COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: September 19, 2023

SUBJECT: Report on Bill 25-290, "Industrial Safety Act Clarification Amendment Act of 2023"

The Committee of the Whole, to which Bill 25-290, the "Industrial Safety Act Clarification Amendment Act of 2023" was referred, reports favorably thereon and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

On May 12, 2023, Bill 25-290, the "Industrial Safety Act Clarification Amendment Act of 2023" was introduced by Chairman Mendelson. The bill amends D.C. Code § 32-802(1) to clarify that individual employees of the District are not considered an "employer" under the Industrial Safety Act (ISA). The bill would make this amendment retroactively applicable to September 1, 2010. The impetus for the bill is a ruling from the D.C. Court of Appeals in *Zelaya v. Strange,* in which the Court applied the ISA to an employee of the District who had sufficient control over a District worksite.

History of the Industrial Safety Act

In 1918, Congress approved the "District of Columbia minimum-wage law," the purpose of which was to establish a minimum wage board in the District to investigate and fix the minimum

wages of women and children in the workforce.[1] The law was amended by Congress in 1941 via H.R. 5202 due to information that suggested that industrial accidents were increasing in "appalling numbers" in the District.[2] As a result of this information, Congress made numerous substantive changes to the law, including:

- Changing the Minimum Wage Board to the Minimum Wage and Industrial Safety Board and empowering the Board to investigate workplace safety matters;
- Authorizing the Council to issue rules and regulations establishing minimum safety requirements; and
- Requiring employers to furnish a reasonably safe workplace for employees.

The Board quickly began holding hearings and drafting safety standards that would impact thousands of employers in the District, with two major statutory exceptions: the United States government and the "District of Columbia or any instrumentality thereof." While the legislative record for H.R. 5202 provides little insight as to why the government of the District of Columbia was excluded from the definition of "employer" in the act, it is likely that this was done because District employees were covered under the provisions of the Federal Longshoreman's and Harbor Workers' Compensation Act and the Federal Employees' Compensation Act.[3] Under these acts, District employees, their widows, or surviving family members could receive compensation for injuries sustained "while in the performance of duty causing death, or disability for more than three days..."[4] if the United States Employees' Compensation Commission determined that they were eligible. Making the worker's compensation program the only recourse available for injured employees ensured that employees could not receive damages from a suit *and* compensation, and it kept the District from being subject to significant financial liability at a time when Congress was solely responsible for the District's budget.[5]

Zelaya v. Strange

The definition of the term "employer" is at the heart of the case that prompted the introduction of this bill: *Zelaya v. Strange,* 291 A.3d 704 (D.C. 2023). According to court records, Rene Zelaya was employed as a foreman at Civil Construction, LLC, which had a contract with

[1] The legislative record suggests that the impetus for the law was a study on the salaries of working women in the District. The study found that 53% of women surveyed were "working at distressingly low wages" despite having worked for years. Cost of Living in the District of Columbia. (1918). *Monthly Review of the U.S. Bureau of Labor Statistics*, 6(1), 1–12. http://www.jstor.org/stable/41829253.

[2] The committee report for H.R. 5202 notes that, in 1939, there over 26,000 industrial accidents. In 1940, that number increased to over 31,000. U.S. House of Representatives. Committee of the District of Columbia. *Creating An Industrial Accident Prevention Board in the District of Columbia and to Define Its Powers and Duties*. (H. Rpt. No. 918-77).

[3] The Federal Employees' Compensation Act was extended to District employees (except police and fire fighters) in 1919. See, 41 Stat 104, ch. 7, § 11.

[4] United States Employees' Compensation Commission*, Eighth Annual Report of the United States Employees' Compensation Commission*. (1924). pg. 1.

[5] The financial consequences of civil suits could have been significant, as data suggests that workplace accidents involving District employees were quite common. A report of the Commissioners of the District states that the Compensation Commission found that 597 employees were injured in the performance of their duties in 1929. See District of Columbia Board of Commissioners, *Report of the Commissioners of the District of Columbia For the Year Ended June 30, 1929*, pg. 15.

the District Department of Transportation (DDOT) to install sewer structures at the corner of Riggs Road and South Dakota Avenue, N.E., in 2010. During the project, Mr. Zelaya was directed by his supervisor, John Constantino, to install a catch basin beneath a high-voltage power line. When Mr. Zelaya lowered the catch basin into place with a metal chain, the chain touched the powerline and electrocuted him. As a result of the accident, Mr. Zelaya was unconscious for three weeks and had to undergo ten surgeries.

Mr. Zelaya initially filed suit against the District seeking damages for his injuries, but that case was dismissed due to Zelaya's failure to meet the notice requirements of D.C. Official Code § 12-309. After this, Mr. Zelaya amended his complaint to add Alfred Strange, an employee of DDOT, as a defendant, arguing that Mr. Strange had a "duty of care" as a matter of statute under the ISA and common law. At the time of the accident, Mr. Strange was a DDOT engineer who acted as a construction manager for the project.

Mr. Strange filed a motion for summary judgment, arguing that he did not owe a statutory, contractual, or common law duty to Mr. Zelaya and that Mr. Zelaya was contributorily negligent. The Superior Court denied his motion, concluding that the question of whether Mr. Strange owed Mr. Zelaya a duty of care was unresolved. After Mr. Strange moved for reconsideration of the order, however, the Court found that Mr. Zelaya was contributorily negligent and determined that Mr. Strange did not owe Mr. Zelaya a duty of care. Mr. Zelaya appealed the Superior Court's ruling to the D.C. Court of Appeals, which remanded the case for the trial court to engage in a "fact-intensive" determination of whether Mr. Strange had requisite "control of custody" of the worksite that would make him an employer with a duty of care under the ISA. On remand, the Superior Court concluded that Mr. Strange did not have requisite control and, therefore, could not be considered an employer under the ISA. Mr. Zelaya appealed this ruling as well. Ultimately, the Court of Appeals reversed the Superior Court decision, concluding that Mr. Strange "had the type of control over the worksite that an 'employer' would under the ISA," and remanded further proceedings to the Superior Court. To reach this conclusion, the Court read the term "employer" broadly and, in its view, consistent with prior opinions (see *Presley v. Com. Moving & Rigging, Inc.*, 25 A.3d 873, 883 (D.C. 2011); *Velásquez v. Essex Condo. Ass'n*, 759 A.2d 676, 679-80 (D.C. 2000); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1332 (D.C. 1997)), and noted that Mr. Strange oversaw all aspects of the projects as a construction manager, per the duties and responsibilities listed in DDOT's Construction Management Manual.[6]

In testimony before the Committee on Bill 25-290, Principal Deputy Solicitor General of the Office of the Attorney General, Mr. Ashwin Phatak, noted that the implications of this case could have a "broad effect," potentially impacting "all District managers who monitor District construction projects where the work is performed by private contractors."[7] It is quite common practice for the District to utilize contractors in construction projects. In fact, in fiscal years 2021 and 2022 alone, the District awarded at least ten construction projects to contractors totaling more

[6] The timeline and facts of the case presented in this report are derived from the two opinions issued by the District of Columbia Court of Appeals. Those opinions are attached to this report.
[7] Statement of Ashwin P. Phatak, Principal Deputy Solicitor General, Office of the Attorney for the District of Columbia, on Bill 25-290, July 13, 2023, pg. 3.

than $87 million.[8] For each project, District employees oversee the work to ensure that it meets appropriate standards. Therefore, this ruling creates a risk of personal liability for any employees on these projects with duties like that of Mr. Strange.

The Committee does not believe that this is a tenable situation for any employees of the District. Nor does the Committee believe that this outcome—the District government being exempt from liability under the ISA but the District's employees being at risk of incurring liability—conforms to the intent of the ISA.

Bill 25-290

The Committee Print for Bill 25-290 includes one minor substantive change based on feedback from the Office of Attorney General. In the Print, the phrase "District of Columbia, its agencies or instrumentalities, or any employee thereof" is amended to read "District of Columbia, its agencies or instrumentalities, or any employee thereof acting within the scope of the employee's official duties." This ensures that District employees are only protected under the ISA while acting pursuant to their official duties.

Conclusion

The Industrial Safety Act was approved by Congress in 1941. The law requires employers to furnish a reasonably safe working environment for employees, and employers who fail to adhere to the law may be subject to civil suits. The definition of "employer" in the law does not include the "District of Columbia or any instrumentality thereof." Despite this, the D.C. Court of Appeals in *Zelaya v. Strange* applied the definition of employer to an employee of the District who had control of a worksite. As a result, District employees who oversee construction projects may be subject to civil suits if an accident involving a contractor occurs at the construction site. This is not only inconsistent with the intent of the law but puts District employees in an untenable situation. Bill 25-290 addresses this by clarifying that individual District employees are not considered employers under the law, thereby ensuring District employees cannot be sued under the ISA. As such, the Committee recommends the Council approve the Print for Bill 25-290.

II. LEGISLATIVE CHRONOLOGY

May 12, 2023	Bill 25-290, the "Industrial Safety Act Clarification Amendment Act of 2023" is introduced by Chairman Mendelson.
May 16, 2023	Bill 25-290 is "read" at a legislative meeting; on this date the referral of the bill to the Committee of the Whole is official.
May 19, 2023	Notice of Intent to Act on Bill 25-290 is published in the *District of Columbia Register*.

[8] Data on construction contracts was obtained from the Office of Contracting and Procurements Transparency Portal. The Committee used NIGP codes 912, 913, and 914 to determine how many construction contracts were awarded during fiscal years 2021 and 2022.

June 23, 2023	Notice of a Public Hearing on Bill 25-290 is published in the *District of Columbia Register.*
July 13, 2023	The Committee of the Whole holds a public hearing on Bill 25-290.
September 19, 2023	The Committee of the Whole marks up Bill 25-290.

III. POSITION OF THE EXECUTIVE

The Executive did not provide testimony on Bill 25-290.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee did not receive any comments from Advisory Neighborhood Commissions on Bill 25-290.

V. SUMMARY OF TESTIMONY

The Committee of the Whole held a public hearing on Bill 25-290 on Thursday, July 13, 2023 at 10:00 a.m. Copies of the written testimony are attached to this report.

Ashwin Phatak, the Principal Deputy Solicitor General for the Office of the Attorney General for the District of Columbia, testified on behalf of the Office of the Attorney General. Mr. Phatak noted that the Industrial Safety Act requires employers to maintain a "reasonably safe" place of employment for employees and that employees injured due to unsafe conditions may file a tort against their employer. The Industrial Safety Act is complemented by the District of Columbia Workers' Compensation Act of 1979, however, which provides that employees entitled to compensation under the Act are barred from pursuing a separate suit against their employer. As a result of this, Mr. Phatak testified that some injured employees have successfully sued other companies involved in construction projects. However, in *Zelaya v. Strange*, the Court expanded such liability for the first time to a District employee—a DDOT construction manager. Mr. Phatak testified that this decision creates a risk of personal liability for the many mid-level District employees who monitor construction contracts, which could be seen as an end-run around the Industrial Safety Act's exclusion of the District from the definition of "employer." Thus, Mr. Phatak recommended that the Council clarify the Act's scope by amending the Act to expressly exclude from the definition of "employer" District employees acting within the scope of their employment.

VI. IMPACT ON EXISTING LAW

Bill 25-290 would amend D.C. Official § 32-802(1) to clarify that individual employees of the District are not considered "employers" under the Industrial Safety Act. The bill would be retroactively applicable to September 1, 2010.

VII. FISCAL IMPACT

VIII. RACIAL EQUITY IMPACT ASSESSMENT

IX. SECTION-BY-SECTION ANALYSIS

Section 1 — Short title.

Section 2 — Amends D.C. Official § 32-802(1) to clarify that individual employees of the District are not considered an "employer" under the Industrial Safety Act.

Section 3 — Makes the act retroactively applicable to September 1, 2010.

Section 4 — Standard fiscal impact statement provision.

Section 5 — Standard effective date provision.

X. COMMITTEE ACTION

XI. ATTACHMENTS

1. Bill 25-290 as introduced.
2. Selected Written Testimony.
3. D.C. Court of Appeals Decisions.
4. Fiscal Impact Statement for Bill 25-290.
5. Legal Sufficiency Determination for Bill 25-290.
6. Racial Equity Impact Assessment for Bill 25-290.
7. Comparative Print for Bill 25-290.
8. Committee Print for Bill 25-290.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, May 15, 2023

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Friday, May 12, 2023. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Industrial Safety Act Clarification Amendment Act of 2023", B25-0290

INTRODUCED BY: Chairman Mendelson

The Chairman is referring this legislation to Committee of the Whole.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Chairman Phil Mendelson

A BILL

_____

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

_____

To amend An Act To protect the lives and health and morals of women and minor workers in the District of Columbia, and to establish a Minimum Wage Board, and define its powers and duties, and to provide for the fixing of minimum wages for such workers, and for other purposes to clarify the definition of "employer."

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Industrial Safety Act Clarification Amendment Act of 2023".

Sec. 2. Section 2(a) of Title II of An Act To protect the lives and health and morals of women and minor workers in the District of Columbia, and to establish a Minimum Wage Board, and define its powers and duties, and to provide for the fixing of minimum wages for such workers, and for other purposes, approved October 14, 1941 (55 Stat. 738; D.C. Official Code § 32-802(1)), is amended by striking the phrase "District of Columbia or any instrumentality thereof" and inserting the phrase "District of Columbia, its agencies or instrumentalities, or any employee thereof" in its place.

Sec. 3. Applicability.

This act shall apply as of September 1, 2010.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Statement of Ashwin P. Phatak
Principal Deputy Solicitor General
Office of the Attorney General for the District of Columbia

Before the

Committee on the Whole
Chairman Phil Mendelson, Chair

On

Bill 25-290

The Industrial Safety Act Clarification Amendment Act of 2023

July 13, 2023

AT A PUBLIC HEARING

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20001

Chairman Mendelson and Members of the Committee of the Whole:

Good morning. I am Ashwin Phatak, the Principal Deputy Solicitor General for the Office of the Attorney General for the District of Columbia. I appreciate the opportunity to testify in support of Bill 25-290, the Industrial Safety Act Clarification Amendment Act of 2023.

This bill would clarify the definition of "employer" in the Industrial Safety Act. D.C. Code § 32-802(1). The Act currently provides that the term "employer" "shall not include the District of Columbia or any instrumentality thereof." The bill would make it clear that this exclusion applies to District employees acting within the scope of their employment, so that, like the District itself, they are not subject to liability under the Act.

Enacted by Congress in 1941, the Industrial Safety Act authorizes the District government to enforce the safety of construction worksites. It permits the Council to promulgate safety regulations and provides criminal penalties for violations. It also provides that "[e]very employer shall furnish a place of employment which shall be reasonably safe for employees." D.C. Code § 32-808(a). Employees injured by unsafe conditions in their place of employment may file an action in tort against their "employers," who are defined to include anyone "having control or custody of any place of employment or of any employee." D.C. Code § 32-802(1).

The Industrial Safety Act is complemented by the Workers' Compensation Act, enacted by the Council in 1980, which provides that "every employer subject

to the Act shall be liable for compensation for injury or death without regard to fault." D.C. Code § 32-1503(b). In exchange for no-fault liability, the Workers' Compensation Act provides that it is an injured employee's exclusive remedy, and it thus bars a separate suit against the employer. D.C. Code § 32-1504.

In recent years, injured employees, barred from suing their employers because they are eligible for workers' compensation under the Workers' Compensation Act, have sued other companies involved in construction projects. These employees have argued that these companies, although not their employers for workers' compensation or any other purpose, were their "employers" under the Industrial Safety Act under the broad definition described above. With some success, they sought damages based on the general obligation in the Act that "employers" furnish a reasonably safe place of employment.

Earlier this year, however, in *Zelaya v. Strange*, the D.C. Court of Appeals expanded such liability for the first time to a District employee. The Court held that a District Department of Transportation (DDOT) construction manager for a street rehabilitation project could be personally liable as an "employer" under the Industrial Safety Act for the injuries to an employee of the private contractor performing the work. The contractor's employee was injured when he instructed his crew to use a boom truck to install a catch basin and the boom touched an overhead power line. The contractor provided its employee workers' compensation for his

injuries. Nonetheless, the Court of Appeals held that the DDOT manager can be liable under the Industrial Safety Act for those same injuries—even though the Act expressly excludes "the District of Columbia or any instrumentality thereof" from liability.

This extension of liability under the Act to District employees would have broad effect if accepted in subsequent cases, with the potential to include all District managers who monitor District construction projects where the work is performed by private contractors. In holding that the DDOT construction manager was an "employer" of the private contractor's employees under the Industrial Safety Act, the *Zelaya* Court relied on his general authority over the contract and responsibility to bring safety violations to the contractor's attention. However, our understanding is that these responsibilities are typical of many District construction managers. Additionally, while acknowledging that the District's manager did not own the worksite, the Court noted that "the District, his ultimate employer, did." The Court also noted that the District granted its manager responsibility and put him in charge of monitoring. Again, the same is true of most District managers for street renovation and other capital projects.

In short, the Court of Appeals' decision creates a risk of personal liability for the many mid-level District employees who monitor construction contracts. The Court, while expressing concern during oral argument about an "end-run" around

the Industrial Safety Act's exclusion of the District from the definition of "employer," effectively allowed the contractor's employee to do just that.

This is a result that we do not believe the drafters of the Act intended. It is also, as far as we are aware, unprecedented in the Act's 80-year history. Clarifying that the exclusion of "the District of Columbia or any instrumentality thereof" from the definition of "employer" was always intended to extend to District employees acting within the scope of their employment would assure the many District employees who manage District construction contracts that they are not subject, simply by virtue of their position with the District, to personal liability for injuries to a contractor's employees.

Clarifying the Act's scope would also protect the District and its employees from financial exposure in the form of judgments that we believe the drafters never intended to authorize. Finally, the Office of the Attorney General typically defends District employees sued personally for actions taken within the scope of their employment by employees of companies with construction contracts with the District. This amendment would ensure that our Office need not expend our limited resources litigating ISA claims against District employees.

For all these reasons, the Office of the Attorney General recommends that the Committee report favorably on Bill 25-290, the Industrial Safety Act Clarification Amendment Act of 2023. I would be pleased to answer any questions.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-411

RENE ZELAYA, APPELLANT,

V.

ALFRED STRANGE, ET AL., APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CAB-3299-13)

(Hon. John M. Campbell, Motions Judge)

(Argued October 25, 2018 Decided February 5, 2021)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and BECKWITH and MCLEESE, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Rene Zelaya appeals from two Superior Court orders granting the motions for summary judgment filed by appellees Alfred Strange and the District of Columbia Water and Sewer Authority (DC Water). The trial court determined that the appellees were not liable for injuries that Mr. Zelaya sustained when he was electrocuted while installing sewer equipment because DC Water owed Mr. Zelaya no duty of care and because Mr. Zelaya was contributorily negligent. We affirm in part and reverse in part.

I.

The following facts come from witness depositions and other documents in the record. In 2010, Mr. Zelaya was employed as a foreman for Civil Construction, LLC. Civil Construction contracted with the District Department of Transportation (DDOT) to install sewer structures at the corner of Riggs Road and South Dakota Avenue NE. Mr. Strange, a DDOT engineer, and Henry Bascom, a DC Water

inspector, were responsible for supervising this project.

Mr. Zelaya's supervisor at Civil Construction, John Constantino, directed Mr. Zelaya to install a catch basin beneath a high-voltage power line at the project site and told him the installation had to be completed that day. Civil Construction already had a boom truck on the worksite to install the catch basin.

Mr. Zelaya called Mr. Constantino and told him that installing the catch basin below the power line with the boom truck was too dangerous. Mr. Constantino recommended that Mr. Zelaya use an excavator rather than the boom truck because of this danger, but the excavator was unavailable. Mr. Zelaya testified that Mr. Constantino pressured him to finish the installation and that he believed he had no choice but to do so or lose his job. According to several witnesses, Mr. Strange and Mr. Bascom knew about the potential danger on the worksite and did not stop the installation.

As Mr. Zelaya lowered the catch basin into place with a metal chain, the chain touched the high-voltage power line and electrocuted him. A DC Water incident report stated that Mr. Strange and a boom-truck operator called 911. Emergency workers placed Mr. Zelaya on a stretcher and took him by ambulance to Washington Hospital Center, where doctors determined he had suffered "massive overwhelming electrical injuries." Mr. Zelaya was unconscious for twenty-one days, during which time he underwent a series of skin graphs and muscle removals. His skull and chest had been severely damaged. When he regained consciousness, doctors informed him that his right foot had been amputated and they were prepared to amputate his right arm, though ultimately Mr. Zelaya did not lose his arm after undergoing two surgeries to replace damaged nerves and tendons. In total, Mr. Zelaya had about ten surgeries, including the eventual amputation of the rest of his right leg. At the time of his testimony, Mr. Zelaya still needed more surgeries, including the reconstruction of his right ear, and he expected to experience ongoing medical issues as a result of the accident.

Mr. Zelaya initially filed a lawsuit against the District of Columbia seeking damages for his injuries. This court affirmed the dismissal of that case because Mr. Zelaya failed to comply with the notice requirement of D.C. Code § 12-309 (2012 Repl.) for plaintiffs who sue the District of Columbia.

Mr. Zelaya amended his complaint to add Mr. Strange and DC Water—Mr. Bascom's employer—as defendants. Mr. Strange filed a motion for summary judgment and argued that he did not owe a statutory, contractual, or common law duty to Mr. Zelaya, that Mr. Zelaya assumed the risk of his injuries, and that Mr.

Zelaya was contributorily negligent. DC Water filed a similar motion.

In 2015, the trial court granted DC Water's motion for summary judgment on the ground that DC Water owed no statutory or common law duty of care to Mr. Zelaya. As to Mr. Strange, the trial court denied his motion for summary judgment in part, concluding that there remained an unresolved issue of fact as to whether Mr. Strange owed Mr. Zelaya a duty of care under contract[1] or the common law, and finding that Mr. Strange had not met his burden to show that Mr. Zelaya was contributorily negligent as a matter of law. Mr. Strange then moved for reconsideration of the 2015 order, and the court found that Mr. Zelaya *was* contributorily negligent as a matter of law and granted that motion.

II.

Mr. Zelaya appeals the trial court's orders granting summary judgment to both appellees. He argues that Mr. Strange and DC Water owed him a statutory duty to provide a safe work environment under the District of Columbia Industrial Safety Act (ISA), that Mr. Strange owed him a duty of care because he was a construction manager who had a special relationship with Mr. Zelaya, and that Mr. Strange and DC Water owed him a common law duty of care. Mr. Zelaya also challenges the trial court's determination that he was contributorily negligent as a matter of law and thus barred from recovery regardless of whether Mr. Strange owed him a duty of care.

We review a trial court's grant of motions for summary judgment *de novo*. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). We therefore use the same standard applied by the trial court, viewing the facts in the light most favorable to Mr. Zelaya and giving no deference to the trial court's resolution of questions of law. *See Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001). To establish a claim for negligence, the plaintiff "must show: (1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011) (en banc). Even if these elements are met, a plaintiff may be precluded from recovery if the defendant establishes that the plaintiff was contributorily negligent. *Dennis v. Jones*, 928 A.2d 672, 676

[1] The parties do not dispute that DC Water owed Mr. Zelaya no contractual duty. There was no contract between DC Water and Civil Construction.

(D.C. 2007).

A. Duty Owed by Appellees

We turn first to Mr. Zelaya's challenge to the trial court's determination that as a matter of law, neither DC Water nor Mr. Strange owed him a duty of care.[2]

1. Appellees' Duties Under the ISA

The ISA creates a statutory duty of care that requires employers to provide a safe workplace. D.C. Code § 32-808(a) (2019 Repl.) (D.C. Code § 36-228(a) (1993 Repl.));[3] *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 883 (D.C. 2011). The statute defines employers to include "persons having control or custody of any place of employment or of any employee." D.C. Code § 32-802(1). Though the term is generally meant to be read broadly, *Presley*, 25 A.3d at 884, its definition explicitly excludes "the District of Columbia or any instrumentality thereof." D.C. Code § 32-802(1). Although the ISA does not define "instrumentality," several sections of the D.C. Code classify DC Water as an instrumentality. *See e.g.*, D.C. Code §§ 2-223.01(5) (2012 Repl.), 34-2702(b) (2019 Repl.).[4] Because it is an "instrumentality" of the District of Columbia, DC

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[2] The trial court's order granting summary judgment to Mr. Strange on reconsideration relied on the independent ground that Mr. Zelaya was contributorily negligent as a matter of law, and the order thus did not revisit the parties' arguments regarding the duties of care that Mr. Strange and DC Water owed Mr. Zelaya.

[3] The text of D.C. Code §§ 32-801–32-812 (sections that involve the ISA) appears in the corresponding sections in §§ 36-228–36-232 (1993 Repl.), where these provisions were listed before recodification. Some code volumes both before and after the 1993 replacement edition incorrectly list these sections as repealed. *See* D.C. Code §§ 36-228–36-232 (1989 Repl.); D.C. Code §§ 32-801–32-812 (2019 Repl.). These inconsistencies may relate to a self-executing scheme that could repeal subchapter II of Chapter 2 of Title 36 (subchapter I of Chapter 8 of Title 32 following recodification) after approval of a new safety plan. D.C. Code § 36-1224(a) (1993 Repl.); D.C. Code § 32-1124 (2019. Repl.). Because this plan has not yet been approved, §§ 32-801–32-812 have not been repealed.

[4] Mr. Zelaya argues that DC Water is not an instrumentality of the District

Water is not an employer under the ISA, and because it is not an employer, it did not owe Mr. Zelaya a statutory duty of care under the ISA.

There is, however, a disputed issue of material fact as to whether Mr. Strange is subject to the standard of care required by the ISA. As an initial matter, contrary to the trial court's determination that Mr. Strange was an instrumentality of the District of Columbia because his authority "stem[med] directly from his employment with DDOT," employees of the District of Columbia are not instrumentalities of the District of Columbia. This is made clear by the fact that sections of the code that do define instrumentality specifically exclude employees from that definition. For example, language in a statute that defines terms pertaining to whistleblower protections defines employees separately from instrumentalities and makes clear that the term "instrumentality" refers to entities and not people. D.C. Code § 2-223.01 ("'Employee' means: any person who is a former or current employee of or an applicant for employment by an instrumentality of the District . . . 'Instrumentality' means a quasi-governmental entity that operates in part with District funds . . . ."). This conclusion is bolstered by the D.C. Code's repeated use of the term "instrumentality" to refer to separate corporate entities where the use of the term "employees" in the same provision would be superfluous if instrumentalities were defined to include employees. *See, e.g.*, D.C. Code § 2-301.04(a) (2001)[5] (stating that "this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government"); D.C. Code § 6-1061.02(e)(1) (2018 Repl.) (stating that a land trust must offer priority status to "[e]mployees of the District of Columbia and its instrumentalities"); D.C. Code § 47-4471(a) (2015 Repl.) (defining how taxes should be levied against employees of the District of Columbia and, separately,

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because its enabling statute does not define it as an instrumentality like other instrumentalities' enabling statutes and DC Water lacks certain indicia of instrumentality. For example, administrative decisions have treated DC Water as a public-sector employer under the District's public-sector workers'-compensation statute that is supposed to exclude instrumentalities of the District. While the District's statutes are far from clear—and at times contradictory—in defining instrumentalities, statutes within the code that treat DC Water as an instrumentality are strong evidence that it is one.

[5] This provision was repealed effective April 8, 2011. D.C. Law 18-371, § 1201(a).

agencies or instrumentalities of the District of Columbia). Thus, Mr. Strange is not an "instrumentality" of the District of Columbia and he is not exempt from responsibility under the ISA for that reason.

Because 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). This analysis is fact intensive and involves fine distinctions among close cases—*see Presley*, 25 A.3d at 883–85 (distinguishing *Presley* from *Traudt v. 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"). We therefore reverse the court's order to the extent it concludes that Mr. Strange was not subject to the standard of care proscribed by the ISA and remand to allow the court to decide in the first instance whether Mr. Strange was an employer under the ISA.

2. Duty of Care Under Contract and Common Law

With respect to his contract and common law claims, Mr. Zelaya argues that Mr. Strange owed him a contractual duty of care under the Construction Management Manual that created a special relationship and that both appellees owed him a duty of care as a third party under the Restatement (Second) of Torts § 324A (Am. Law Inst. 2019).

a. Mr. Strange's Alleged Contractual Duty of Care

Both Mr. Zelaya and Mr. Strange rely on the same paragraph in the Construction Management Manual to support their respective duty-of-care arguments. That paragraph, which is on page three of the manual, provides that 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. 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.

To bolster his argument that Mr. Strange owed him a contractual duty of care, Mr. Zelaya relies on language that required the construction manager to report dangerous situations and on the construction manager's power to stop work. For his part, Mr. Strange points to the clause stating that the construction manager is "not responsible for the safety of the contractor's work force and methods of construction."

As the project engineer, Mr. Strange assumed the role of the construction manager under the Construction Management Manual. Although 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. The 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. 25 A.3d at 878–79. In that case, we affirmed a trial court's decision that the contractor did not owe a contractual or statutory (ISA) duty of care to a construction worker, who had fallen from a cooling tower and sued a crane operator and a consultant charged with monitoring the project. *Id.* at 890, 898. *Presley* stated that "policy considerations of fairness counsel against imposing a duty on [a party] where doing so would effectively restructure the contractual relationships and obligations undertaken by the parties." *Id.* at 890. Because the contract at issue here excluded the construction manager from responsibility for contract worker safety, we likewise decline to find that Mr. Strange owed Mr. Zelaya a duty under contract law.[6]

b. Appellees' Alleged Third-Party Duties of Care

Mr. Zelaya argues that both Mr. Strange and DC Water owed him a common law duty as a third party under the Restatement (Second) of Torts § 324A, which

[6] As Mr. Strange did not owe Mr. Zelaya a duty under contract, we do not address whether the Construction Management Manual was incorporated into the contract between the District of Columbia and Civil Construction or whether Mr. Zelaya was a party to that contract.

provides that

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

"In the absence of contractual privity with an unrelated third party, whether a party should have foreseen that its contractual undertaking was necessary for the protection of the third party is important." *Presley*, 25 A.3d at 888 (citing *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1098–99 (D.C. 1994) (concluding that a plumber who contracted with a building owner to repair a broken pipe was under no duty to warn the management company or the public about a dangerous condition—an ice patch that formed in a nearby alley—that was caused by the broken pipe)).

Mr. Zelaya cites *Long v. District of Columbia*, 820 F.2d 409, 419 (D.C. Cir 1987), to support his argument that DC Water and Mr. Strange owed him a third-party duty because their contractual undertaking was necessary for his protection. In *Long*, the D.C. Circuit found an electric-power company liable as a third party under § 324A because it failed to use reasonable care to fix malfunctioning traffic lights. 820 F.2d at 419. By contracting with the District to fix traffic lights, the company assumed contractual duties to the general public. *Id.* at 418. *Long* is distinguishable from this case, however, in that the power company's exercise of reasonable care was "necessary" under § 324A to the safety of motorists because it had "full contractual responsibility to repair [malfunctioning traffic signals]." *Id.* at 419.

Here, Mr. Strange and DC Water did not take on full contractual

responsibility—or any contractual responsibility—for Mr. Zelaya's safety. 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. 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 . . . ." Mr. Strange's and DC Water's power to stop work on the project, as provided for 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. 25 A.3d at 879. As in *Presley*, the appellees' power to stop work in this case did not create a third-party duty under § 324A. *Id.* at 889–91. 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.

B. Contributory Negligence

Mr. Zelaya makes two arguments regarding the trial court's contributory negligence analysis in this case. First, Mr. Zelaya argues that the judicially developed defense of contributory negligence is unavailable in cases where the plaintiff seeks to establish negligence based on the violation of certain workplace-safety statutes, such as the Occupational Safety and Health Act and the ISA. Second, Mr. Zelaya contends that the contributory negligence analysis asks whether the plaintiff acted reasonably. This reasonableness analysis, he argues, focuses on the plaintiff and takes into account the circumstances surrounding the plaintiff's actions—including, in this case, evidence that Mr. Zelaya was following a supervisor's orders and that he feared that he would lose his job if he did not follow those orders.

In its 2015 order, the trial court declined to find Mr. Zelaya contributorily negligent as a matter of law. In that order, the trial court recognized an exception to contributory negligence when an employee is carrying out a boss's specific order. The court relied on *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206 (9th Cir. 1994), and *Williams v. Brasea Inc.*, 497 F.2d 67 (5th Cir. 1974). The court said it was a close call whether Mr. Zelaya was acting reasonably, but given the possibility that Mr. Zelaya was following his superior's specific orders, the court could not conclude that Mr. Zelaya was contributorily negligent as a matter of law.

Then in 2017, the trial court walked back its reasoning from the 2015 order and determined that no direct-order exception to contributory negligence had been

recognized in this jurisdiction, and the cases on which it relied in the 2015 order—*Jenkins* and *Williams*—were distinguishable as they involved federal statutes and had materially different facts. The trial court concluded that in the absence of any equitable exception, Mr. Zelaya was contributorily negligent as a matter of law.

"Contributory negligence is found where the plaintiff, by encountering the risk created by the defendant's breach of duty, departed from an objective standard of reasonable care." *Dennis*, 928 A.2d at 677 (citation omitted). Unless an exception to the contributory-negligence doctrine applies,[7] a plaintiff's contributory negligence will act as a complete bar to their recovery in a negligence action. *See id*. at 676. "Ordinarily, questions of contributory negligence must be decided by the trier of fact," and "[o]nly in the exceptional case is evidence so clear and unambiguous that contributory negligence should be found as a matter of law." *Poyner v. Loftus*, 694 A.2d 69, 71 (D.C. 1997) (cleaned up). "A party asserting the defense of contributory negligence is required to establish, by a preponderance of the evidence, that the plaintiff failed to exercise reasonable care." *Id.* (citation omitted). In order to succeed on a motion for summary judgment, Mr. Strange must present evidence that, when viewed in the light most favorable to Mr. Zelaya, establishes that Mr. Zelaya was contributorily negligent "so clearly that no other inference can reasonably be drawn." *Id.*

At the outset, Mr. Zelaya argues that if Mr. Strange is an employer under the ISA, then he is barred from arguing the defense of contributory negligence, and if Mr. Strange wants to bring a defense based on Mr. Zelaya's conduct, he would have to show that Mr. Zelaya acted with willful, wanton, or reckless disregard for his own safety. Mr. Zelaya is correct. In *Martin v. George Hyman Constr. Co.*, this court held "that the contributory negligence of a wage earner does not bar recovery based on an employer's breach of the statutory duty to provide reasonably safe working conditions for wage earners." 395 A.2d 63, 71 (D.C. 1978). In *Martin*, a wage earner employed by a subcontractor brought a claim under the ISA against a general contractor regarding an incident at a construction site overseen by the general contractor. *Id.* at 65. The *Martin* court found that Mr. Martin had a potentially meritorious claim under the ISA that the general contractor breached his duty to provide reasonably safe working conditions, and therefore, the possible

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[7] *See, e.g.*, *District of Columbia v. Huysman*, 650 A.2d 1323, 1326 (D.C. 1994) ("The last clear chance doctrine enables a plaintiff to recover despite his contributory negligence.") (citation omitted).

contributory negligence of Mr. Martin could not bar recovery. *Id.* at 70–71. The *Martin* court noted that "[t]he nearly universal rule is that neither contributory negligence nor assumption of risk bars recovery for breach of a duty imposed by statute, ordinance, or regulation if the purpose of the statute, ordinance, or regulation would be defeated by application of either defense." *Id.* at 68 (citing Restatement (Second) of Torts §§ 483, 496F (1965)). The *Martin* court reasoned that the duty under the ISA to maintain "reasonably safe" conditions of employment is "broader than its common law counterpart because it is incumbent not only on 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.'" *Id.* at 70. Moreover, the term "reasonably safe" in the ISA "has been defined broadly." *Id.* "The language of the Code itself admonishes us that the term 'shall not be given restrictive interpretation so as to exclude any mitigation or prevention of a specific danger.'" *Id.* (quoting D.C. Code § 36-432(c) (1973)).[8] The *Martin* court concluded that to hold that "a wage earner's contributory negligence is a defense for the employer would impermissibly ignore the congressionally imposed duty" and "[t]his court is not free to disregard the command of Congress nor to frustrate its unequivocal intent." *Id*. at 71. It was immaterial to the analysis that Mr. Martin was an employee of the subcontractor rather than the general contractor. *See id.* at 68–71. Therefore, 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. Instead, Mr. Strange must show that Mr. Zelaya acted with willful, wanton, or reckless disregard for his own safety. *Id.* at 71.

In the alternative, Mr. Zelaya argues that regardless of the origin of Mr. Strange's duty (whether statutory, contractual, or at common law), summary judgment is inappropriate in this case because the relevant question is whether Mr. Zelaya's conduct was reasonable under the circumstances. Mr. Zelaya argues that the trial court should have considered relevant circumstances including, but not limited to, whether Mr. Zelaya was following specific orders from a superior, and whether Mr. Zelaya believed he risked losing his job if he refused to continue with the work. We agree that whether Mr. Zelaya was following orders and whether Mr. Zelaya's job was at risk if he refused to work are relevant factors in the

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[8] D.C. Code § 36-432(c) (1973) is now codified at § 32-802(c) (2019 Repl.), but the language remains identical.

reasonableness inquiry.[9] A choice that looks dangerous in isolation could be reasonable if it is compelled by some sort of motivation or threat. In *United States Electric Lighting Co. v. Sullivan*, for example, our predecessor court held that "[i]t is reasonable and just to consider the conditions, and the force of the obligation of the service in which the [plaintiff] was engaged at the time, as influencing his conduct." 22 App. D.C. 115, 132–33 (D.C. Cir. 1903).[10] In *Sullivan*, a bartender was electrocuted by a wire in a cellar at the bar he was working in, just two hours after a different person was electrocuted and killed in the same cellar. *Id.* at 118–19. The *Sullivan* court held that it was inappropriate to find the bartender contributorily negligent as a matter of law because although the bartender went into the cellar with the knowledge that a man had just been electrocuted in the cellar, it "was important to the business of the employer that the [cellar] should be visited" and the manager on duty at the time "did not consider the acts as necessarily one of imminent danger." *Id.* at 133–34.

We do not determine whether Mr. Zelaya's fear of job loss or following of orders made his conduct reasonable and thus not contributorily negligent. That is a question for the jury. We do recognize, however, that Mr. Zelaya's fear and the question whether he was following orders are relevant circumstances that could make his conduct more reasonable. Ultimately, whether Mr. Zelaya's conduct was reasonable may be a close question for the jury. Yet we cannot agree that, given these circumstances, no reasonable jury would be able to find Mr. Zelaya acted reasonably. Therefore, the trial court erred when it granted summary judgment based on a finding of contributory negligence.

III.

For the foregoing reasons, we reverse the trial court's ruling that Mr. Zelaya was contributorily negligent and remand for the trial court to determine whether Mr. Strange owed Mr. Zelaya a duty of care under the ISA. We affirm the trial

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[9] Likewise, these circumstances are relevant to whether his conduct was reckless, willful, or wanton.

[10] "[D]ecisions of the D.C. Circuit rendered prior to February 1971, as well as the decisions of this court 'constitute the case law of the District of Columbia' and can be overruled only by this court en banc." *Hernandez v. Banks*, 65 A.3d 59 n.2 (D.C. 2013) (quoting *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C.1971)).

court's grant of DC Water's summary judgment motion, however, and further conclude that Mr. Strange owed Mr. Zelaya no common law or contractual duty of care.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies sent to:

Honorable John M. Campbell

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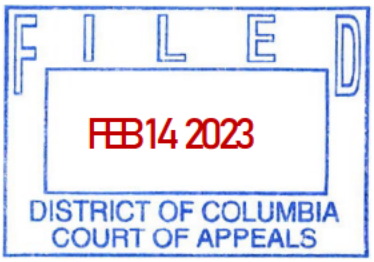
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-CV-0564



RENE ZELAYA, APPELLANT,

v.

ALFRED T. STRANGE, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(2013-CA-003299-B)

(Hon. Jason Park, Superior Court Judge)

(Argued November 30, 2022 Decided February 14, 2023)

Before BLACKBURNE-RIGSBY, *Chief Judge*, EASTERLY, *Associate Judge*, and GLICKMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Rene Zelaya was electrocuted and severely injured while working as a foreman on a project to rehabilitate the intersection of Riggs Road and South Dakota Avenue NE. Mr. Zelaya was employed by Civil Construction, a contractor for the D.C. Department of Transportation. Appellee Alfred Strange, a mid-level DDOT employee represented in this appeal by the District of Columbia, worked as the project engineer and construction manager for the Riggs Road Project and was on site at the time of the accident. Mr. Zelaya sued Mr. Strange,[1] seeking to argue that Mr. Strange owed him a duty of care as an

[1] Mr. Zelaya also unsuccessfully sued the District and D.C. Water and Sewer Authority (now D.C. Water). The Superior Court dismissed his claim against the District for lack of presuit notice under D.C. Code § 12-309 and his claim against D.C. Water on the ground that it did not owe him a duty of care; this court affirmed both rulings. *See Zelaya v. D.C. Mun. Corp.*, No. 12-CV-1767, Mem. Op. & J. (D.C. Dec. 27, 2013); *Zelaya v. Strange*, No. 17-CV-411, Mem. Op. & J. (D.C. Feb. 5, 2021).

"employer" under the Industrial Safety Act, D.C. Code § 32-808.

In a previous appeal, *Zelaya v. Strange*, No. 17-CV-411 (D.C. Feb. 5, 2021) ("*Zelaya I*"), this court reviewed a ruling by the Superior Court granting Mr. Strange summary judgment on the ground that he was excluded as a matter of law from the ISA's definition of "employer," which provides that the term does "not include the District of Columbia or any instrumentality thereof." D.C. Code § 32-802(1). We remanded the case for the trial court to engage in the "fact intensive" determination whether Mr. Strange had the requisite "control or custody" of Mr. Zelaya's worksite so as to be considered an employer with a duty of care to Mr. Zelaya under the ISA. Mr. Zelaya now asks us to review the trial court's summary judgment ruling on remand in which the court, based on the record presented, ruled Mr. Strange had not exercised the requisite custody or control to be an employer under the ISA. Our review of this summary judgment ruling and the embedded legal conclusion regarding Mr. Strange's employer status is de novo. *Baker v. Chrissy Condo. Ass'n*, 251 A.3d 301, 305 (D.C. 2021); *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). We again conclude that summary judgment was erroneously granted and reverse.[2]

The District of Columbia Industrial Safety Act requires "[e]very employer" to:

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[2] Following oral argument on November 30, 2022, Mr. Strange filed a letter pursuant to D.C. App. R. 28(k) in which he requested permission to submit a supplemental brief. Specifically, Mr. Strange sought to address whether he, as an agent of the District, is excluded as a matter of law from the definition of an employer under the ISA, a question that was raised by this court at oral argument. We decline to grant that request. Upon our review of the briefing in *Zelaya I*, it appears Mr. Strange raised this issue when he defended the trial court's first summary judgment ruling that he was not an employer under the statute. After another division of this court held that Mr. Strange was not an instrumentality and directed remand, however, Mr. Strange did not seek rehearing on the ground that his defense of the trial court's ruling had been broader and had rested not only on Mr. Strange's potential status as an instrumentality of the District but also on his status as an agent of the District. Instead Mr. Strange returned to the Superior Court to argue simply that he could not be deemed an employer under the facts of this case. Given this sequence of events, we conclude that Mr. Strange has waived this argument and limit our review to the arguments the parties made on remand and in their briefs in this appeal.

> furnish a place of employment which shall be reasonably safe for employees, . . . furnish and use safety devices and safeguards, and . . . 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.

D.C. Code § 32-808(a). The purpose of this legislation is "to foster, promote, and develop the safety of wage earners of the District of Columbia in relation to their working conditions." *Id.* § 32-801; *see also* H.R. Rep. No. 77-918, at 1 (1941); S. Rep. No. 77-675, at 4 (1941) (citing the "appalling numbers" of employees injured in workplace accidents and noting that "[t]he majority of the fatal accidents happened in construction work"). First enacted in 1918 to create a Board to establish minimum wage protections for women and minors, including the imposition of criminal penalties for noncompliance, the Act was amended in 1941 to promote industrial safety as well; it did so by authorizing the Board to promulgate safety regulations and authorized the imposition of criminal penalties on "employers" who failed to meet industrial safety standards. *See* D.C. Code § 32-812 (making violations of the ISA a misdemeanor). Under the ISA, an employer is any "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." *Id.* § 32-802(1).

In recent years, putative plaintiffs like Mr. Zelaya have looked to the ISA as providing a source of a duty of care in tort actions. *See, e.g.*, *Presley v. Com. Moving & Rigging, Inc.*, 25 A.3d 873, 883 (D.C. 2011); *Velásquez v. Essex Condo. Ass'n*, 759 A.2d 676, 679-80 (D.C. 2000); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1332 (D.C. 1997). In this context, this court has considered whether the defendant is an "employer" under the statute as a threshold question before considering the secondary and tertiary questions of what the scope of the duty of care was and whether it was breached. *See Velásquez*, 759 A.2d at 681.

Our court has made clear that the expansive plain-text statutory definition of employer "is to be read broadly," *Presley*, 25 A.3d at 884, in light of the statute's "broad remedial purposes" and without limitation to the common-law understanding of that term, *Velásquez*, 759 A.2d at 680-81. More particularly, our cases reflect a functional, totality-of-the-circumstances assessment to determine if a defendant is an employer by virtue of their custody or control over the workplace (which itself is broadly defined, *see* D.C. Code § 32-802(4) (generally defining "[p]lace of employment" to "mean[] any place where employment is carried on")).

Thus, in *Traudt*, this court held that PEPCO was an employer under the ISA after a contractor's employee was injured while removing asbestos from energized cable wires because PEPCO owned the worksite and the electric cables; reserved the right to perform other work on the site and adjust the contractor's schedule to accommodate that work; mandated compliance with its own safety rules; and 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." 692 A.2d at 1331.

Similarly in *Velásquez*, this court held that a condominium association and its property manager were both employers for ISA purposes after a contractor's employee injured himself on the worksite. 759 A.2d at 680. In support of this determination, we noted that the association owned the building where the work was performed and had reserved the right to "perform [other] construction [work] or operations related to the Project." *Id.* at 678-79. Additionally, the condominium association had authority to promulgate safety rules to which the contractor's employees were bound and to monitor and inspect the contractor's work and equipment. *Id.*[3]

By contrast in *Presley*, this court held that a consultant to a construction project was not an employer under the ISA, where the consultant did not own the worksite; had "at most[] limited and infrequent interactions" with the general contractor; was not obligated under its contract to maintain a constant presence on the worksite; and was not at the worksite when the accident at issue occurred. 25 A.3d at 885-86, 890-91. Further, the consultant did not have the power to promulgate safety rules and was "not responsible for performing periodic and exhaustive surveys of the work environment in regard to safety." *Id.* at 885-86. Against this backdrop, the fact that the consultant had some authority both to monitor and report safety violations to a third party who would then pass them on to the general contractor and "to 'stop work' for imminent danger situations observed," and "might have 'intervened' . . . to remind [workers] of safety requirements," was insufficient to establish control over the worksite for ISA purposes. *Id.* at 880, 886-

[3] These reasons seemingly only applied to the condominium association, Essex; nevertheless we expressly held that "Essex *and* Zalco [the property manager] are employers under the Act," 759 A.2d at 680 (emphasis added), perhaps because Zalco acted as Essex's agent, although the opinion only references that fact in its discussion of the duty of care, *id*. at 681, not in its analysis of employer status.

87.

We conclude that this case is more akin to *Traudt* and *Velasquez* than to *Presley*. Granted, Mr. Strange did not personally own the worksite, but the District, his ultimate employer, did. Further, the evidence established that he was placed "in charge" and made "responsible" for the rehabilitation project at that location through the District's agency, DDOT, as he acknowledged at his deposition. *Cf*. *Presley*, 25 A.3d at 889-90 (contrasting the "limited duties of a contract compliance consultant" deemed not to be an employer in that case with "the more extensive duties of . . . a general construction manager"). The DDOT Construction Management Manual, which "presents DDOT's procedures and standards for managing . . . construction projects" and "describes the duties involved," confirms Mr. Strange's obligation as construction manager to oversee all aspects of the project—either directly or through supervision of others.

Specifically as to the safety of the worksite, Mr. Strange had conceded, documented responsibilities. While he himself did not promulgate safety rules for the project, as a DDOT construction manager Mr. Strange had the obligation under the Construction Management Manual to attend progress meetings with Civil Construction (as well as the authority to call such meetings), at which "[s]afety should be an agenda item" for discussion. He and representatives from Civil Construction were supposed to review inspection and (if any) accident reports and "determine if additions or amendments to the Contractor's Safety Plan need[ed] to be instituted." Apart from setting safety expectations, according to Mr. Strange's own testimony on-site monitoring was part of his job; he was responsible for reporting safety concerns, could stop work, and had stopped work for safety violations in the past. Again, the DDOT Construction Management Manual, which Mr. Strange acknowledged set forth his professional obligations as a DDOT construction manager, confirms Mr. Strange's monitoring obligations and provides that a construction manager like Mr. Strange is "responsible for monitoring the Contractor for conformance with contractual safety requirements" and for "bring[ing] all observed violations to the attention of the Contractor." Additionally, under the Construction Management Manual Mr. Strange was obligated *both* 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 or substantial property damage," much like the "employer" in *Traudt*, 692 A.2d at 1331 (reserving the right to stop work at

any time, inspect the workplace, and mandate compliance with its safety rules).[4] Lastly, Mr. Strange was on the site the day that Mr. Zelaya was injured, and the trial court found that "Mr. Zelaya [had] informed Mr. Strange of the potential danger" of using the equipment provided by the contractor, indicating that Mr. Zelaya understood that Mr. Strange had the power to intervene to address the situation.[5]

Mr. Strange highlights that the DDOT Construction Management Manual provides that "*[i]n general*, the construction Contractor is solely responsible for safety of the work" (emphasis added), and that a DDOT construction manager like Mr. Strange is "not responsible for the safety of the contractor's work force and methods of construction." But the former statement does not relieve Mr. Strange of his expressly enumerated safety responsibilities, see *supra*, and the part of the latter statement absolving the construction manager from responsibility for the safety of the contractor's work force seems to speak to Mr. Strange's lack of custody and control over Mr. Zelaya, which does not defeat his argument that Mr. Strange had custody or control of his place of employment. *See* D.C. Code § 32-802(1) (recognizing either as a basis for identifying a person or entity as an "employer").[6] Although the balance of this statement purporting to carve out "methods of construction" from the DDOT construction manager's responsibilities may provide some support for an argument that Mr. Strange is not an employer under the ISA, we conclude it is outweighed by the other evidence supporting this determination. *See Velásquez*, 759 A.2d at 678, 680 (concluding similar contractual language

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[4] While the trial court noted that "monitoring the job site was one of Mr. Strange's job duties on the Project," it highlighted the fact that "two other DDOT employees were responsible for completing daily inspection forms, which Mr. Strange did not sign or approve." But this finding (which Mr. Zelaya challenges on other grounds which we need not address) misses the point that, even if Mr. Strange did not himself sign off on the daily reports, he supervised the employees who did. As the Construction Management Manual provides, a DDOT construction manager is "responsible for the supervision of field inspection staff" and among other things must "ensure that [they] are familiar with . . . safety requirements."

[5] The trial court found that Mr. Strange instead "told Mr. Zelaya to contact Mr. Constantino [Mr. Zelaya's boss at Civil Construction]."

[6] Although, after examining these provisions in *Zelaya I*, we concluded that Mr. Strange did not hold a *contractual* duty of care to Mr. Zelaya under the manual, that determination does not dictate a conclusion that Mr. Strange is not an employer under the ISA.

making the contractor "solely responsible for . . . construction means, methods, [and] techniques" did not defeat a determination that the defendant was an employer under the ISA).

Based on the foregoing, we hold that Mr. Strange had the type of control over the worksite that an "employer" would under the ISA. Accordingly, we reverse the trial court's order granting summary judgment to Mr. Strange on the basis that he was not an employer within the meaning of the ISA and we remand for further proceedings consistent with this opinion.[7]

So ordered.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

[7] Mr. Strange asks us to affirm on the alternate ground that Mr. Zelaya cannot receive double recovery from an employer under the Workers' Compensation Act and in a tort action. This argument is unpreserved and without merit. The ISA and the Workers' Compensation Act are distinct statutory schemes; thus, an individual's status as an "employer" under the former does not dictate their status as such under the latter. *Traudt*, 692 A.2d at 1333 n.7 (citing *Meiggs v. Associated Builders, Inc.*, 545 A.2d 631, 638 (D.C. 1988), to reject the argument that the plaintiff's ISA-based tort claim was barred because he had received workers' compensation benefits); *Meiggs*, 545 A.2d at 638 (explaining that recipients of workers' compensation can still "pursue [a] full common law remedy when the employee believes that the negligence of a third person caused [their] injury"); *see also Martin v. George Hyman Constr. Co.,* 395 A.2d 63, 68 n.7 (D.C. 1978) (acknowledging that the plaintiff, who had a viable claim against a general contractor as his "employer" under the ISA, could not seek workers' compensation from the general contractor because, for workers' compensation purposes, the plaintiff was an employee of a subcontractor).

Copies emailed to:

Honorable Jason Park

Director, Civil Division
QMU

Copies e-served to:

Marc I. Fiedler, Esquire

Caroline S. Van Zile, Esquire
Solicitor General for the District of Columbia

COMMITTEE OF THE WHOLE
DRAFT COMPARATIVE PRINT
BILL 25-290

D.C. OFFICIAL 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**~~ **District of Columbia, its agencies or instrumentalities, or any employee thereof acting within the scope of the employee's official duties**, 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.

DRAFT COMMITTEE PRINT
Committee of the Whole
September 19, 2023

A BILL

25-290

IN THE DISTRICT OF COLUMBIA

To amend An Act To protect the lives and health and morals of women and minor workers in the District of Columbia, and to establish a Minimum Wage Board, and define its powers and duties, and to provide for the fixing of minimum wages for such workers, and for other purposes to clarify the definition of "employer."

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Industrial Safety Act Clarification Amendment Act of 2023".

Sec. 2. Section 2(a) of Title II of An Act To protect the lives and health and morals of women and minor workers in the District of Columbia, and to establish a Minimum Wage Board, and define its powers and duties, and to provide for the fixing of minimum wages for such workers, and for other purposes, approved October 14, 1941 (55 Stat. 738; D.C. Official Code § 32-802(1)), is amended by striking the phrase "District of Columbia or any instrumentality thereof" and inserting the phrase "District of Columbia, its agencies or instrumentalities, or any employee thereof acting within the scope of the employee's official duties" in its place.

Sec. 3. Applicability.

This act shall apply as of September 1, 2010.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.