Mr. Strange, but reversing as to whether Mr. Strange owed a statutory duty under the ISA and whether Mr. Zelaya was contributorily negligent, and remanding to allow the trial court "to decide in the first instance whether Mr. Strange was an employer under the ISA" (A 487).

On remand, Mr. Strange moved for summary judgment on the basis that he was not an employer under the ISA. (A 11-101.) On August 11, 2021, Judge Jason Park entered an order granting that motion. (A. 576-87.) On August 16, 2021, Mr. Zelaya noted this appeal.

Statement of the Facts

A. Mr. Zelaya was working on a construction project overseen by DDOT's construction manager, Alfred Strange.

On September 16, 2010, Mr. Zelaya was a thirty-two-year-old carpentry foreman for Civil Construction, LLC. (A 134, 135.) Civil Construction was undertaking a project, under a contract with DDOT, entitled "Rehabilitation of Riggs Road and South Dakota Avenue, N.E. Intersection" (A 269), or "Riggs Road Project" for short (A 240.) The work to be performed under this contract involved upgrading roads, sidewalks, curbs, and gutters and included improving water, sewer, and storm-water-drainage systems, which are DC Water utilities. (A 242,

299-300, 308-09.) DDOT's project engineer was Alfred Strange. (A 232, 306, 307.)

B. Mr. Strange had authority to stop dangerous work.

Mr. Strange served as the office engineer and construction manager "responsible" for and "in charge of [the Riggs Road] project." (A 233 (referencing A 282-83), 235 (same), 236 (same), 282; *see also* A 202.) Among his many duties was monitoring safety on the jobsite. (A 244-45.) Mr. Strange was "responsible for monitoring the Contractor [i.e., Civil Construction] for conformance with contractual safety requirements" and was required to "bring all observed violations to the attention of the Contractor." (A 283.) He was required to "order the termination of work that poses a serious and imminent danger to public safety or substantial property damage" and to "require correction of observed situations that are potentially dangerous to workers, the public and the project." (A 283; *see also* A 245.) Mr. Strange had authority to stop work on the project if he became aware of an unsafe situation. (A 245, 262, 263.) Indeed, he regularly spoke with the Civil

Construction superintendent about safety issues on the project and stopped work when those safety issues were not addressed. (A 246-48.)

C. Mr. Zelaya's bosses ordered him to use a boom truck to install a catch basin under a high-voltage power line, despite the unreasonable risk of electrocution.

Civil Construction's superintendent, John Constantino, was Mr. Zelaya's boss and the person to whom Mr. Zelaya reported. (A 136, 157, 196, 246-47, 351, 359-60.) On September 16, 2010, Mr. Constantino directed Mr. Zelaya to install a large catch basin in a trench on Third Street, N.E. near the intersection of Riggs Road and South Dakota Avenue, N.E. (A 142-43, 147, 155, 157, 359, 368, 369, 426.) A catch basin is a concrete structure that filters water runoff from the road and transfers it to the sewer system. (A 257-58 (referencing A 293 (photograph of catch basin)), 301-02.) This catch basin was about two and one-half feet wide, eight to twelve feet long, and six or seven feet high. (A 357.) A boom truck, which is a truck mounted with a telescoping crane-like arm, was on the worksite to lift and move the catch basin. (A 352, 361, 362-63.) The trench where the catch basin was to be installed with the boom truck was located directly below an energized high-voltage power line. (A 360-61 (referencing A 426), 373.)

At about 10:00 a.m., Mr. Zelaya phoned Mr. Constantino to discuss the difficulty and danger of the assigned task. (A 153, 155-56.) Specifically, Mr. Zelaya notified Mr. Constantino that the work that Mr. Constantino had directed

him to do, namely, installing the catch basin under the power line with the boom truck, was dangerous. (A 156.) Rather than telling Mr. Zelaya to stop the work, Mr. Constantino informed him that Civil Construction was behind its contractual schedule, told him that the catch basin had to be set that day, and ordered him to proceed with the work regardless of the danger. (A 142-43, 155-58, 183, 228-29; *see also* A 433-36.)

Mr. Zelaya tried to avoid using the boom truck by seeking to use another device known as an excavator, but it was unavailable. (A 179-80, 182-83, 221-22.) Mr. Zelaya and his crew could not wait till an excavator became available because the time was late and Mr. Constantino demanded that Mr. Zelaya install the catch basin that day. (A 183, 223.)

Civil Construction's head foreman, Mr. Bertolino, also discussed the hazardous installation with Mr. Constantino, who said "go ahead and do it." (A 432, 433-34.) Conveying that directive, Mr. Bertolino instructed Mr. Zelaya to continue installing the catch basin with the boom truck, despite the dangerous proximity of the power line. (A 434-35, 442-44, 451.)

D. Mr. Zelaya believed he must perform the dangerous work or he would lose his job.

Mr. Zelaya was afraid and did not want to do the job because it was dangerous. (A 158, 177, 181, 197, 219, 446-47, 451.) But he was being pressured by his

supervisors to undertake the dangerous task. (A 172-73, 183, 192, 416, 446-47, 448-49, 451.) Because of the orders from Messrs. Constantino and Bertolino, Mr. Zelaya believed he had no choice but to install the catch basin or he would be fired. (A 159-60, 162-63, 165, 192-93, 417-18, 444.)

E. Mr. Strange was aware of the danger but did not stop the work.

Mr. Zelaya did not have authority to order the stoppage of the catch-basin installation. (A 142, 162, 183, 212, 218, 225.) He therefore looked for persons on site with that authority to halt the dangerous work. (A 142, 181-82, 185, 225.)

Mr. Constantino, who was not present on the jobsite, told Mr. Zelaya by phone that he would contact Mr. Strange and the DC Water inspector at the project, Henry Bascom, who were present on the jobsite. (A 156, 157, 175-76, 304-05.) From that conversation, Mr. Zelaya understood that Messrs. Strange or Bascom would stop the work if it became too hazardous. (*See* A 178-79 ("if anything happened, the inspectors were there").) Mr. Zelaya believed that Messrs. Strange and Bascom possessed stop-work authority. (A 142, 143-44, 145-46, 158-59, 165, 166-71, 185, 194-96, 198-200, 202, 218.) He hoped and expected that they would exercise their authority and direct a stoppage of the dangerous work. (A 144, 154, 158-59, 163, 166-67, 171, 172, 184-85, 197, 200-01, 204, 219, 225-26.) So following his phone call to Mr. Constantino, Mr. Zelaya brought his concerns to Messrs. Bascom and Strange.

Mr. Zelaya informed Mr. Bascom that Mr. Constantino had told him that he had to install the catch basin that day and that he had no choice. (A 289, 358-59 (reading A 426), 368, 369, 416.) Mr. Bascom understood that Mr. Zelaya believed he had to proceed with the installation or lose his job. (A 417-18.) Mr. Bascom recognized "the dangers of the [b]oom truck working too close to [h]igh [v]oltage [c]ables." (A 426; *see also* A 399-400.) He believed that the Civil Construction crew was in imminent danger of electrical shock or electrocution if the boom were to come into contact with or too close to the power line, which he knew was energized. (A 371-73, 401-02.)

Mr. Zelaya urged Mr. Bascom to halt the work. (A 158-59, 204.) And he expected that Mr. Bascom would do so. (A 154; *see also* A 142, 143-44, 158-59, 163, 165-66, 172, 173, 184-85, 197, 204, 225-26.). But Mr. Bascom – as an inspector for DC Water, which had no contractual relationship with Civil Construction – did not order the work stopped. (A 146-47, 165-66, 200.)

Mr. Zelaya spoke with DDOT inspector Pamela Wilson concerning the dangers of installing the catch basin beneath energized power lines. (A 238-39, 446-47.) He told her that he was being pressured to do the work because Messrs. Constantino and Bertolino wanted the catch basin to be installed that day. (A 434-35, 446-47, 450-51.) She spoke to Mr. Bertolino, who denied that using the boom truck to install the catch basin beneath the power line presented a danger to the crew and

told her that Mr. Constantino had approved continuing with the work. (A 434, 447.)

Ms. Wilson, Mr. Bascom, and Mr. Zelaya all spoke with Mr. Strange about the risk to the Civil Construction workers if they proceeded to use the boom truck to install the catch basin beneath the energized power lines, as directed by Messrs. Constantino and Bertolino. Ms. Wilson informed Mr. Strange that there was a safety issue with installing the catch basin under the power lines and told Mr. Strange to speak with Mr. Bascom about it. (A 436-37, 438, 447.)

Mr. Bascom told Mr. Strange that using the boom truck to install the catch basin under an energized power line was dangerous and he urged Mr. Strange to stop the Civil Construction crew from proceeding with the hazardous undertaking. (A 361, 363-64, 415, 426.) Mr. Bascom took Mr. Strange to the area where the Civil Construction crew was about to begin installing the catch basin to show him what was about to take place and to stop it. (A 364-65, 366, 371, 426.) That apprised Mr. Strange of the safety issue. (A 255.)

When Mr. Strange reached the crew, he spoke with Mr. Zelaya. (A 174, 177, 227, 366-67, 415.) Mr. Zelaya pleaded with Mr. Strange to order a work stoppage. (A 163, 204.) But Mr. Strange did not stop the work. (A 152, 219-20.) Instead, he told Mr. Zelaya that he was not Mr. Zelaya's boss and that Mr. Zelaya should call Mr. Constantino. (A 147, 157, 163, 201, 204, 227.) Mr. Zelaya tried phoning Mr.

Constantino again, but he was in a meeting and did not answer the call. (A 163-64.)

F. Mr. Zelaya proceeded carefully with the work, but the boom contacted the high-voltage power line, causing Mr. Zelaya to be electrocuted.

The Civil Construction crew then proceeded to install the catch basin. (A 374.) Mr. Zelaya asked a member of his crew to act as a spotter to watch the operation of the boom. (A 148-49, 151.) The crew attached cables to the catch basin and lifted it with the boom. (A 375-76. 380-85, 426.) Mr. Zelaya guided the structure by holding on with both hands to the metal chain with which the boom truck was lifting and moving the catch basin. (A 387, 390, 418, 420-21, 426.)

The crew proceeded with its labors very slowly because they were trying to be cautious. (A 387-88, 389.) The procedure took about twenty minutes, during which Mr. Zelaya was attempting to guide the catch basin into the trench. (A 387, 390, 419.) Mr. Bascom watched from several yards away. (A 385-86, 391, 419, 421.) He thought it "was obvious that [the boom] would hit the power line." (A 388.) Mr. Strange was on the worksite then, too. (A 159, 228, 391, 421.) Mr. Bascom saw the boom get "very close" to the energized power line. (A 391.) But still Mr. Strange did not order the work stopped. (A 152, 159.)

Eventually, the Civil Construction crew managed to get the catch basin into the trench, but they still needed to adjust its position. (A 391-92 (reading A 426).) Mr.

Zelaya was focused on his effort to place the catch basin properly and so he was looking down into the trench. (A 151, 224-25, 395-96.) No one alerted him that the boom was about to touch the power line. (A 151, 215.)

Mr. Bascom observed the boom elevate and extend until it touched the overhead power lines. (A 394, 426-27.) At that moment, Mr. Bascom saw Mr. Zelaya being electrocuted. (A 395, 429; *see also* A 256, 267.) Mr. Zelaya was shocked for about one minute. (A 427.) He collapsed to the ground and "cr[ied] out indicating he was in severe [p]ain." (A 397 (reading A 427), 398 (same).)

G. The electrocution injured Mr. Zelaya catastrophically.

Mr. Zelaya was hospitalized with "[m]assive overwhelming electrical injuries." (A 458.) Rendered unconscious by the severe electrical shock, he did not recover his memory until about twenty-one days later. (A 205, 206.) By then, he had already undergone five surgical procedures, including autografts of the neck and chest, a massive excision of soft tissue of the right arm, and an above-the-knee amputation of his right leg. (A 209, 453-54, 458-59, 467-68.) Despite several more procedures to his right upper extremity, he eventually lost much of the use of his right arm and right hand. (A 186, 187, 210.) Muscles in his left leg were removed, so it no longer functions properly. (A 186, 207, 465-66.) Necrotic tissue was removed from his skull, resulting in a partial amputation of his right ear and

irreversible scarring about his head and face. (A 465-66.) He also sustained serious injuries to his retina, neck, chest, and abdomen. (A 189, 207-08.)

Mr. Zelaya remained hospitalized for about seven months. (A 206.) Because he could not be safely discharged to the home in which he had lived independently, Mr. Zelaya had to give up his house and move in with his aunt. (A 471, 473-74.) He has undergone years of physical therapy, approximately ten surgeries, and more skin grafts than he is able to recall. (A 208.) He will need further surgical procedures to improve function in his right arm and hand, and to repair visible deformities and scarring. (A 209, 210.)

The electrocution has caused Mr. Zelaya to suffer permanent catastrophic injuries that adversely affect his activities of daily living, his wage-earning capacity, and his quality of life. He now uses a prosthetic right leg and always walks with a cane. (A 210, 211.) He is unable to live alone and will need continued care and treatment for his injuries throughout his life. (A 210-211.) His appearance has been irreversibly altered, he continues to suffer daily from pain in his head and body, and he is unable to work. (A 186, 188, 190, 207, 211.)

Standard of Review

Whether the trial court properly granted summary judgment is a question of law.[2] Accordingly, this Court reviews orders granting summary judgment de novo.[3] In doing so, the Court conducts an independent review of the record and applies the same substantive standard used by the trial court.[4] "Under that standard, to prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law."[5] "A fact is 'material' if a dispute over it might affect the outcome

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[2] *Blair v. District of Columbia*, 190 A.3d 212, 220 (D.C. 2018); *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012); *1303 Clifton St., LLC v. District of Columbia*, 39 A.3d 25, 30 (D.C. 2012).

[3] *Holbrook v. District of Columbia,* 259 A.3d 78, 85 (D.C. 2021); *Baker v. Chrissy Condo. Ass'n*, 251 A.3d 301, 305 (D.C. 2021); *Farmer-Celey v. State Farm Ins. Co.*, 163 A.3d 761, 765 (D.C. 2017).

[4] *Baker*, 251 A.3d at 305; *Onyeoziri v. Spivok*, 44 A.3d 279, 283 (D.C. 2012); *Jaiyeola v. District of Columbia*, 40 A.3d 356, 361 n.9 (D.C. 2012).

[5] *Johnson v. Washington Gas Light Co.*, 109 A.3d 1118, 1120 (D.C. 2015) (footnote omitted); *see also* SUPER. CT. CIV. R. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

of a suit under governing law."[6] "[A]n issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'"[7]

"The record, as well as any reasonable inferences therefrom, must be viewed in the light most favorable to the non-moving party."[8] "'[T]he court may not resolve issues of fact or weigh evidence at the summary judgment stage.'"[9] "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of [the] judge . . . .'"[10]

"Summary judgment is improper if there is evidence on which the jury could reasonably find for the nonmoving party."[11] If the party moving for summary

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[6] *Baker*, 251 A.3d at 305 (quoting *Holcomb v. Powell,* 433 F.3d 889, 895 (D.C. Cir. 2006)); *Tillery v. District of Columbia*, 227 A.3d 147, 151 (D.C. 2020) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[7] *Baker*, 251 A.3d at 305 (quoting *Holcomb,* 433 F.3d at 895); *Tillery*, 227 A.3d at 151 (quoting *Anderson*, 477 U.S. at 248).

[8] *Holbrook*, 259 A.3d at 85 (citation omitted); *see also Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013) ("On review of summary judgment, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" (quoting *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1255 (D.C. 2012))).

[9] *Fry v. Diamond Constr. Inc.*, 659 A.2d 241, 245 (D.C. 1995) (quoting *Nader v. de Toledano*, 408 A.2d 31, 50 (D.C. 1979)); *accord, Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008) (quoting *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005)).

[10] *Blount v. Nat'l Ctr. for Tobacco-Free Kids*, 775 A.2d 1110, 1114 (D.C. 2001) (quoting *Anderson*, 477 U.S. at 255); *Fry*, 659 A.2d at 245 (same).

[11] *Armstrong*, 80 A.3d at 183 (citing *Han v. Se. Acad. of Scholastic Excellence Pub. Charter Sch.*, 32 A.3d 413, 416 (D.C. 2011)); *see also Holbrook,* 259 A.3d at 85 ("If we determine that record evidence exists on which a jury could properly

judgment fails to meet its burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, then summary judgment must be reversed.[12]

Summary of Argument

The D.C. Industrial Safety Act imposes a duty to provide a safe workplace on every "manager" having "control or custody of any place of employment or of any employee." *Control* means the power or authority to manage, direct, or oversee.

Mr. Strange had the requisite control because he possessed the power or authority to manage, direct, and oversee the Riggs Road Project. As the construction manager, he was responsible for and in charge of the project. His duties were extensive. Among other things, Mr. Strange was responsible for administering the construction contract to ensure that the work was completed in accordance with the plans and specifications, required quality standards, the contract performance period, and the contract price. He was obliged to document and prepare all requests for changes. He was required to attend progress meetings and review construction schedules. He was responsible for supervising the field-

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reach a verdict for [the appellant], then summary judgment was granted in error, and we must reverse." (citation omitted)).

[12] *See Onyeoziri*, 44 A.3d at 283 (citation omitted); *Kurth v. Dobricky*, 487 A.2d 220, 224 (D.C. 1985) (citations omitted).

inspection staff, instructing them on their responsibilities, reviewing and countersigning their daily reports, coordinating between them and the contractor's superintendents, and conferring with them on nonconforming work.

Additionally, Mr. Strange was responsible for verifying quantities and checking all payments; maintaining a comprehensive record of all quantities and payments made; monitoring the quality of materials and work in place; processing shop drawings and other submittals; monitoring all testing; observing the work being installed; gathering certifications, warranties, and guarantees; and recording all nonconforming work and completion of corrective action.

As to matters of safety, Mr. Strange's authority was substantial. He was responsible for monitoring the contractor for conformance with contractual safety requirements and was required to notify the contractor of all observed violations. Mr. Strange was obligated to require correction of observed situations that were potentially dangerous to workers, the public, or the project, and to order the termination of work that posed a serious and imminent danger to public safety. When aware of an unsafe situation, he had the authority — which he exercised — to stop work until the situation was corrected.

This constellation of requirements and prerogatives is comparable to that of other defendants whom this Court has held owed a duty under the ISA. It shows that Mr. Strange possessed the power or authority to manage, direct, and oversee

the Riggs Road Project. In other words, the evidence and the inferences that may be drawn from it, viewed in the light most favorable to Mr. Zelaya, demonstrates that he had control of the workplace sufficient to trigger a statutory duty to furnish Mr. Zelaya with a reasonably safe place of employment.

The trial court's opposite conclusion does not withstand scrutiny. First, by focusing on merely one factor — Mr. Strange's stop-work authority — to the exclusion of everything else, the trial court failed to properly consider the full panoply of Mr. Strange's responsibility and authority over the worksite, thereby traducing the requirement that all the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Second, by expressly relying on evidence submitted by Mr. Strange for the first time in support of his reply brief, the trial court ran afoul of the principle that evidence attached to a reply brief should be disregarded. Furthermore, that belatedly proffered evidence, viewed against the backdrop of the record as a whole and in the light most favorable to Mr. Zelaya, does not support the conclusion that Mr. Strange lacked control of the worksite. Finally, the authority on which the trial court chiefly relied is materially distinguishable because it involved a defendant who (a) undertook to perform only the limited duties of a contract-compliance consultant, not the more extensive duties of a construction manager, such as Mr. Strange; (b) was not responsible for monitoring the workplace as to safety, which

Mr. Strange was; and (c) was not obligated to require correction of observed situations that were potentially dangerous to workers, as was Mr. Strange.

Argument

Mr. Strange owed Mr. Zelaya a duty under the ISA to provide him a place of employment that was reasonably safe.

A. Those who have control of any worksite or any worker must provide a reasonably safe workplace.

The ISA requires employers to provide workplaces that are reasonably safe for employees:

> Every employer shall furnish a place of employment which shall be reasonably safe for employees, shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably safe and adequate to render such employment and place of employment reasonably safe.[13]

The ISA defines the term "employer" expansively as "every *person*, firm, corporation, partnership, stock association, *agent*, *manager*, representative, or foreman, or other persons having *control or custody of any place of employment or of any employee*."[14] This Court has stressed that "the statutory duty of due care imposed by this statute 'is broader than its common law counterpart because it is

[13] D.C. CODE § 32-808(a).

[14] *Id*. § 32-802(1) (emphasis added).

incumbent not only upon employers as defined at common law but also upon "every person . . . having control or custody of any industrial employment, place of employment, or of any employee."""[15] Thus, coverage under the ISA may arise from the "control or supervision exercised by the employer over the wage earner or work performed" or from the employer's "control of the worksite."[16]

The ISA's purpose is "to foster, promote, and develop the safety of wage earners of the District of Columbia in relation to their working conditions."[17] In enacting the statute, "Congress was concerned with the 'appalling numbers' of wage earners injured in employment-related 'accidents.'"[18] "The majority of the fatal accidents happened in construction work."[19] Congress sought to prevent work-related injuries caused by accidents, most of which "are due to lack of proper supervision and control" over workers who "will not always exercise due care for their own safety."[20] "Finding that these accidents 'could be avoided if proper safety

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[15] *Velásquez v. Essex Condo. Ass'n*, 759 A.2d 676, 680 (D.C. 2000) (quoting *Martin v. George Hyman Constr. Co.*, 395 A.2d 63, 70 (D.C. 1978)); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1331 (D.C. 1997) (same).

[16] *Traudt*, 692 A.2d at 1331.

[17] D.C. CODE § 32-801.

[18] *Martin*, 395 A.2d at 70-71 (quoting H.R. REP. NO. 77-918, at 2 (1941); S. REP. NO. 77-675, at 4 (1941)).

[19] H.R. REP. NO. 77-918, at 2; S. REP. NO. 77-675, at 4.

[20] *Martin*, 395 A.2d at 70 (citing in support of first quotation H.R. REP. NO. 77-918, at 2; S. REP. NO. 77-675, at 4).

measures were taken,' Congress imposed upon employers (as broadly defined) the sole responsibility for avoiding those accidents."[21]

A defendant having the requisite custody or control of work, workers, or workplaces can be an "employer" under the ISA even if it is not the plaintiff's common-law employer.[22] And more than one defendant may be subject to liability as a statutory "employer."[23]

B. One possessing the power or authority to manage, direct, or oversee a workplace has the "control" of a place of employment needed to qualify as an ISA "employer."

Familiar principles of statutory construction show that the "control or custody of any place of employment or of any employee" that is a prerequisite to being an "employer" under the ISA[24] consists of managerial authority over a workplace or a worker. The text, structure, purpose, and history of the ISA indicate that it imposes

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[21] *Id.* at 70 (citing H.R. REP. NO. 77-918, at 2; S. REP. NO. 77-675, at 4).

[22] *See, e.g.*, *Traudt*, 692 A.2d at 1329, 1331-32 (holding that electric-utility company owed duty under ISA to asbestos-abatement contractor's employee who was burned while removing asbestos covering from energized underground electric cables); *Fry*, 659 A.2d at 247 (holding that general contractor owed duty under ISA to subcontractor's employee who was injured when he fell off ladder placed on scaffold).

[23] *See Velásquez*, 759 A.2d at 678, 681 (holding that both the owner and the property manager of the workplace were employers under the ISA, though neither was the common-law employer of the plaintiff).

[24] D.C. CODE § 32-802(1).

a duty to provide a safe place to work on those persons or entities that have the power or authority to manage, direct, or oversee the workplace or a worker.[25]

"When interpreting a statute, the judicial task is to discern, and give effect to, the legislature's intent."[26] "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."[27] So a court must "look first to the plain meaning of the statutory language."[28] A court "may also look appropriately 'to dictionary definitions to determine the ordinary meaning of [the statutory] words' if they are not otherwise defined in the statute."[29]

Since the ISA does not define the term *control,* it is appropriate to ascertain its plain meaning by resorting to a dictionary. The dictionary definition of the term

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[25] *See Cass v. District of Columbia*, 829 A.2d 480, 486 (D.C.), *as amended on reh'g in part*, 829 A.2d 488 (D.C. 2003) (construing statute according to its text, structure, purpose, and history); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586-600 (2004) (same).

[26] *A.R. v. F.C.,* 33 A.3d 403, 405 (D.C. 2011) (citing *Grayson v. AT & T Corp.,* 15 A.3d 219, 237 (D.C. 2011) (en banc)).

[27] *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753 (D.C. 1983) (en banc) (internal quotation marks omitted).

[28] *In re Estate of James,* 743 A.2d 224, 227 (D.C. 2000).

[29] *McClintic v. McClintic*, 39 A.3d 1274, 1278 (D.C. 2012) (quoting *Tippett v. Daly,* 10 A.3d 1123, 1127 (D.C. 2010) (en banc)); *see also 1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) ("In finding the ordinary meaning, '[t]he use of dictionary definitions is appropriate in interpreting undefined statutory terms.'" (quoting *West End Tenants Ass'n v. George Washington Univ.,* 640 A.2d 718, 727 (D.C.1994)).

control is "the power or authority to manage, direct, or oversee."[30] Thus, the plain meaning of the definition of the term "employer" under the ISA includes a person or entity that has the power or authority to manage, direct, or oversee a workplace or a worker.

Statutory structure reinforces the conclusion that one with the power or authority to manage, direct, or oversee a workplace or a worker qualifies as a statutory "employer." The ISA requires an "employer" not only to furnish employees with a safe place of employment but also to furnish to the Minimum Wage and Industrial Safety Board any required information, to submit to the board a report of each employee's injury or death, and to keep an accurate record of every employee.[31] One who has the power or authority to manage, direct, or oversee a workplace or workers would be well situated to meet these statutory requirements.

Requiring a person or an entity possessing managerial authority over a workplace or a worker to furnish a safe workplace furthers the ISA's express purpose. That purpose is "to foster, promote, and develop the safety of wage

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[30] *Control*, Black's Law Dictionary (11th ed. 2019); *see also control*, American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=control ("Authority or ability to manage or direct"); *control*, Merriam-Webster Dictionary https://www.merriam-webster.com/dictionary/control ("power or authority to guide or manage").

[31] *See* D.C. CODE § 32-808.

earners of the District of Columbia in relation to their working conditions."[32] One having the power or authority to manage, direct, or oversee a workplace or workers would be ideally positioned, through the exercise of that power or authority, to fulfill the statute's salutary purpose.

The legislative history supports interpreting the term *control* in the statute's definition of "employer" to mean the power or authority to manage, direct, or oversee. In enacting the ISA, Congress sought to prevent work-related injuries caused by accidents, especially "in construction work,"[33] most of which "are due to lack of proper supervision and control" over workers who "will not always exercise due care for their own safety."[34] Placing "responsibility for avoiding those accidents"[35] on persons and entities having the power or authority to manage, direct, or oversee workplaces or workers effectuates Congress's aim because those with that managerial authority have the capacity to adopt, implement, or require "proper safety measures."[36]

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[32] *Id.* § 32-801.

[33] H.R. REP. NO. 77-918, at 2; S. REP. NO. 77-675, at 4.

[34] *Martin*, 395 A.2d at 70 (citing in support of first quotation H.R. REP. NO. 77-918, at 2; S. REP. NO. 77-675, at 4).

[35] *Id.* at 70.

[36] *Id.* (quoting H.R. REP. NO. 77-918, at 2; S. REP. NO. 77-675, at 4).

C. **Mr. Strange had the power or authority to manage, direct, or oversee the Riggs Road Project and therefore owed Mr. Zelaya a statutory duty to furnish a safe workplace.**

As a person with the power or authority to manage, direct, or oversee the Riggs Road Project, Mr. Strange was an "employer" under the ISA. Mr. Strange was the construction manager on the project. (A 235; *see also* A 235, 236 (noting that he was also the office engineer.) His job duties were set forth in DDOT's Construction Management Manual. (A 233-36.) Under the manual's terms, Mr. Strange was the "full-time DDOT employee" who was "assigned/responsible/in charge of [the] project." (A 282; *see also* A 202 (corroborating that Mr. Strange was "the DDOT supervisor or inspector in charge of th[e] project").) Being "in charge of" the Riggs Road Project denotes that Mr. Strange had control of it.[37]

As the construction manager in charge of the project, Mr. Strange's duties were extensive. Among other things, he was "responsible for the administration of the construction contract to ensure that the contract work [wa]s completed in accordance with the plans and specifications, required quality standards, the contract performance period, and the contract price." (A 282.) More specifically,

[37] *See in charge of*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/in%20charge%20of ("having control of or responsibility for (something)"); *in charge of*, American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=in+charge+of ("Having control over or responsibility for").

he "[wa]s responsible for monitoring work[] of the contractors to ensure that the work [wa]s performed in accordance with an agreed schedule" and was obliged to "document and prepare all requests for changes." (A 282.) He was required to attend progress meetings and review construction schedules. (A 282.) He was "responsible for the supervision of field inspection staff" and was required to "instruct the field inspectors in taking and recording quantities, checking and verifying layout, observing the work and maintaining daily reports." (A 282; *see also* A 238 (acknowledging that Mr. Strange managed two construction inspectors on the Riggs Road Project).) Mr. Strange was further required to "review specifications, procedures, and testing requirements with the field inspectors" and "review the Inspector Daily Reports (IDR) for accuracy and countersign the report[s]." (A 282.) He was also to "prepare a daily diary of project progress and the events." (A 282.)

Additionally, Mr. Strange was "responsible for verifying quantities and checking all payments for the work for which payment [wa]s requested." (A 282.) He was required to "maintain a documented comprehensive record of all quantities and payments made." (A 282-83.) He was "responsible for monitoring the quality of materials and work in place in order to confirm compliance to the Specifications and industry quality standards[, which] include[d] processing of shop drawings and other submittals, monitoring of all testing both on-site and off-site, observation of

the work being installed and gathering of certifications, warranties, and guarantees." (A 283.) He was to "record all non-conforming work and completion of corrective action." (A 283.)

As to matters of safety on the Riggs Road Project, the buck stopped with Mr. Strange. He was "responsible for monitoring the Contractor for conformance with contractual safety requirements" and was *required* to "bring all observed violations to the attention of the Contractor." (A 283.) Although he was "not responsible for the safety of the contractor's work force and methods of construction," Mr. Strange was *obligated* to "require correction of observed situations that are potentially dangerous to workers, the public and the project, and [to] order the termination of work that poses a serious and imminent danger to public safety." (A 283.) When aware of an unsafe situation, he had "the authority to stop work until the situation [wa]s corrected." (A 262; *see also* A 263 ("I do have the authority to stop work."); 245 (admitting that "if need be, as construction manager, if I saw a safety violation, I could stop the work").) And, when warranted, he did stop work. (*See* A 248.)

Thus, while the initial responsibility for workers' safety lay with Civil Construction, Mr. Strange had the last word. If Civil Construction's supervisors ordered its workers to engage in work that was "potentially dangerous" and Mr. Strange observed it, he could in effect veto the order because he was authorized to

stop the work and obligated to require Civil Construction to correct the dangerous situation. (*See* A 262, 263, 283.)

On the day of the accident, Mr. Strange's duty to stop the work and order correction of the unsafe situation was triggered because he was made aware of the danger. (*See* A 255.) DC Water inspector Henry Bascom and DDOT inspector Pamela Wilson both told Mr. Strange that using the boom truck to install the catch basin beneath an energized power line was hazardous and urged him to stop the dangerous work. (A 255, 261, 363-65, 371-73, 399-400, 426, 436-37, 438, 447.) Mr. Zelaya also discussed the danger with Mr. Strange. (A 160, 177, 227.) That Ms. Wilson, Mr. Bascom, and Mr. Zelaya all turned to Mr. Strange with their concerns about the risk to the Civil Construction workers supports the inference that they believed Mr. Strange had sufficient control over the worksite to prevent that foreseeable risk from materializing.

By virtue of his authority and responsibility as the construction manager in charge of the project, including the duty to stop and to require correction of hazardous work that he was aware of, Mr. Strange had "the power or authority to manage, direct, or oversee"[38] the worksite. This was true even — indeed, especially — when, as here, Civil Construction's supervisors had ordered their

[38] *Control*, Black's Law Dictionary (11th ed. 2019).

workers to undertake a task that Mr. Strange knew to be hazardous. In other words, Mr. Strange possessed supervisory authority over the Riggs Road Project that included the obligation and the ability to employ adequate measures for the protection of Civil Construction's workers, including Mr. Zelaya, from foreseeable dangers. Hence Mr. Strange had "control" of a "place of employment" so as to render him an "employer" under the ISA.[39]

That Civil Construction's superintendent, Mr. Constantino, had directed Mr. Zelaya to use the boom truck to install the catch basin under the power line, despite the danger it posed to him and his crew, underscores the importance of the control that Mr. Strange possessed but failed to exercise. Civil Construction was behind schedule and was "cutting corners to save time." (*See* A 416.) "[E]verything was in a rush" and Civil Construction was "[o]verlooking safety most of the time[]." (A 416.) Consequently, its workers were "under pressure" (A 183, 416) and, as Mr. Strange acknowledged, "were being pushed . . . to be productive" by their supervisors (A 251). So Mr. Strange knew that these workers were at an elevated risk of injury and should have known that exercising his authority to safeguard

[39] D.C. CODE § 32-802(1); *see also Traudt*, 692 A.2d at 1331 (holding that electric utility was "employer" of independent contractor's employee where utility "reserved the right to inspect [the contractor's] work, direct stoppage, and require replacement or supplementation of personnel and equipment in case of noncompliance with the contract").

them was particularly necessary here. Accidents to workers, such as Mr. Zelaya, who are supervised carelessly and subjected to a Hobson's choice of undertaking a hazardous task as ordered or refusing at the risk of termination are precisely what the ISA was designed to prevent.[40] Mr. Strange's duty as construction manager was to prevent contractors from cutting corners on safety by serving as a backstop, as the last line of defense, to protect workers exposed to danger. Although Mr. Constantino was Civil Construction's boss, he was outranked on the worksite by Mr. Strange, who was in charge of the entire project and present to observe the dangerous work. Mandated to "require correction of observed situations that are potentially dangerous to workers" (A 283), Mr. Strange was obligated to override Mr. Constantino's orders that jeopardized workers' safety. Thus, Mr. Strange's control over the workplace as to protection of workers against unsafe conditions transcended Mr. Constantino's control over his workers.

Viewed in the light most favorable to Mr. Zelaya, the record presents at least a genuine issue of material fact as to whether Mr. Strange had sufficient control so as to permit a reasonable jury to find that he owed and breached a statutory duty to

[40] *See Martin*, 395 A.2d at 70-71, 72-73.

provide a safe place of employment and to ensure the use of safe work practices and procedures.[41]

D. The control possessed by Mr. Strange compares favorably to that possessed by others who have been found to be "employers" under the ISA.

Though no two cases are identical, the factors showing Mr. Strange's control over the Riggs Road Project are similar to the factors that this Court has previously found sufficient to demonstrate the control necessary to qualify a defendant as an ISA "employer." Like the defendant in *Traudt v. Potomac Electric Power Co.*[42] and one of the defendants in *Velásquez v. Essex Condominium Association*,[43] Mr. Strange had authority to monitor and inspect the contractor's work. (A 282, 283.) Like the defendant in *Traudt*,[44] Mr. Strange could stop the contractor's work. (A. 245, 262, 263.) Comparable to the *Traudt* defendant's reservation of the right to require replacement or supplementation of personnel and equipment in case of noncompliance with the contract,[45] Mr. Strange was obligated to "require correction of observed situations that are potentially dangerous to workers, the

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[41] *See* D.C. CODE § 32-808(a).

[42] 692 A.2d at 1330, 1331.

[43] 759 A.2d at 678, 681.

[44] 692 A.2d at 1330, 1331.

[45] *Id*.

public and the project, and [to] order the termination of work that poses a serious and imminent danger to public safety." (A 283.)

In at least some respects, Mr. Strange's control over the workplace exceeded that of defendants who have been held to be ISA "employers." He was responsible for "ensur[ing] that the contract work [wa]s completed in accordance with the plans and specifications, required quality standards, the contract performance period, and the contract price." (A 282.) The defendants in *Traudt*[46] and in *Velásquez*,[47] by contrast, did not have that responsibility, yet were held to owe a statutory duty to provide a safe workplace nevertheless.

While Mr. Strange did not own the workplace as did the defendant in *Traudt*[48] and one of the defendants in *Velásquez*,[49] ownership is not a necessary condition to being an "employer" under the ISA. Nothing in the statute's text provides that ownership is a prerequisite to having "control or custody" of a place of employment.[50] At least twice, this Court has held that a defendant who did not own the workplace was nevertheless a statutory "employer." In *Fry,* the statutory

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[46] *Id*.

[47] 759 A.2d at 678, 681.

[48] 692 A.2d at 1330, 1331.

[49] 759 A.2d at 678, 681.

[50] *See* D.C. CODE § 32-802(1).

employer was an independent contractor that had been retained by the owner.[51] In *Velásquez*, one of the statutory employers was a property manager.[52] Like the property manager in *Velásquez*, Mr. Strange managed the property for the owner, here, the District of Columbia. (*See* A 21 ("the Riggs Road Project was an outdoor public space, owned by the District"), A 237 (confirming that the District of Columbia was "the owner"), A 282-83 (summarizing Mr. Strange's responsibilities as DDOT's construction manager).) Just as the property manager's lack of ownership in *Velásquez* did not prevent it from being held to be an ISA "employer," so Mr. Strange's lack of ownership does not prevent him from being held to be a statutory employer. Furthermore, as the construction manager "responsible" for and "in charge of" the Riggs Road Project (A 282), Mr. Strange

[51] *See Fry*, 659 A.2d at 243, 247-48 (holding that a general contractor retained by the District of Columbia for a construction project at a public school was an "employer" under the ISA).

[52] *See Velásquez*, 759 A.2d at 678, 681 (holding that "Essex [the owner] and Zalco [the property manager] are employers under the [Industrial Safety] Act").

in effect operated the premises.[53] A premises operator or manager owes the same duty of care as the owner.[54]

That Mr. Strange was "not responsible for the safety of the contractor's work force and methods of construction" (A 283) does not preclude him from owing a duty under the ISA. Those are the responsibilities of a common-law employer.[55]

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[53] *See operate*, American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=operate ("To conduct the affairs of; manage: *operate a business*."); *operate*, Oxford English Dictionary, https://www-oed-com.dclibrary.idm.oclc.org/view/Entry/131741?rskey=FDNKQU&result=2#eid ("To manage, to direct the operation of (a business, enterprise, etc.).").

[54] *See Bostic v. Henkels & McCoy, Inc.*, 748 A.2d 421, 425 (D.C. 2000) ("[A] party who operates the premises but is neither the owner nor the lessee may also have a duty of reasonable care." (*quoting Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998))); *Childs v. Purll*, 882 A.2d 227, 233-37 (D.C. 2005) (holding that management company owed same duty of care as property owners); *Spar v. Obwoya*, 369 A.2d 173, 175-77 (D.C. 1977) (same); *F. W. Woolworth Co. v. Stoddard*, 156 A.2d 229, 230 (D.C. 1959) (holding that the operator of a store owed an actionable duty of care to its customers); *Viands v. Safeway Stores*, 107 A.2d 118 (D.C. 1954) (same).

[55] *See* 29 U.S.C. § 654(a) ("Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . "); *Caison v. Project Support Servs., Inc.*, 99 A.3d 243, 248 (D.C. 2014) ("in determining whether an individual is an employee under the common law . . . 'the decisive test is whether the employer has the *right to control and direct the servant in the performance of his work and the manner in which the work is to be done'*" (quoting *Hickey v. Bomers,* 28 A.3d 1119, 1123 (D.C. 2011)); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the

But as this Court has repeatedly emphasized, "the statutory duty of due care imposed by [the ISA] 'is broader than its common law counterpart because it is incumbent not only upon employers as defined at common law but also upon "every person . . . having control or custody of any industrial employment, place of employment, or of any employee."'"[56] The Court's precedents bear this out. In *Traudt,* the defendant was held to be an "employer" under the ISA even though the plaintiff's common-law employer, rather than the defendant, was "solely responsible for the means, methods, techniques, sequences, and procedures of construction," was responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the Work," and was obligated to "comply with all applicable laws, ordinances, rules, regulations, and orders of any public body" concerning jobsite safety.[57] In *Velásquez*, the defendant was held to be a statutory "employer" even though the plaintiff's common-law employer, rather than the defendant, was "totally responsible for job and site safety," was "responsible for initiating, maintaining, and supervising all safety precautions and programs," was responsible for "tak[ing] reasonable precautions for safety" and for

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product is accomplished." (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)), *cited with approval in Traudt*, 692 A.2d at 1331.

[56] *Traudt*, 692 A.2d at 1331 (quoting *Martin*, 395 A.2d at 70).

[57] *Id*. at 1330, 1331-32.

"provid[ing] reasonable protection to prevent damage, injury, or loss to: employees . . . and other persons," and was obligated to comply with applicable legal requirements bearing on safety of persons and property and their protection from damage.[58] Thus the lack of responsibility for the safety of a contractor's workforce or the means and methods of its work does not disqualify a defendant, such as Mr. Strange, from being an "employer" under the ISA if it otherwise had "control" of the worksite.

E. None of the grounds asserted by the trial court warrants summary judgment.

In support of its order granting summary judgment, the trial court undertook an analysis of the evidence and the applicable law that does not withstand scrutiny.

i. The trial court misconstrued the evidence.

The trial court's assertion that Mr. Strange's "limited authority to stop work at the site, . . . standing alone, is not enough to impose ISA liability" (A 585) mischaracterizes the nature and extent of his authority as to safety and ignores his supervisory authority over the worksite. (*See also* 586 ("The Court . . . finds that Mr. Strange's authority to order a stoppage of work on the Project in certain situ[a]tions is insufficient to establish a genuine dispute of material fact that Mr. Strange exercised 'custody or control' over the worksite.").) Mr. Strange not only

[58] 759 A.2d at 678-79, 681.

had authority to stop work on the project if he became aware of an unsafe situation (A 245, 262, 263) but also actually exercised that authority (A 248.) Additionally, it was his duty to monitor jobsite safety. (A 244-45.) Mr. Strange was "responsible for monitoring the Contractor [i.e., Civil Construction] for conformance with contractual safety requirements." (A 283.) He was "responsible for the supervision of field inspection staff" and was required to ensure their familiarity with "safety requirements." (A 282.) Mr. Strange was required to "bring all observed violations to the attention of the Contractor." (A 283.) He was required to "order the termination of work that poses a serious and imminent danger to public safety or substantial property damage" and to "require correction of observed situations that are potentially dangerous to workers, the public and the project." (A 283.) In light of this evidence, the trial court's trivialization of Mr. Strange's safety-related authority as "limited" hardly does the record justice.

Furthermore, that authority does not, as the trial court put it, "stand[] alone." (A 585.) As the construction manager "responsible" for and "in charge of" the Riggs Road Project (A 282), Mr. Strange's authority was substantial. He was responsible for administering the construction contract to ensure that the work was completed according to the plans and specifications, required quality standards, the contract performance period, and the contract price. (A 282.) He was obliged to document and prepare all requests for changes, to attend progress meetings, and to review

construction schedules. (A 282.) Mr. Strange was required to supervise and instruct the field inspectors; coordinate between them and the contractor's superintendents; review specifications, procedures, and testing requirements with the field inspectors; review their daily reports for accuracy; and countersign those reports. (A 282.) He was responsible for preparing a daily diary of project progress and events. (A 282.) He was responsible for verifying quantities, checking all payments for the work for which payment was requested, and maintaining a documented comprehensive record of all quantities and payments made. (A 282-83.) Mr. Strange was responsible for monitoring the quality of materials and work in place; monitoring all testing; observing the work being installed; and gathering certifications, warranties, and guarantees. (A 283.) And he was responsible for recording all nonconforming work and completion of corrective action. (A 283.)

Thus, the evidence demonstrating Mr. Strange's control over the Riggs Road Project was far more robust than the trial court acknowledged in its reductive analysis. By failing to properly consider the full panoply of Mr. Strange's responsibility and authority over the worksite, the trial court impermissibly deviated from the requirement that all evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary

judgment.[59] This error was highly prejudicial to Mr. Zelaya. The trial court's crabbed view of the record deprived Mr. Zelaya of the benefit of all the evidence showing that Mr. Strange possessed sufficient power or authority to manage, direct, or oversee the Riggs Road Project so as to have the requisite control over the workplace to be deemed an ISA "employer."

The trial court similarly erred in its treatment of certain evidence submitted by Mr. Strange at the last minute. In its analysis, the trial court stated in part as follows:

> Though monitoring the job site was one of Mr. Strange's job duties on the Project, *see* Strange Tr. 88:19-19:15, the record indicates that two other DDOT employees were responsible for completing daily inspection forms, *which Mr. Strange did not sign or approve*, *see* Def.'s Reply, Ex. A (Inspection Reports).

(A 586 (emphasis added).)

As indicated by the trial court's citation to the record, the evidence on which it relied in support of this assertion was submitted by Mr. Strange in support of his Reply to Plaintiff Zelaya's Opposition to Defendant Strange's Motion for Summary Judgment on Remand. (*See* A 508-74.) Mr. Strange produced that

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[59] *See Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 892 (D.C. 2008) (citation omitted); *New 3145 Deauville, L.L.C. v. First Am. Title Ins. Co.*, 881 A.2d 624, 627 (D.C. 2005) ("The court must view all the evidence presented in the light most favorable to the nonmoving party and draw all reasonable inferences from the evidence for that party" (citing *Holland v. Hannan,* 456 A.2d 807, 815 (D.C. 1983))).

evidence to buttress the argument in his reply brief that he was not required to oversee comprehensive monitoring of the worksite by field inspection staff. (*See* A 503-04.) Mr. Strange had not advanced that argument in the memorandum in support of his motion for summary judgment (*see* A 18-25), had not presented this evidence in support of that motion (*see* A 27-101), and did not reference this evidence in his statement of undisputed facts (*see* A 14-17).

In considering this evidence and the argument that Mr. Strange cited it to support, the trial court erred. Courts generally "do not consider arguments raised for the first time in a reply brief."[60] This is because considering those arguments "would be manifestly unfair" to the opposing party and deprives the court of the benefit of "the adversarial process for sharpening the issues for decision."[61] "The 'basic precept that arguments generally are forfeited if raised for the first time in reply'" applies to trial courts.[62] "This 'same principle applies to newly proffered

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[60] *PHCDC1, LLC v. Evans & Joyce Willoughby Tr.*, 257 A.3d 1039, 1043 (D.C. 2021) (citing *J.P. v. District of Columbia*, 189 A.3d 212, 222 (D.C. 2018)).

[61] *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 196 (D.C. Cir. 1992); *see also McFarland v. George Washington Univ.*, 935 A.2d 337, 351 n.7 (D.C. 2007) (citing *District of Columbia v. Patterson,* 667 A.2d 1338, 1346 n.18 (D.C. 1995) (citing *Wilson v. O'Leary,* 895 F.2d 378, 384 (7th Cir. 1990) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them.")).

[62] *Nguyen v. U.S. Dep't of Homeland Sec.,* 460 F. Supp. 3d 27, 34 (D.D.C. 2020) (quoting *Twin Rivers Paper Co. v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019)); *see also Hight v. United States Dep't of Homeland Sec.*, 533 F. Supp. 3d 21, 30 (D.D.C. 2021) ("Courts 'generally will not entertain arguments omitted from [a

evidence attached to a reply brief.'"[63] So Mr. Strange's tardily submitted evidence and argument should have been disregarded.

In its analysis of that evidence and argument, the trial court also contravened the standards governing summary judgment. "In considering a motion for summary judgment, *all evidence and inferences from that evidence must be viewed in the light most favorable to the non-moving party*."[64] Properly viewed in the light most favorable to Mr. Zelaya, Mr. Strange's delinquently proffered evidence and the

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party's] opening brief and raised initially in [its] reply brief. . . . Considering an argument advanced for the first time in a reply brief ... is not only unfair to [the other party] . . . but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered.'" (quoting *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1210, 1211 (D.C. Cir. 1986))); *Performance Contracting, Inc. v. Rapid Response Constr., Inc.*, 267 F.R.D. 422, 425 (D.D.C. 2010) ("As a general matter, it is improper for a party to raise new arguments in a reply brief because it deprives the opposing party of an opportunity to respond to them, and courts may disregard any such arguments." (citing *Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne*, 537 F.Supp.2d 1, 12 n.5 (D.D.C. 2008))).

[63] *Nguyen,* 460 F. Supp. 3d at 34 (refusing to consider affidavits attached to the movants' reply brief) (quoting *Patterson v. Johnson*, 391 F. Supp. 2d 140, 142 n.1 (D.D.C. 2005) (refusing to consider affidavits attached to the movant's reply brief), *aff'd*, 505 F.3d 1296 (D.C. Cir. 2007), and citing *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. CV 15-01582 (APM), 2015 WL 9269401, at *3 (D.D.C. Dec. 8, 2015) (declining to consider declarations submitted with a reply brief, when the "Plaintiff easily could have offered such evidence with its" motion).

[64] *Estenos*, 952 A.2d at 892 (emphasis added) (citation omitted); *see also New 3145 Deauville, L.L.C.*, 881 A.2d at 627 ("The court must view *all the evidence* presented in the light most favorable to the nonmoving party and draw *all reasonable inferences* from the evidence for that party" (emphasis added) (citing *Holland,* 456 A.2d at 815)).

inferences from it do not support the conclusion that Mr. Strange lacked control of the workplace. According to DDOT's Construction Management Manual, which Mr. Strange attested summarized his job duties (A 233-36), the construction manager "will review the Inspector Daily Reports (IDR) for accuracy and countersign the report" (A 282). In other words, Mr. Strange was *required* to countersign the Inspector Daily Reports. The inference to be drawn in the light most favorable to Mr. Zelaya from Mr. Strange's failure to sign the IDRs is that he was careless in carrying out his job duties. The inference that the trial court drew – that Mr. Strange's responsibility as to the IDRs was limited – deprived Mr. Zelaya of the benefit of the inference to which he was entitled. It also conflicts with the evidence of record showing that Mr. Strange's responsibilities over the field inspectors and their work was substantial. Mr. Strange was responsible not only for reviewing and countersigning the field inspectors' daily reports but also for supervising the inspectors, instructing them on their responsibilities, coordinating between them and the contractor's superintendents, and conferring with them on nonconforming work. (A 282.) To the extent that the trial court's erroneous treatment of Mr. Strange's late-submitted evidence contributed to its conclusion that he did not have control of the Riggs Road Project, the error prejudiced Mr. Zelaya.

ii. The principal legal authority on which the trial court relied is inapt.

In its analysis, the trial court relied heavily on *Presley v. Commercial Moving & Rigging, Inc.*, the only published opinion of this Court finding that a defendant did not qualify as an "employer" under the ISA.[65] *Presley*, however, is materially distinguishable.

In that case, a worker who had been injured on a construction project brought a claim against, among others, a consultant to the project alleging, among other things, breach of duty under the ISA. The defendant there (CRSS) was a mere outside consultant that had been retained by the entity (the State Department, via the General Services Administration ("GSA")) that contracted with the employer (Grimberg) of the plaintiff (Presley).[66] As a consultant, the defendant stood "separate and apart from the chain of delegation running from the GSA to Grimberg and eventually to Presley."[67] It "undertook to perform only the limited duties of a contract compliance consultant, *not the more extensive duties of a safety engineer or general construction manager.*"[68] Mr. Strange, by contrast, *was the project engineer and construction manager* "responsible" for and "in charge of

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[65] 25 A.3d 873 (D.C. 2011).

[66] *Id*. at 878.

[67] *Id*. at 885 n.10.

[68] *Id*. at 889-90 (emphasis added).

[the Riggs Road] project." (A 232, 235, 282.) He stood directly in the "chain of delegation" running from DDOT to Civil Construction and ultimately to Mr. Zelaya because he was employed by the entity (DDOT) that contracted with Mr. Zelaya's employer (Civil Construction) and was "responsible for the administration of the construction contract" (A 282).

The defendant in *Presley* was "*not responsible for performing periodic and exhaustive surveys of the work environment in regard to safety.*"[69] Mr. Strange, by contrast, was "responsible for monitoring the Contractor for conformance with contractual safety requirements" and "responsible for the supervision of field inspection staff" who he was required to ensure were familiar with those "safety requirements." (A 282, 283.)

The defendant in *Presley* "did not have the authority to rectify safety violations directly."[70] Mr. Strange, by contrast, was obligated to "require correction of observed situations that are potentially dangerous to workers." (A 283.) Moreover, Mr. Strange admitted that "if I or any inspector at a project site becomes aware of an unsafe situation, we have the authority to stop work until the situation is corrected." (A 262; *see also* 245, 263.)

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[69] *Id*. at 879.

[70] *Id*. at 885.

In *Presley*, the evidence as to whether the defendant ever actually ordered work stopped was equivocal.[71] Mr. Strange, by contrast, admitted that when circumstances warranted he did stop work on the worksite. (A 248.)

On the day of the injury-causing incident in *Presley*, employees of the defendant consultant were not on site and thus did not see the danger to which the plaintiff was exposed.[72] Mr. Strange, by contrast, was on site on the day of Mr. Zelaya's accident and indisputably was made aware of the danger to Mr. Zelaya. (A 254; *see also* A 159, 166, 176, 177, 227-28, 358-59, 361, 363-65, 366, 371, 391, 426.)

In short, this case is *Presley*'s antithesis. The record belies the trial court's Procrustean effort to force this case into *Presley*'s mold. The level of authority possessed and exercised by Mr. Strange over the project in general and safety matters in particular far exceeded that of the defendant in *Presley*. So Mr. Strange had the requisite control over the workplace to be deemed an ISA "employer."

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[71] *Compare id*. at 885 ("it appears that on occasion [the defendant] stopped the work of Grimberg employees to correct safety hazards it observed first-hand"), *with id*. at 879 ("The [defendant's] reports, do not . . . . indicate who directed that work be stopped."), *id*. at 881 (project manager for plaintiff's employer "could not recall . . . if [defendant's] inspectors ever stopped work at the site if they encountered safety hazards"), *and id*. at 885 (same).

[72] *Id*. at 882.

Also, to paraphrase *Presley*, Mr. Strange's "responsibility under the [ISA] for [Mr. Zelaya's] particular injury is commensurate with the nature and extent of the control that [Mr. Strange] exercise[d] in fact over the workplace."[73] He had the authority, responsibility, and opportunity to stop or require correction of the dangerous work he became aware of, and his failure to do so resulted in Mr. Zelaya's horrific injuries.[74] Hence he is subject to liability as an ISA "employer."

Conclusion

The evidence and the inferences that may be drawn from it, viewed most favorably to Mr. Zelaya, show that Mr. Strange, as the construction manager in charge of the Riggs Road Project with authority to stop and an obligation to require correction of dangerous work that he was aware of, had control of Mr. Zelaya's workplace sufficient to qualify Mr. Strange as an "employer" who owed Mr. Zelaya a duty under the ISA to furnish a reasonably safe place of employment. Accordingly, this Court should reverse the order erroneously granting summary

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[73] *Id*. at 886-87 (quoting *Velásquez*, 759 A.2d at 681.

[74] *Compare Velásquez*, 759 A.2d at 679-81 (holding that, although condominium owner was "employer" under ISA, that status did not make it liable for independent contractor's employee's fall from scaffolding where no one from owner actually worked on site or supervised contractor's work, neither owner nor its property manager actually instructed or otherwise controlled contractor's employees as to project, contractor owned and erected scaffolding, and neither owner nor manager had access to scaffolding from which contractor's employee fell).

judgment to Mr. Strange and should remand this long-pending case for a trial on the merits.

Dated January 31, 2022

Respectfully Submitted,

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ADDENDUM OF RELEVANT PARTS OF STATUTE

D.C. CODE § 32–801. Purpose of subchapter.

The purpose of this subchapter is to foster, promote, and develop the safety of wage earners of the District of Columbia in relation to their working conditions.

D.C. CODE § 32-802. Definitions.

When used in this subchapter, the following words shall have the following meanings, unless the context clearly requires otherwise:

(1) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other persons having control or custody of any place of employment or of any employee. It shall not include the District of Columbia or any instrumentality thereof, or the United States or any instrumentality thereof.

(2) "Board" means the Minimum Wage and Industrial Safety Board.

(3) "Safe" and "safety" as applied to an employment, a device, or a place of employment, including facilities of sanitation and hygiene, mean such freedom from danger to life or health of employees as circumstances reasonably permit, and shall not be given restrictive interpretation so as to exclude any mitigation or prevention of a specific danger.

(4) "Place of employment" means any place where employment is carried on; provided, however, that such term shall not include the premises of any federal or District of Columbia establishment, except to include any and all work of whatever nature being performed by an independent contractor for the United States government or any instrumentality thereof, or the District of Columbia or any instrumentality thereof.

D.C. CODE § 32-808. Employer to furnish safe place of employment, information required by Board, report of employees' injury or death, and record of employees.

(a) Every employer shall furnish a place of employment which shall be reasonably safe for employees, shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably safe and adequate to render such employment and place of employment reasonably safe.

(b) Every employer shall furnish to the Board any information which the Board is authorized to require and shall make true and specific answers to all questions.

(c) Every employer shall submit to the Board within 10 days from the date of any injury or death, or from the date that the employer has knowledge of any disease or infection resulting from any injury, a duplicate copy of the report provided for in § 930 of Title 33, United States Code, as made applicable to the District of Columbia by §§ 36-501 and 36-502 [1973 Ed.].

(d) Every employer shall keep an accurate record of every person employed by him so as to be able in case of accident immediately to give an accurate record relative to same.

Certificate of Service

This certifies that on this 1st day of February, 2022, a copy of the foregoing Brief for Appellant was served through this Court's electronic-filing system on:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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Case Number(s)

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