No. 21-CV-564

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

RENE ZELAYA,
APPELLANT,

V.

ALFRED STRANGE,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

BRIEF FOR ALFRED STRANGE

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STATEMENT OF THE ISSUES

This case returns to this Court after a remand to determine whether a District of Columbia employee assigned as construction manager for a street rehabilitation project in the District performed by a private contractor was an "employer" of the contractor's employees under the D.C. Industrial Safety Act. If so, the District employee may be charged with a duty of care for the safety of a foreman employed by the contractor, who was injured when a boom truck operated by the foreman's co-worker touched an overhead power line. On remand, the Superior Court granted summary judgment to the District employee, finding that he was not an "employer" under the statute because, based on the undisputed facts, he did not have control or custody of the foreman or the worksite. The issues on appeal are:

First, whether the court's finding was correct, where the District employee, like the construction project monitor found not to be an "employer" in *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873 (D.C. 2011), (1) did not own the worksite, (2) did not promulgate safety regulations, (3) had only limited authority to stop work, (4) did not normally act directly to rectify safety violations, and (5) had no obligation to maintain a constant presence at the workplace to oversee safety requirements; and where (as this Court previously acknowledged) the Construction Management Manual applicable to the project "specifically excludes

the construction manager from responsibility for the safety and methods of construction used by the contractor's workers." Joint Appendix ("JA") 488.

Second, if the District employee was the foreman's "employer," whether the foreman would be precluded from bringing a tort action against the District employee because the foreman received workers' compensation benefits for his injuries under the D.C. Workers' Compensation Act, which is an employee's exclusive remedy against an employer for injuries occurring within the District.

STATEMENT OF THE CASE

Rene Zelaya, a foreman employed by Civil Construction, Inc., which had a contract with the District of Columbia Department of Transportation ("DDOT") for a street rehabilitation project in the District, was injured when a boom truck operated by a fellow Civil Construction worker contacted an overhead power line. Zelaya sued the District, but that suit was dismissed for his failure to comply with the notice requirements of D.C. Code § 12-309, and this Court affirmed. *See* JA 483. Zelaya then sued the District of Columbia Water and Sewer Authority (DC Water) and Alfred Strange, a DDOT project engineer assigned as the construction manager for the project. The Superior Court granted summary judgment for both defendants, and Zelaya appealed. This Court affirmed as to DC Water but reversed as to Strange. *See* JA 493-94. Although rejecting Zelaya's arguments that Strange had a contractual or common-law duty of care for his safety, this Court remanded

for the Superior Court to determine whether Strange had a statutory duty of care as an "employer" under the District of Columbia Industrial Safety Act, which defines "employer" as a person "having control or custody of any place of employment or of any employee," D.C. Code § 32-802(1). JA 487. On remand, the Superior Court granted summary judgment to Strange, finding that he was not an "employer" because, based on the undisputed facts, he did not have control or custody of Zelaya or of the worksite. JA 584. On August 16, 2021, Zelaya filed a timely appeal.

STATEMENT OF FACTS

1. District of Columbia Industrial Safety Act.

The D.C. Industrial Safety Act ("ISA"), D.C. Code § 32-801 *et seq.*, was enacted by Congress in 1941. Act of Oct. 14, 1941, ch. 438, 55 Stat. 738. The ISA "requires that '[e]very employer shall furnish a place of employment which shall be reasonably safe for employees, [and] shall furnish and use safety devices and safeguards.'" *Presley*, 25 A.3d at 883 (alterations in original) (quoting D.C. Code § 32-808(a)). The ISA defines "employer" as follows:

> "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.

D.C. Code § 32-802(1). Violations of the ISA are punishable by criminal penalties. *Id.* § 32-812.

2. Factual History.

A. Background.

Civil Construction had a contract with DDOT to rehabilitate the intersection of Riggs Road and South Dakota Avenue, NE, known as the "Riggs Road Project." JA 14 (Defendant Strange's Statement of Undisputed Facts ("DSUF") ¶ 1); JA 125 (Plaintiff's Statement of Disputed Material Facts ("PSDF") ¶ 1). The site was "on a public roadway." JA 15 (DSUF ¶ 4); JA 125 (PSDF ¶ 4). While the District owned the sidewalks, streets, and other areas where the project was to be done, Civil Construction, the contractor, did the actual work. JA 237 (Strange Depo.).

Zelaya had been an employee of Civil Construction for ten years before the accident. JA 33 (Zelaya Depo.). As a foreman on the project, he supervised a crew of eight. JA 35. He reported to John Constantino, Civil Construction's project superintendent, and Kevin Salehi, another higher-level supervisor at Civil Construction. JA 36. Zelaya had received safety training from the company, including training relating to electricity, and also had annual safety trainings from an Occupational Safety and Health Administration representative. JA 35-36.

Strange was employed by DDOT and was the project engineer for the Riggs Road Project. JA 232 (Strange Depo.). He also had the role of "construction

manager" for the project under the Construction Management Manual. JA 235. Strange supervised two DDOT inspectors, Pamela Wilson and William Lester. JA 239. Although Strange gave them some directions, most of their directions came from Strange's own supervisor, Paul Stevens. JA 239.

Strange testified that prior to the accident at issue, he had stopped work a couple of times when Civil Construction had not cleared construction work by 3:30pm to allow traffic to proceed on the main thoroughfares, such as Riggs Road. JA 248 (Strange Depo.).

B. The contract specifications.

The "Specifications" for Civil Construction's contract with the District for the Riggs Road Project "contain[] provisions, requirements, and instructions pertaining to th[e] contract." JA 273. Part VIII the contract specifications, entitled "Safety; Accident Prevention," provides that "[i]n the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation." JA 276. It also requires that "[t]he contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines . . . to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract." JA 276.

C. The Construction Management Manual.

The Construction Management Manual "presents DDOT's procedures and standards for managing and administering construction projects." JA 281. Its "primary purpose . . . is to establish standard operating procedures for DDOT's engineers, construction managers, consultants, and contractors in order to promote uniformity and efficiency." JA 281. The Manual provides that a Ward Team Leader "is responsible for the administration of construction projects within his/her assigned Ward" and "is responsible for securing funding, budgeting, planning, scheduling, preparing bid documents, and general oversight of the project from inception to completion." JA 282. The Manual provides that the construction manager "is the primary contact between the Construction Contractor and the [Ward] Team Leader"; that the construction manager "may also be a consultant, and hold additional titles such as Project Engineer and Resident Engineer"; and that the construction manager "is responsible for the administration of the construction contract to ensure that the contract work is completed in accordance with the plans and specifications, required quality standards, the contract performance period, and the contract price." JA 282.

The Manual includes several provisions concerning safety, including responsibilities of the construction manager and the contractor. With respect to the contractor's responsibilities, the Manual provides that "[i]n general, the

construction Contractor is solely responsible for safety of the work, including work done or materials supplied by subcontractors, consultants, and vendors." JA 290. Moreover, "[t]he Contractor is responsible for complying with the requirements for safety, accident prevention, and loss control contained in the construction contract and for compliance with all Federal, State, and Local Authority ordinances, regulations and standards applicable to the work." JA 290. By contrast, the construction manager "is responsible for monitoring the Contractor for conformance with contractual safety requirements and shall bring all observed violations to the attention of the Contractor." JA 283. Additionally, the construction manager "is not responsible for the safety of the contractor's work force and methods of construction, but shall require correction of observed situations that are potentially dangerous to workers, the public and the project, and shall order the termination of work that poses a serious and imminent danger to public safety or substantial property damage." JA 283.

D. The accident.

The following facts are undisputed. On September 16, 2010, the day of the accident, the following persons were at the worksite: Zelaya; the eight crew members he supervised; Civil Construction Supervisor John Bartolino; DDOT project engineer Strange; DDOT Inspector Pamela Wilson; and DC Water technician Henry Bascom. JA 14 (DSUF ¶ 2); JA 125 (PSDF ¶ 2). Civil

Construction's Project Superintendent John Constantino was available by cell phone, at least in the morning. JA 44 (Zelaya Depo.). Hector Choto, Civil Construction's Safety Officer, was not present at the time of the accident. Zelaya testified that Choto "was on site early in the morning and later on he had a meeting and then he left so he wasn't there." JA 38 (Zelaya Depo.). Choto "oversaw safety conditions at the site." JA 577; *see* JA 37 (Zelaya Depo.) ("[Choto] was controlling that everybody was wearing all the equipment properly. And also the surroundings, that nothing was like threatening, a threat of danger.").

The project required Civil Construction to place a catch basin weighing several tons into an excavated trench. JA 15 (DSUF ¶ 4); JA 125 (PSDF ¶ 4). Zelaya had access only to Civil Construction's hydraulic boom truck to do the job, although he knew that the boom truck was too big because of an electric power line overhead. JA 15 (DSUF ¶ 5); JA 125 (PSDF ¶ 5). Zelaya called his boss, Superintendent Constantino, at 10:00am and "told him that the boom truck was too big and I would . . . need to use the excavator." JA 50 (Zelaya Depo.). Constantino made it clear to Zelaya that he wanted the catch basin installed regardless of the danger it posed. JA 16-17 (DSUF ¶ 17); JA 127 (PSDF ¶ 17); JA. 73 (Zelaya Depo.). However, Civil Construction Supervisor Bartolino was using the excavator and refused to let Zelaya use it because he had a deadline to meet. JA 15 (DSUF ¶ 8); JA 125 (PSDF ¶ 8).

Zelaya was warned by Strange and DC Water technician Bascom that attempting to use the boom truck to install the catch basin was dangerous. JA 16 (DSUF ¶ 14); JA 126 (PSDF ¶ 14). In addition, DDOT Inspector Wilson warned Constantino that what Zelaya was attempting to do was dangerous. JA 16 (DSUF ¶ 14); JA 126 (PSDF ¶ 14). Zelaya asked Strange to stop the work, but Strange told him that he should call Superintendent Constantino because Strange was not Zelaya's boss. JA 16 (DSUF ¶ 16); JA 127 (PSDF ¶ 16).

Zelaya called Constantino, but he did not answer. JA 16 (DSUF ¶ 16); JA 127 (PSDF ¶ 16). Zelaya did not call Civil Construction Safety Officer Choto because "he was in a meeting." JA 46 (Zelaya Depo.). Zelaya also did not call Kevin Salehi, who was also his supervisor, because he "was more used to communicat[ing] [with] Constantino." JA 61 (Zelaya Depo.). According to Zelaya, "as a foreman . . . [he] had the authority to stop a member of [his] crew from doing something that could endanger their health or safety." JA 70 (Zelaya Depo.).

The accident occurred at about 3:00pm or 3:30pm in the afternoon. JA 49 (Zelaya Depo.). Initially, Zelaya acted as the spotter to tell the boom truck operator if the truck was too close to the power lines, but Zelaya then asked a co-worker, William Cruz, to act as the spotter. JA 42 (Zelaya Depo.); JA 16 (DSUF ¶ 11); JA 126 (PSDF ¶ 11). Zelaya grabbed the chain securing the catch basin and

tried to guide it into the trench. JA 43; JA 16 (DSUF ¶ 12); JA 126 (PSDF ¶ 12). "[T]he Civil Construction crew managed to get the catch basin in the trench, but they had to adjust its position." JA 109 (Zelaya's Opp'n to Mot. for Summ. J.). "Mr. Bascom observed the boom elevate and extend until it touched the overhead power lines." JA 110. Electricity traveled from the power lines through the chain that Zelaya was holding, causing his injuries. JA 16 (DSUF ¶ 13); JA 127 (PSDF ¶ 13). Zelaya believed that the boom truck operator, Thomas Andrews, bore most of the responsibility for his injuries. JA 59 (Zelaya Depo.). Moreover, Zelaya did not know whether Cruz (the spotter) told him that the crane was getting too close to the wires. JA 42.

E. Zelaya's receipt of workers' compensation.

Zelaya testified that starting two months after the accident, he began to receive workers' compensation of "$670 per week." JA 33-34 (Zelaya Depo.). In addition, Zelaya received $535 a month from his union. JA 53. Zelaya continued receiving weekly workers' compensation payments until March 6, 2019, when the Office of Workers' Compensation in the D.C. Department of Employment Services awarded Zelaya a lump sum payment of $1,238,020.55. *See Zelaya v. Civil Construction & CNA Insurance*, OWC No. 674313 (Mar. 6, 2019) (Attachment A).

3. Procedural History.

A. Zelaya's initial suit against the District of Columbia.

Zelaya initially sued the District. *See* JA 483. However, the Superior Court dismissed that case because of Zelaya's failure to comply with the notice requirements of D.C. Code § 12-309, and this Court affirmed. *Zelaya v. District of Columbia*, No. 12-CV-1767 (D.C. Dec. 27, 2013) (unpublished opinion).

B. Zelaya's suit against Strange and DC Water; the Superior Court's grant of summary judgment to defendants; and this Court's decision remanding in part.

Zelaya then filed the present suit against Strange and DC Water. JA 2. He alleged that Strange was negligent because Strange knew or should have known of the unreasonable risk to Zelaya and failed to exercise reasonable care in directing Zelaya to continue installing the catch basin and in neglecting to implement reasonable safeguards to prevent an electric shock. JA 5-6 (Am. Compl. ¶¶ 16-18). He also asserted that DC Water was liable based on the negligence of its on-site inspector, Henry Bascom, who failed to adopt and implement reasonable safeguards to prevent Zelaya from being shocked. JA 7-8 (Am. Compl. ¶¶ 23-27).

The Superior Court (Campbell, J.) granted summary judgment in favor of both defendants, finding that Zelaya was contributorily negligent as a matter of law and that DC Water owed no statutory or common law duty of care. *See* JA 484.

On appeal, this Court affirmed the Superior Court's judgment in large part. Specifically with regard to Strange, the Court ruled in his favor in two respects.

First, the Court rejected Zelaya's argument that Strange had a contractual duty of care. The Court noted that the Construction Management Manual expressly provided that the construction manager "is not responsible for the safety of the contractor's work force and methods of construction" even though he was required to correct certain observed situations and terminate work under certain circumstances. JA 487-88 (quoting Construction Management Manual, JA 283). Referring to this paragraph, the Court held that "[a]lthough the paragraph at issue places safety obligations on the construction manager, it specifically excludes the construction manager from responsibility for the safety and methods of construction used by the contractor's workers." JA 488. The Court observed that "[t]he Construction Management Manual is thus similar to the contract in *Presley*, which required the contractor to conduct inspections and gave the contractor the power to stop work but excluded it from liability." *Id.* (citing *Presley*, 25 A.3d at 878-79).

Second, the Court rejected Zelaya's argument that Strange (or DC Water) had a common-law duty of care toward Zelaya based on an alleged contractual duty to protect him. The Court noted that "[h]ere, Mr. Strange and DC Water did not take on full contractual responsibility—or any contractual responsibility—for Mr. Zelaya's safety." JA 489-90. The Court explained that "[t]he contract between Civil Construction and the District of Columbia could not have been more

explicit that Mr. Zelaya's employer retained responsibility for his safety. Mr. Zelaya's employer, the contractor, was required to 'take any other needed actions as it determines . . . to be reasonably necessary to protect the life and health of employees on the job . . . .'" JA 490 (quoting the contract specifications, JA 276).

The Court again noted the similarity of this case with *Presley*: "As in *Presley*, the appellees' power to stop work in this case did not create a third-party duty under [the Restatement (Second) of Torts] § 324A." JA 490 (citing *Presley*, 25 A.3d at 889-91). Indeed, the Court explained that "Civil Construction had direct duties to protect Mr. Zelaya's safety, whereas Mr. Strange's and DC Water's third-party obligations to inspect the worksite were not 'necessary' for the protection of Mr. Zelaya under § 324A. Thus, DC Water and Mr. Strange owed Mr. Zelaya no third-party duties of care." JA 490.

However, the Court held that there was "a disputed issue of material fact as to whether Mr. Strange is subject to the standard of care required by the ISA." JA 486. The Court held that Strange, unlike DC Water, was not an "instrumentality" of the District and thereby not excluded from the ISA's definition of "employer." JA 486-87. And the Court noted that "[b]ecause the trial court viewed Mr. Strange as an instrumentality of the District of Columbia, it never resolved whether he, as a project engineer, had 'control or custody' of the project worksite such that he qualified as an 'employer' under D.C. Code § 32-802(1)." JA 487. The Court

observed that "[t]his analysis is fact intensive and involves fine distinctions among close cases—*see Presley*, 25 A.3d at 883-85 (distinguishing *Presley* from *Traudt Potomac Elec. Power Co.*, 692 A.2d 1326 (D.C. 1997), and *Velásquez v. Essex Condo. Ass'n*, 759 A.2d 676 (D.C. 2000), based on differences in employers' authority 'with respect to safety rules')." JA 487.

Furthermore, the Court rejected the trial court's finding that Zelaya was contributorily negligent, reasoning that "if Mr. Strange owes a duty to Mr. Zelaya under the ISA, then Mr. Strange cannot raise the defense of contributory negligence to evade responsibility." JA 492. Instead, the court held that "Mr. Strange must show that Mr. Zelaya acted with willful, wanton, or reckless disregard for his own safety." JA 492.

Thus, the Court "reverse[d] the [trial] court's order to the extent it conclude[d] that Mr. Strange was not subject to the standard of care pr[e]scribed by the ISA and remand[ed] to allow the court to decide in the first instance whether Mr. Strange was an employer under the ISA." JA 487.

C. Superior Court's decision on remand.

On remand, Strange moved for summary judgment, asserting that the undisputed facts showed that he was not Zelaya's "employer" under the ISA. JA 12. On August 11, 2021, the Superior Court (Park, J.) granted Strange's motion. JA 576. The court held that "viewing the record evidence in the light most

favorable to the plaintiff, [it] cannot find that this record gives rise to a genuine question of fact that Mr. Strange was an 'employer' owing a duty to Mr. Zelaya." JA 583.

Specifically, the court found that there was no genuine dispute of material fact that Strange "did not exercise the requisite 'custody or control' over Mr. Zelaya or the site to give rise to a duty of care under the ISA." JA 584.[1] The court observed that Strange's duties as construction manager were set forth in the DDOT Construction Management Manual. JA 577. The court reasoned that "though the DDOT manual gave Mr. Strange the authority to stop work upon witnessing a safety violation, it also 'specifically exclude[d] [him] from responsibility for the safety and methods of construction used by the contractor's workers.'" JA 584-85 (quoting JA 488 (*Zelaya v. Strange*, No. 17-CV-411 (D.C. Feb. 5, 2021) (unpublished opinion))). The court found that this "limited authority to stop work at the site . . . standing alone, is not enough to impose ISA liability." JA 585 (citing *Presley*, 25 A.3d at 885). The court also noted that, "[t]hough monitoring the job site was one of Mr. Strange's job duties on the Project, . . . the record

[1] The Superior Court erroneously named Zelaya, instead of Strange, in four places in its opinion—the first sentence at JA 584; the second-to-last and the last sentences of the paragraph at JA 586; and the second "ORDERED" paragraph, at JA 587. The District filed a praecipe pointing out these typographical errors. JA 589. There is no dispute that the Superior Court intended to name Strange, rather than Zelaya, in these places. This is also clear from the rest of the court's order.

indicates that two other DDOT employees were responsible for completing daily inspection forms, which Mr. Strange did not sign or approve." JA 586 (citing *Presley*, 25 A.3d at 878-79); *see* JA 509-30 (Inspector's Daily Reports by Lester and Wilson).

In addition, the court found it "undisputed that Mr. Strange, as the construction manager, did not have the authority to promulgate and implement safety regulations." JA 585 (contrasting this case with *Velásquez*, 759 A.2d at 680, and *Traudt*, 692 A.2d at 1331). The court found it undisputed that "Hector Choto, a safety officer for Civil Construction, oversaw the safety conditions at the site." JA 576-77. Finally, the court found it undisputed that Strange "did not own the site, nor did he own the construction equipment used on the Project." JA 586 (contrasting this case with *Velásquez*, 759 A.2d at 681, and *Traudt*, 692 A.2d at 1331). The court thus "conclude[d] that there is no genuine dispute of material fact that Mr. Strange did not possess the requisite 'custody or control' over the site to qualify as Mr. Zelaya's 'employer' pursuant to the statute." JA 586.

STANDARD OF REVIEW

The standard of review of the Superior Court's grant of a motion for summary judgment is de novo. *See Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1088 (D.C. 2008). This Court's "standard of review is the same as the trial court's standard for initially considering a party's motion for summary

judgment; that is, summary judgment is proper if there is no issue of material fact and the record shows that the moving party is entitled to judgment as a matter of law." *Clampitt v. Am. Univ.*, 957 A.2d 23, 28 (D.C. 2008) (citing Super. Ct. Civ. R. 56(c)). Moreover, the existence of some factual disputes per se will not defeat summary judgment if these differences do not raise genuine issues of material fact. As the Supreme Court noted in *Anderson v. Liberty Lobby, Inc.*, "the mere existence of *some* alleged factual disputes between the parties will not defeat an otherwise properly supported motion." 477 U.S. 242, 247-248 (1986); *accord McAllister v. District of Columbia*, 653 A.2d 849, 852 (D.C. 1995). There must be a "genuine" issue of "material" fact, and materiality depends upon the substantive law. *Anderson*, 477 U.S. at 248; *accord Rajabi v. PEPCO*, 650 A.2d 1319, 1321 (D.C. 1994).

SUMMARY OF ARGUMENT

1. This Court should affirm the judgment below because, as the Superior Court correctly found, Strange was not an "employer" under the ISA, and he therefore did not have a duty of care for Zelaya's safety. Specifically, Strange lacked sufficient "control or custody" of Zelaya or of the worksite. This case is materially indistinguishable from *Presley*, which held that a defendant with similar responsibilities regarding safety was not an "employer" under the ISA. Like the defendant in *Presley*, Strange (1) did not own the property on which the injured

individual was working; (2) did not promulgate safety regulations; (3) had only limited authority to stop work in a narrow set of situations; (4) did not normally act directly to rectify safety violations; and (5) did not have an obligation to maintain a constant presence at the workplace to oversee safety requirements.

First, it is undisputed that Strange did not own the property. Second, it is similarly undisputed that Strange did not promulgate safety regulations. Third, although Strange had limited authority to correct observed safety violations, and did in fact stop work on a few occasions for non-safety-related reasons, this did not alone give him "control or custody" of the worksite. As this Court held in its remand decision, the Construction Management Manual is "similar to the contract in *Presley*, which required the contractor to conduct inspections and gave the contractor the power to stop work but excluded it from liability." JA 488. Fourth, like the defendant in *Presley*, Strange did not normally act directly to rectify safety violations. As this Court held: "The contract between Civil Construction and the District of Columbia could not have been more explicit that Mr. Zelaya's employer retained responsibility for his safety." JA 490. Fifth and finally, though Zelaya was present the day of the accident, there is no evidence that he was obligated to maintain a constant presence at the workplace to oversee safety requirements. It was undisputed that Hector Choto, Civil Construction's Safety Officer, oversaw the safety conditions at the site.

Because *Presley* is controlling, Zelaya's reliance on *Traudt* and *Velásquez* is misplaced. In those cases, the entities that this Court found to be "employers" had far more extensive control over the safety conditions at their respective worksites. Most importantly, while the defendants in those cases owned the worksite and had authority to promulgate safety regulations or require that their safety regulations be followed, the same is not true of Strange, who did not own the worksite and had no authority to promulgate safety regulations.

Finally, Zelaya's argument that he was prejudiced by the Superior Court's reliance on the Inspector's Daily Reports because they were appended to Strange's summary judgment reply is without merit. Strange appropriately cited these reports to counter Zelaya's argument in his opposition that Strange's reporting responsibilities were more comprehensive than reports that the defendant had filed in *Presley*. In any case, if Zelaya had considered this evidence prejudicial, he could have sought relief below, such as requesting leave to file a surreply. It is too late for him to raise this issue in this Court after failing to raise it in the Superior Court, where it might have been corrected. In any event, Zelaya does not actually identify any unfair prejudice, and he does not dispute that the inspection reports are authentic.

2. Even assuming that Strange were Zelaya's employer under the ISA, this Court may affirm on the independent basis that Zelaya is precluded from

recovering against Strange by the D.C. Workers' Compensation Act, D.C. Code § 32-1501 *et seq*. That Act provides the exclusive remedy against an employer by an employee injured in the District, and it precludes an action in tort against an employer for these injuries. Zelaya testified that he received a significant workers' compensation award as a result of his injuries. JA 33-34 (Zelaya Depo.). Indeed, after receiving years of weekly payments of around $670, a judicially noticeable order of the Office of Workers' Compensation awarded him a further lump-sum payment of over $1.2 million. *See* Attach. A. Because Zelaya was covered by the Act and received workers' compensation, he is precluded from filing his action in tort against Strange on the theory that Strange was Zelaya's "employer."

ARGUMENT

I. Strange Was Not An "Employer" Under The Industrial Safety Act Because He Did Not Have "Control Or Custody" Of Zelaya Or The Worksite.

In its decision remanding this case, this Court instructed the Superior Court to resolve the question whether Strange was an "employer" under the ISA. The Court noted that "[t]his analysis is fact intensive involving distinctions among close cases . . . based on differences in employers' authority 'with respect to safety rules.'" JA 487 (quoting *Presley*, 25 A.3d at 883). As the trial court correctly found on remand, Strange is not an "employer" under the ISA because he did not have "custody or control" of Zelaya or the worksite. The facts of this case are

materially indistinguishable from *Presley* and are readily distinguishable from *Traudt* and *Velásquez*.

A. This case is materially indistinguishable from *Presley*.

Presley is controlling here. In *Presley*, a worker injured when knocked off a tower by a crane sued both the crane operator and CRSS, a consultant that had "responsibility to 'monitor labor and safety requirements.'" 25 A.3d at 880. CRSS's responsibility was "outlined in [a Construction Quality Manager] contract" and included the "authority to 'stop work' for imminent danger situations observed.'" *Id.* Further, there was evidence that "CRSS 'regularly monitored' the work of [the plaintiff's] crew" and "stopped the work of his crew to correct safety hazards." *Id.* at 881. Nevertheless, this Court held that CRSS did not qualify as an "employer." *Id.* at 845-85.

In so concluding, the Court in *Presley* relied on five factors: (1) "CRSS did not own the property on which the injured individual was working," *id*. at 885; (2) "there is no evidence that CRSS promulgated safety regulations," *id*. at 886; (3) CRSS had only "limited authority to stop work in situations where it actually observed 'imminent danger situations,'" *id*. at 885; (4) CRSS did "not normally act directly to rectify safety violations," *id*. at 887; and (5) CRSS had no "obligation to maintain a constant presence at the workplace to oversee safety requirements," *id*. at 886. Applying these factors to this case, the undisputed evidence shows that

Strange's duties to Zelaya with respect to safety were similar to CRSS's duties in *Presley*, and that Strange therefore did not have the relevant "custody or control" over Zelaya or the worksite.

First, as in *Presley*, Strange "did not own the property on which the injured individual was working." 25 A.3d at 885. The worksite was on public property owned by the District. *See* JA 14 (DSUF ¶ 4); JA 125 (PSDF ¶ 4); JA 237 (Strange Depo.). Zelaya concedes that Strange did not own the worksite. Br. 31.

Second, as in *Presley*, Strange did not have authority to promulgate safety regulations, which the trial court found as an undisputed fact. JA 576-77; *see Presley*, 25 A.3d at 885 ("CRSS'[s] limited authority [with respect to safety rules] falls well short of the level of contractual authority retained by the employers in *Traudt* and *Velásquez*, where the employers were responsible for promulgating and implementing specific safety regulations."). Again, Zelaya has not argued to the contrary.

Notably, ownership of the worksite and authority to promulgate safety regulations were key factors in *Presley* in determining whether a person is an "employer" under the ISA. As the Court explained, "when an employer does not have direct 'custody or control' over the employee, as in the present case, we have emphasized ownership of the worksite and authority with respect to safety rules in finding that an entity is an 'employer' under the ISA." 25 A.3d at 883. Strange

plainly did not have *direct* custody or control over Zelaya. Zelaya was employed as a foreman by Civil Construction and reported to Civil Construction Superintendent Constantino and supervisor Salehi. JA 36 (Zelaya Depo.). Thus, the fact that Strange lacked ownership of the worksite or authority to promulgate safety regulations provides strong support on its own for the Superior Court's finding that Strange was not an "employer" under that statute.

Third, as in *Presley*, Strange only "had limited authority to stop work." *Id.* at 885. To be sure, while the Construction Management Manual provides that the construction manager "is not responsible for the safety of the contractor's work force and methods of construction," it also provides that the construction manager "shall require correction of observed situations that are potentially dangerous to workers, the public and the project, and shall order the termination of work that poses a serious and imminent danger to public safety or substantial property damage." JA 283. But this authority is almost identical to CRSS's authority in *Presley*, where there was evidence that "CRSS 'regularly monitored' the work of [the plaintiff's] crew" and "stopped the work of his crew to correct safety hazards." 25 A.3d at 881. As this Court explained, "[t]he evidence . . . that CRSS had some authority to stop work and perhaps, at times, might have 'intervened' with [the contractor] to remind them of safety requirements, shows, at most, limited and

infrequent interactions that are insufficient to establish that CRSS had the requisite control, in fact, over the workplace when Presley was injured." *Id*. at 886.[2]

So too here. As this Court recognized in its remand decision, "Mr. Strange's . . . power to stop work on the project, as provided in the disputed paragraph on page three of the Construction Management Manual, was similar to the power of the contractor in *Presley*, who was found to owe no duty to a third-party employee." JA 490 (citing *Presley*, 25 A.3d at 879); *see* JA 283. Indeed, the evidence of Strange's stop-work authority is even *weaker* than in *Presley*. Although the Superior Court found that Strange stopped work at least on one occasion—after Civil Construction failed to open all lanes to traffic on main thoroughfares at 3:30pm, JA 248, 584—this was not for a safety violation at all. There is *no* evidence in the record that Strange ever stopped work at the work site because of a safety concern.

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[2] Zelaya is simply wrong that "the evidence as to whether [CRSS] ever actually ordered work stopped was equivocal." Br. 44. Rather, there was clear evidence in *Presley* that CRSS had in fact issued a stop work order for safety reasons. As the Court there noted, a foreman "testified that CRSS 'regularly monitored' the work of his crew." 25 A.3d at 880-81. The foreman also "testified that CRSS stopped the work of his crew to correct safety hazards, such as when his crew had to move pipes out of the way." *Id*. at 881. Moreover, the contract in *Presley* "gave the contractor the power to stop work," as this Court recognized in its remand decision. JA 488 (citing *Presley*, 25 A.3d at 878-79). Thus, the fact that, as the Superior Court found, "on at least one occasion, Mr. Strange ordered that work be stopped at the site," JA 584, does not distinguish this case from *Presley*.

Fourth, as in *Presley*, Strange did "not normally act directly to rectify safety violations." *Presley*, 25 A.3d. at 887. Again, it is true that the Construction Management Manual provided that Strange "shall require correction of *observed* situations that are potentially dangerous to workers." JA 283 (emphasis added). But, contrary to Zelaya's argument, that that does not mean that Strange had the broad responsibility to "furnish a safe work place." Br. 24. This argument ignores specific provisions of the Manual and the contract specifications, which place responsibility for the safety of a contractor's employees on the contractor.

The Manual provides that "the construction Contractor is *solely* responsible for safety of the work." JA 290 (emphasis added). Thus, referring to the Manual in its remand decision, this Court explained that "[a]lthough the paragraph at issue [at JA 283] places safety obligations on the construction manager, it specifically *excludes* the construction manager from responsibility for the safety and methods of construction used by the contractor's workers." JA 488 (emphasis added). The contract specifications similarly provide that "[t]he *contractor* shall . . . take any other needed actions as it determines . . . to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract." JA 276 (emphasis added). As this Court emphasized in its remand decision, "[t]he contract between Civil Construction and the District of Columbia could not have

been more explicit that Mr. Zelaya's employer retained responsibility for his safety." JA 490.

Zelaya argues more broadly that Strange had the "duty to monitor jobsite safety" and "was required to 'bring all observed violations to the attention of the Contractor.'" Br. 36 (quoting JA 283). However, again, the same was true of CRSS in *Presley*. The Court there noted that "the CQM [Construction Quality Manager] contract required CRSS to 'inspect,' 'review,' 'monitor,' and 'report,' and then submit the reports to the [General Services Administration], which in turn submitted them to [the general contractor] to take the appropriate actions." *Presley*, 25 A.2d at 885. Likewise, Strange, as "construction manager," did not have authority to tell the contractor's employees how to do their jobs, but instead was required to "monitor[] the Contractor for conformance with contractual safety requirements and . . . bring all safety observed violations to the attention of the Contractor." JA 283. The Manual was crystal clear that the construction manager "is not responsible for the safety of the contractor's work force and methods of construction." JA 283.

Fifth, as in *Presley*, there is no evidence that Strange had "an obligation to maintain a constant presence at the workplace to oversee safety requirements." 25 A.3d at 886; *see id.* (holding that CRSS was not an "employer" despite "testimony that CRSS inspectors' responsibilities with respect to monitoring compliance with

safety regulations included walking the site on a daily basis"). Although Strange was on the worksite the day of the accident, there is no evidence that he was required to keep "a constant presence at the workplace," let alone monitor every activity taking place for a major construction project.

Moreover, although the Construction Management Manual provides that the construction manager "is responsible for the administration of the construction contract to ensure that the contract work is completed in accordance with the plans and specifications, required quality standards, the contract performance period, and the contract price," JA 282, nowhere does it require the construction manager to "oversee safety requirements." *Presley*, 25 A.3d at 886. Rather, as noted above, the contract specifications and the Construction Management Manual placed the responsibility for the safety of the contractor's workforce squarely on the contractor, Civil Construction. *See supra* pp. 25-26. Furthermore, as the Superior Court recognized, it was undisputed that "Hector Choto, a safety officer for Civil Construction, oversaw the safety conditions at the site." JA 576-77.

Thus, contrary to Zelaya's argument, Strange was *not* "obligated to override Mr. Constantino's orders that jeopardized workers' safety." *See* Br. 29. Rather, consistent with Civil Construction's responsibility for controlling its workers and ensuring their safety, Strange properly told Zelaya that Strange was not Zelaya's boss and that Zelaya should ask his boss, Superintendent Constantino, to order the

work stopped. And Zelaya confirmed as much, testifying that it was "my direct supervisors who had the ability to stop the job." JA 142 (Zelaya Depo.); *see* JA 162 (Zelaya Depo.) ("When I used to observe any danger, I would always consult with my boss. And then the orders would always come from him."). In short, "[a]s to matters of safety on the Riggs Road Project, the buck stopped with" Civil Construction, not Strange. *See* Br. 26.[3]

B. Zelaya's reliance on *Traudt* and *Velásquez* is misplaced.

Zelaya relies heavily on *Traudt* and *Velásquez*. Br. 30-35. Those cases were distinguished in *Presley* and are similarly distinguishable here.

In *Traudt*, an employee of a PEPCO contractor was injured while removing an asbestos covering from electric cables in PEPCO's underground manhole system. 692 A.2d at 1330-31. The Court held that PEPCO was the plaintiff's "employer" under the ISA, citing two key factors. First, PEPCO "retained ownership of the workplace and the electric cables, asserting this form of control concretely by dictating that work on the cables was to be done while they were energized." *Id.* at 1331. Second, "PEPCO insisted on compliance with its own as well as public safety rules and reserved the right to inspect that work, direct

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[3] Zelaya notes that CRSS "was a mere outside consultant," Br. 42, but that point is irrelevant. The fact that CRSS did not have as much authority as Strange over the project as a whole does not change the fact that Strange's authority *with respect to safety rules* was nearly identical to that of CRSS—namely, minimal.

stoppage, and require replacement or supplementation of personnel and equipment in case of noncompliance with the contract." *Id.* Thus, the Court concluded that "PEPCO's ownership of the manhole system and the electric cables, together with the authority it reserved in the contract to monitor [the contractor's] work and perform other work simultaneously at the job site, established its control of the 'place of employment' sufficient to make it Traudt's employer for purposes of the statute." *Id.*

Similarly, in *Velásquez*, the defendant, Essex, used a contractor to renovate its condominium building, and an employee of that contractor was injured in a fall from a scaffold. 759 A.2d at 678-79. In distinguishing *Velásquez*, the Court in *Presley* explained that "the contract between Essex and [its contractor] required [the contractor] to 'obey . . . the rules and regulations which may from time to time during [its] work be promulgated by [Essex] for various reasons such as safety, health, preservation of property or maintenance of a good and orderly appearance to the area.'" 25 A.3d at 884 (quoting *Velásquez*, 759 A.2d at 679). Thus, "Essex constituted an 'employer' within the meaning of the ISA because Essex owned the property where the work was performed and retained authority to promulgate rules and regulations and monitor the work performed by [its contractor]." *Id.*[4]

[4] Although the Court in *Velásquez* held that Essex was an "employer" under the ISA, it did not find Essex liable, holding that "even when the record is viewed

In contrast to *Traudt* and *Velásquez*, here the Superior Court found as an undisputed fact that Strange "did not own the site, nor did he own the construction equipment used on the Project." JA 586. Moreover, Strange did not have the authority that PEPCO had in *Traudt* to "reserve[] the right to inspect [the] work" or "require replacement or supplementation of personnel and equipment in case of noncompliance with the contract." *Presley*, 25 A.3d at 884. Finally, unlike in *Velásquez*, Strange did not have authority to promulgate rules and regulations related to safety or other aspects of the contractor's performance of its contract. As in *Presley*, then, Strange's "limited authority falls well short of the level of contractual authority retained by the employers in *Traudt* and *Velásquez*." *Id.* at 885.

Conceding that "Strange did not own the workplace," Zelaya argues that "ownership is not a necessary condition to being an 'employer' under the ISA." Br. 31. However, while it is true that ownership of the worksite is not dispositive by itself, it is a key factor where the defendant also does not have control or custody of the injured employee, as in this case. Notably, in holding that "CRSS did not . . . have the degree of control over the workplace to qualify as an

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in the light most favorable to Velásquez, there is no material question of fact that Essex or Zalco actually asserted any control over the scaffold so as to permit a reasonable jury to find that they breached a statutory duty of due care to Velásquez." 759 A.2d at 681 (citing *Traudt*, 692 A.2d at 1332).

'employer' that was present in both *Traudt* and *Velásquez*," the Court in *Presley* found it significant that "[i]n contrast to the employers in *Traudt* and *Velásquez*, CRSS did not own the property on which the injured individual was working." 25 A.3d at 884-85.[5]

Zelaya also argues that "the lack of responsibility for the safety of a contractor's workforce or the means and methods of its work does not disqualify . . . Strange[] from being an 'employer' under the ISA" because—in Zelaya's view—the defendants in *Traudt* and *Velásquez* also lacked such responsibility. Br. 35. But this argument ignores the fact that the defendants in each of those cases had extensive authority over their contractors' workforces. In *Traudt*, PEPCO's authority included the power to direct its contractor to cease work, to comply with PEPCO's own safety rules, and to remove any employee of the contractor from the work and add PEPCO's own workers. 692 A.2d at 1330. In *Velásquez*, the Court explained that Essex reserved the authority in the contract "to monitor [its contractor's] work, to promulgate rules and regulations to which

[5] Zelaya mentions that in *Velásquez*, the defendant property manager (Zalco Realty Company) found to be an employer under the Act along with the property owner (Essex), did not itself own the property. Br. 32. It does not appear, however, that the property manager attempted to differentiate its status or liability under the Act from that of the property owner. *See Velásquez*, 759 A.2d at 681 (referring to "Essex, [and] its agent Zalco"); *cf. Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 720 (D.C. 1995) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[the contractor] and its employees were bound, and to inspect [the contractor's] equipment." 759 A.2d at 681. In the present case, in contrast, the contract specifications and Construction Management Manual expressly gave Civil Construction responsibility for the safety of its employees and did not give Strange authority to control those employees to a similar extent.

Moreover, and in any case, the holding in *Presley* that CRSS was not an "employer" under the ISA did not turn solely on CRSS's lack of responsibility for the employer's workforce, but also on other factors, including the fact that CRSS did not own the worksite, did not have authority to promulgate safety regulations, had only limited authority to stop work, and was not required to keep a constant presence at the worksite to oversee safety. As noted, all of these factors are present here as well. The fact that the Manual and contract specifications gave Civil Construction, and not the DDOT construction manager, responsibility for the safety of the contractor's workforce is simply an *additional* reason supporting the Superior Court's finding that Strange did not have sufficient control or custody over the worksite to give rise to a duty of care to Zelaya.

C. Zelaya's argument that he was prejudiced by the Superior Court's reliance on the Inspector's Daily Reports is without merit.

Finally, Zelaya faults the Superior Court for noting that "the record indicates that two other DDOT employees were responsible for completing daily inspection forms, which Mr. Strange did not sign or approve." Br. 38 (quoting JA 586); *see*

JA 509-30 (Inspector's Daily Reports by Lester and Wilson). Zelaya argues that the court should not have considered the inspection reports because they were appended to Strange's reply in support of his summary judgment motion. Br. 38-41. This argument is without merit.

In his opposition to the motion for summary judgment, Zelaya argued that "[t]he defendant in *Presley* was '*not responsible for performing periodic and exhaustive surveys of the work environment in regard to safety.*'" JA 119 (quoting *Presley*, 25 A.3d at 879). Zelaya contended that "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.'" JA 119 (quoting JA 282). Strange properly responded to this argument in his reply, explaining that "Strange was not required to oversee such comprehensive duties either by contract or the [Construction Management Manual]" and noting that "DDOT employees Pamela Wilson's and John Lester's daily inspection forms were pro forma and cited the location, counted items, identified the construction phase and the excavation dimensions," and were not "signed/approved by Strange." JA 503. This was an appropriate response to Zelaya's argument in his opposition, and the inspection reports themselves were thus properly attached to the reply.

On appeal, Zelaya argues, contrary to the statement in Strange's reply, that Strange was "required to countersign the Inspector Daily Reports" by the Construction Management Manual. He therefore argues that he was prejudiced to the extent that the Superior Court relied on the inspection reports to conclude that Strange did not have control over the project without hearing Zelaya's response. Br. 41. However, "[i]t is a well-established rule that a party who fails to raise an issue at trial generally waives the right to raise that issue on appeal." *Gillespie v. Washington*, 395 A.2d 18, 21 (D.C. 1978) (citing *Miller v. Avirom*, 384 F.2d 319, 321-22 (D.C. Cir. 1967)). "This rule applies specifically in a case of summary judgment." *Id.* (citing *Calhoun v. Freeman*, 316 F.2d 386, 388 (D.C. Cir. 1963)). Here, Zelaya could have obtained the opportunity to respond to Strange's arguments by seeking relief from the Superior Court, such as by moving to file a surreply, which would have been within the court's discretion to grant. *See Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003); *see generally Gates v. District of Columbia*, 66 F. Supp. 3d 1, 28-29 (D.D.C. 2014). Zelaya does not explain why he did not seek this relief below, instead waiting to raise this issue for the first time on appeal.

In any event, Zelaya shows no prejudice. He does not dispute the authenticity or admissibility of the inspection reports, s*ee* Br. 38-41, and this Court's review of the summary judgment ruling is de novo. *See* D.C. Code § 11-

721(e) ("[T]he District of Columbia Court of Appeals shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). Finally, those inspection reports formed a minor part of the Superior Court's order, and even if they were introduced erroneously, all of the other evidence overwhelmingly demonstrates that Strange did not have the requisite "custody or control" over Zelaya or the worksite under the ISA.

II. If Strange Were Zelaya's Employer, Zelaya Was Precluded From Suing Strange Because Zelaya Received Compensation For His Injuries Under The D.C. Workers' Compensation Act.

Even if Strange were Zelaya's "employer" under the ISA, Zelaya would be precluded from recovering against him by the D.C. Workers' Compensation Act, D.C. Code § 32-1501 *et seq*. That Act "creates a comprehensive scheme for workers to recover wage loss and medical benefits from their employers for injuries sustained on the job." *Kelly v. D.C. Dep't of Emp. Servs.*, 214 A.3d 996, 1001 (D.C. 2019); *see* D.C. Code § 32-1503(a)(1) (providing that an employer is liable under the Act for "[t]he injury or death of an employee that occurs in the District of Columbia if the employee performed work for the employer, at the time of the injury or death, while in the District of Columbia"). Importantly, D.C. Code § 32-1504 provides that "[t]he liability of an employer prescribed in § 32-1503 shall be exclusive and in place of all liability of such employer to the employee."

As this Court has explained, the Act "is an exclusive and mandatory regime—one that includes a 'statutory presumption of compensability'—because '[e]mployees and employers were both thought to gain by a system in which common law tort remedies were discarded for assured compensation regardless of negligence or fault.'" *Kelly*, 214 A.2d at 1001 (quoting *Ferreira v. D.C. Dep't of Emp. Servs.*, 531 A.2d 651, 654-55 (D.C. 1987)). Thus, an employer of an employee who is covered by the Workers' Compensation Act, and *a fortiori* an employee who actually receives compensation under that Act, is immune from civil liability in tort. *See USA Waste of Maryland, Inc. v. Love*, 954 A.2d 1027, 1029 (D.C. 2008).[6]

Here, Zelaya is eligible to receive—and has received—workers' compensation under the Act. Zelaya testified below that as a result of his injuries, he received compensation of "$670 per week" beginning two months after the

[6] Although Strange did not raise this ground below, it is well-settled that this Court may affirm on grounds supported by the record other than those cited in the trial court's decision. *See Olivarious v. Stanley J. Sarnoff Endowment for Cardiovascular Sci., Inc.*, 858 A.2d 457, 462 (D.C. 2004); *Dandridge v. Williams*, 397 U.S. 471, 474 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."). This is especially appropriate in this case since there was no allegation in Zelaya's amended complaint that Strange was an "employer" under the ISA. *See* JA 5-6. Zelaya made this argument for the first time in response to Strange's motion for summary judgment. JA 112. Moreover, the Superior Court addressed this issue for the first time only on remand.

accident at issue. JA 33-34 (Zelaya Depo.). Then, several years later, the Office of Workers' Compensation of the D.C. Department of Employment Services issued an order pursuant to D.C. Code § 32-1508(8) awarding Zelaya a lump sum payment of $1,238,020.55. Attach. A.

Although not in evidence below, this order of a District agency, the Office of Workers' Compensation, is judicially noticeable by this Court. *See Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003) (noting that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" (quoting Fed. R. Evid. 201(b))). The document is a formal order of the Office of Workers' Compensation that was issued pursuant to statutory authority. Thus, the facts in it are not "subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id*. Moreover, "[j]udicial notice may be taken at any time, including on appeal." *Id.* (quoting *United States v. Burch*, 169 F.3d 666, 671 (10th Cir. 1999)); *accord Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 395 n.11 (D.C. 2006).

Zelaya's receipt of workers' compensation precludes his tort claims in this suit. Although the ISA creates a statutory duty of care for an employer to provide

a safe workplace, *see* D.C. Code § 32-808(a), the ISA does not create a statutory cause of action. It provides only criminal penalties. *See* D.C. Code § 32-812. For an employee to obtain recovery for a breach of this statutory duty of care, he must file an action in tort. Indeed, Zelaya's First Amended Complaint states that "Plaintiff Rene Zelaya amends his complaint under Superior Court Civil Rule 15(a) to bring this *tort action* for damages against Defendant's Alfred T. Strange and the District of Columbia Water and Sewer Authority." JA 2 (emphasis added).

As an action in tort, Zelaya's complaint is plainly subject to the exclusive remedy provisions of the Workers' Compensation Act, D.C. Code § 32-1504. Because Zelaya has received workers' compensation under the Act, he is barred from obtaining further compensation by a suit against Strange on the theory that Strange is Zelaya's "employer." The Superior Court's grant of summary judgment may be affirmed on this alternative ground.

CONCLUSION

This Court should affirm the decision of the Superior Court.

Respectfully submitted,

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May 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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.

/s/ James C. McKay, Jr.
Signature

21-CV-564
Case Number

JAMES C. McKAY, JR.
Name

May 12, 2022
Date

james.mckay@dc.gov
Email Address

CERTIFICATE OF SERVICE

I certify that on May 12, 2022, this brief was served through this Court's electronic filing system, to:

Marc I. Fielder
Counsel for appellant

/s/ James C. McKay, Jr.
JAMES C. McKAY, JR.

ATTACHMENT A

DEPARTMENT OF EMPLOYMENT SERVICES
LABOR STANDARDS
OFFICE OF WORKERS' COMPENSATION

RENE ZELAYA	:	
	:	
Claimant,	:	
	:	
v.	:	**OWC No.: 674313**
	:	
CIVIL CONSTRUCTION	:	
	:	
Employer	:	
	:	
and	:	
	:	
CNA INSURANCE CO.	:	
	:	
Administrator.	:	

APPROVAL OF LUMP-SUM SETTLEMENT PURSUANT TO SECTION 32-1508

Pursuant to the agreement and stipulation by and between the interested parties and such further investigation in the above-captioned claim having been made as is considered necessary and no hearing having been called or considered necessary by the Associate Director, Office of Workers' Compensation, the Associate Director makes the following:

FINDINGS OF FACT

1. On September 16, 2010, Claimant Rene Zelaya, suffered severe and permanent injuries to his right leg, right arm, left arm, body, face and head, which arose out of and in the course of his employment with the Employer, the Civil Construction as a construction foreman.

   At the time of the occurrence the Employer was insured by National Fire Insurance Co. of Hartford, and administered by CNA Insurance Co.

2. At the time of the work injury, the claimant had an average weekly wage of $1,005.70 and a compensation rate of $670.47 per week.

3. At the time of the injury, the Claimant was 32 years old. He is presently 41 years old.

4. The Claimant came under the care and treatment of several medical providers as a result of his injuries, including Prathur Remenini, M.D., Sunjay Berdia, M.D., Marion Jordan, M.D., among others. The Claimant is currently being followed by physical medicine and rehabilitation specialist Howard Gilmer, M.D. He has reached MMI and is follow-ups

only for medication management and management of his prosthesis.

5. There is a genuine dispute between the parties as to the nature and extent of Claimant's injuries. It is the opinion of the Claimant that he is and will continue to be entitled to temporary total disability benefits, and will be entitled to permanent total disability benefits in the future. The Employer contests the nature and extent of the Claimant's disability.

6. Considering all of the circumstances of this claim the claimant, and counsel, Roger C. Johnson and Kasey K. Murray, have agreed to compromise the Claimant's claim for disability and medical benefits.

7. Considering the aforementioned circumstances of this case, the Employer and Insurer have agreed to pay, and the Claimant has agreed to accept One Million Three Hundred Thirty Eight Thousand Two Hundred Eighty Four Dollars and 00/100 ($1,338,284.00) in a lump sum in exchange for a full and final release of his workers' compensation claim against the Employer and Insurer arising out of or otherwise related to the injury of September 16, 2010. Furthermore, the Employer will continue to pay to Claimant TTD benefits through the date of the approval of this lump sum settlement by the Office of Workers' Compensation. The Employer and Insurer will pay, or have paid, all reasonable, necessary and causally related medical expenses incurred through the date of the approval of this Settlement Petition. Medical benefits will be considered settled beyond that date, and will become the responsibility of the Claimant. As referenced below in Paragraph 8, the Parties have negotiated that $338,284.00 of this settlement amount should be set aside by the Claimant for the purchase of an annuity to fund the attached future medical allocation.

8. Furthermore, the Employer and Insurer have agreed to accept one-third, less litigation costs divided equally between the Claimant and the Employer/Insurer, of any recovery of $25,000 or more, in any potential third-party claim brought by or on behalf of the Claimant for the injuries he sustained on September 16, 2010, in full satisfaction of their lien in this matter. However, the total recovery by Employer/Insurer shall be no more than 2/3 of the total lien. Additionally, if the recovery of any third-party claim is less than $25,000, the Employer/Insurer agree to waive their lien in this matter in full.

9. Medical Cost Projection (MCP): The parties have considered the interests of Medicare. The Claimant is not currently a Medicare beneficiary and is not expected to become a Medicare beneficiary within the next 30 months. The Employer/Insurer had prepared a Medical Cost Projection, attached hereto as Exhibit 1, which has evaluated the potential need for future medical treatment that the claimant may require as a result of this work injury. The Employer and Insurer have offered to pay the Claimant the annuitized cost of this medical cost projection, or $338.284.00. Accordingly, the Claimant agrees to reserve $338.284.00 of his net settlement proceeds to cover any causally related future medical expenses that he may require as a result of this work injury and in accordance with the then current requirements of Medicare. Further, the Claimant understands that he cannot pass the costs of any required treatment onto Medicare and has no plans to do the same. Because all future medical treatment for the

work injury is to be paid out of the funds set aside for medical treatment, the parties agree that the Claimant will be responsible for satisfaction of any overpayments or conditional payments made by Medicare on his behalf for treatment related to the work accident which is incurred subsequent to the approval of the Lump Sum Settlement. The parties believe that no conditional payments have been made by Medicare at this time. To the extent that any conditional payments have been made by Medicare prior to the date approval of this Settlement Petition, the Employer/Insurer will remain responsible for reimbursing and satisfying Medicare for any such payments.

10. The parties certify that this agreement satisfies all the conditions under 42 CFR 411.46 (Medicare Regulation). This case does not meet the Centers for Medicare and Medicaid Services review threshold because the Claimant is not a Medicare beneficiary, he has not applied for Social Security disability and has no plans to file for same within the next 30 months. Claimant certifies that at the time of this settlement, he is not eligible to receive Social Security Disability benefits. In light of the above representations, this compromised indemnity settlement is not anticipated to prejudice or affect any known or expected interest of Medicare or the Center for Medicare or Medicaid Services. The Claimant agrees to the settlement terms referenced herein with full knowledge and consideration of any possible Medicare interest, and with full knowledge and consideration of the scrutiny with which this settlement may be subject by Medicare.

11. The parties recognize that the Social Security Act, and specifically 42 U.S.C. Section 424a(b), provides for the proration of workers' compensation benefits received in the form of a lump sum settlement in determining whether there should be an offset of workers' compensation benefits against social security disability benefits. The claimant requests, and the self-insured employer concur, that the compromise settlement of the claimant's future rights to periodic cash benefits and should be apportioned as follows:

    A. Attorney's fees of $100,000.00 as authorized by the District of Columbia Office of Workers' Compensation in its Order approving the join petition herein;

    B. Legal expenses of $263.45 as authorized by the District of Columbia Office of Workers' Compensation in its Order approving the join petition herein; and

    C. Estimated future medical expenses of $338,284.00;

    D. For the period beginning with the first day after the periodic monthly compensation ends the present value of the settlement agreement state herein shall be prorated in accordance with POMS §52001.555C(4)(a) unless such other method provided at §52001.555H should be more advantageous to the total family and/or the wage earner. Specifically, this petition designates that the rate at which the lump sum award will be prorated is to be based upon the life expectancy of the claimant. In the absence of an applicable life expectancy table adopted by statute in the District of Columbia or Virginia where the claimant is domiciled, the life expectancy is determined in accordance with National Center for Health Statistics' life tables. The claimant's life expectancy is 36.9 years, or 442.8 months, according to the tables.

Therefore, the lump sum shall be prorated by the dividing the balance of the lump sum after fees, expenses, and future medical costs as set forth in paragraphs A, B, and C of this section, or $899,736.55, over the life expectancy of the Claimant in months. Therefore, even though paid to the Claimant in a lump sum, the benefit shall be prorated and considered to be a monthly payment of $2,031.93 per month commencing on the date on which this agreement is approved. The claimant is relying on these facts in agreeing the accept the settlement set forth hereinabove.

12. The parties believe that this agreement is being made solely because it is in the best interest of the claimant.

13. The Claimant has been continuously represented by Roger C. Johnson and Kasey K. Murray, with the law firm of Koonz, McKenney, Johnson, DePaolis & Lightfoot, LLP. Counsel has counseled the claimant with respect to this claim, has continuously reviewed this claim from a medical and legal standpoint, prepared for litigation, conducted discovery, attended deposition(s), attended hearing(s) and engaged in protracted settlement negotiations with representatives of the employer and insurer in an effort to arrive at the agreed upon settlement. Counsel have represented Claimant since September 10, 2011 in this claim.

14. Accordingly, Mr. Johnson and Ms. Murray are requesting an approval of an attorney's fee in the amount of $100,000.00. In addition, Counsel is requesting an approval of $263.45 in expenses. The amount of the fee and expenses has been discussed with the Claimant who understands that the fee and costs will be deducted from the amount of the settlement and agrees that said sums are fair and reasonable.

15. After deduction of attorneys' fees and/or costs, the Claimant's net proceeds from the settlement will be a total of **$1,238,020.55** as a result of the Lump Sum Settlement Agreement.

16. The Associate Director, Office of Workers' Compensation, pursuant to the authority vested in him pursuant to Section 32-1508 of the District of Columbia Workers' Compensation Act of 1979 and acting as the designee of the Mayor of the District of Columbia, finds that it is in the best interest of the claimant discharging the liability of the employer and insurer for such compensation consistent with the terms of the agreed settlement.

Matthew Tidball
Attorney for the Employer/Insurer

Rene Zelaya
Claimant

Kasey K. Murray
Attorney for the Claimant

Rene Zelaya
OWC No: 674313

CERTIFICATION OF FILING AND SERVICE

I certify that the foregoing Lump Sum Settlement was filed in the Office of the Associate Director and a copy was mailed on March 6, 2019 by certified mail to all parties and their representatives at the last known address of each as follows:

Rene Zelaya
Koonz, McKenney, Johnson, DePaolis & Lightfoot
2001 Penna. Avenue, N.W. Suite 450
Washington, D.C. 20006
CLAIMANT

Kasey Murray, Esquire
Koonz, McKenney, Johnson
Depaolis & Lightfoot
2001 Penna. Avenue, N.W. Suite 450
Washington, D.C. 20006
ATTORNEY FOR CLAIMANT

Matthew Tidball, Esquire
Law Offices of Anthony D. Dwyer
1954 Greenspring Drive, Suite 435
Titonium, Maryland 21093
ATTORNEY FOR EMPLOYER/INSURER

Sandra Miller- Sandra Miller 3/6/19
Claims Examiner

This award becomes due and payable on the date received by the insurer. It must be paid within 10 days of said date or a penalty in the amount equal to twenty percent thereof shall be added to the unpaid amount.

Corrected to read Lump Sum Settlement.