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In the Supreme Court of Pennsylvania

No. _____

JASON YODER, Petitioner

v.

MCCARTHY CONSTRUCTION, INC.;
CASTELLI MECHANICAL DESIGN and
CATANIA ENGINEERING ASSOCIATES, INC.

v.

AIR CONTROL TECHNOLOGY, INC.; and
RRR CONTRACTORS, INC.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 1605 EDA 2021 filed January 31, 2023, Application for Reargument Denied April 11, 2023, Reversing the July 22, 2021 Judgment of the Court of Common Pleas of Philadelphia County, at May Term, 2018, No. 769, on the Jury's Verdict in Plaintiff's Favor

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I. INTRODUCTION

This case vividly demonstrates how Pennsylvania's current statutory employer scheme has been turned on its head and lost its way. The 1915 Workmen's Compensation Act was originally enacted to protect and help injured Pennsylvania workers by ensuring that they would receive workers' compensation benefits when their direct employer did not have workers' compensation insurance. At that time, over a century ago, the doctrine was a necessity to protect injured workers because employers were not required to obtain workers' compensation coverage. **That is no longer the reality in Pennsylvania.**

After the enactment of the 1974 Amendments to the Workers' Compensation Act, **which now require subcontractors to possess workers' compensation insurance**, allowing general contractors to escape responsibility under the statutory employer doctrine when they have not actually been called on to pay workers' compensation benefits no longer serves any valid purpose. In fact, allowing general contractors to continue to hide behind the outdated statutory employer doctrine, particularly after the 1974 Amendments, only serves to harm the Pennsylvania construction workers the Act was intended to protect by barring them from recovering

against general contractors that have caused their injuries, and it disincentivizes general contractors from protecting Pennsylvania construction workers by keeping construction sites safe. **What was first enacted to benefit injured Pennsylvania workers is now being used by general contractors as a shield, ultimately hurting Pennsylvania construction workers and citizens.**

Furthermore, the statutory employer doctrine also continues to harm subcontractors who employ workers injured on construction sites by causing those subcontractors to have higher workers' compensation insurance premiums due to their workers' compensation insurers being precluded from seeking subrogation from the funds that would have been recovered in a third-party action against general contractors whose undisputed negligence injured the workers for those subcontractors. This clearly infringes on a workers' compensation insurer's right to subrogation — a right this Court has called "absolute" in *Frazier* v. *W.C.A.B. (Bayada Nurses, Inc.)*, 52 A.3d 241, 247 (Pa. 2012). In fact, in this very case, the subcontractor's workers' compensation insurer is State Workers Insurance Fund ("SWIF"), a statutorily created arm of Pennsylvania's Department of Treasury, so by

barring SWIF's subrogation rights, the statutory employer defense is impacting every single tax-paying Pennsylvania citizen.

The time has come for this Court to remedy the severe injustice of this anachronistic statutory employer doctrine and bring it back to its originally intended purpose of protecting injured Pennsylvania workers, rather than shielding general contractors from their own negligence and severely penalizing and treating workers as second-class citizens who lack the same ability to recover from negligent general contractors that an injured passer-by would possess. This case presents the ideal opportunity for effectuating this long overdue change to Pennsylvania law.

II. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

On January 31, 2023, the Superior Court of Pennsylvania issued its published, precedential opinion in this case. The Superior Court, concluding that the so-called "statutory employer" doctrine rendered carpentry contractor McCarthy Construction immune to plaintiff Jason Yoder's personal injury claims, vacated the trial court's judgment entered on the jury's unanimous verdict in plaintiff's favor and remanded for the entry of

judgment in favor of McCarthy and against Yoder. *See Yoder* v. *McCarthy Constr., Inc.*, 291 A.3d 1 (Pa. Super. 2023). A copy of the Superior Court's opinion is attached as Exhibit A. Petitioner filed a timely application for reargument, which the Superior Court denied by means of an order filed April 11, 2023. *See* Exhibit B hereto.

The opinion of the Court of Common Pleas of Philadelphia County, Pennsylvania, issued on February 10, 2022 pursuant to Pa. R. App. P. 1925(a) in support of its order denying defendant McCarthy's motion for post-trial relief, is attached as Exhibit C. The judgment that the trial court entered in favor of plaintiffs and against defendants on July 22, 2022, in accordance with the jury's verdict in plaintiffs' favor, is attached as Exhibit D.

III. THE ORDER IN QUESTION

The final two paragraphs of the Superior Court's opinion state, in full:

> Because McCarthy meets all five elements of the *McDonald* test, we are constrained to conclude that it is Mr. Yoder's statutory employer, rendering it immune from tort liability. While we express our displeasure with having to disturb the jury's verdict, taking away Mr. Yoder's damages award, we are bound by controlling law to reverse the judgment entered in favor of Mr. Yoder and remand for the entry of judgment in favor of McCarthy.

> Judgment vacated. Case remanded for judgment to be entered in favor of McCarthy. Jurisdiction relinquished.

See Exhibit A at 40 (footnote omitted).

IV. STATEMENT OF PLACE OF RAISING OR PRESERVATION OF ISSUES

On the afternoon of June 7, 2022, the jury trial of this case began. R.842. That morning, the trial court heard oral argument on the parties' motions *in limine*, including two motions concerning the statutory employer defense and whether McCarthy could present evidence pertaining to that defense to the jury at trial. R.819a-25a.[1] The trial court ruled on the record in open court that McCarthy did not qualify as Yoder's statutory employer because McCarthy had not been called on to pay Yoder's workers' compensation benefits. R.821a-22a; 824a. Thus, the first Question Presented herein was before the trial court at the motions *in limine* stage and was relied upon by the trial court at that time as the reason why McCarthy did not qualify as Yoder's statutory employer in this case. R.821-22, 824a.

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[1] Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Superior Court. In accordance with Pa. R. App. P. 1112(d), petitioner has lodged a copy of that Reproduced Record with this Court.

Yoder further raised the arguments that are the subject of the first and second Questions Presented in his Pa. Superior Court Brief for Appellee at pages 50-56 and in his Pa. Superior Court Application for Reargument at pages 7-13. Despite McCarthy's arguments in its Pa. Superior Court Reply Brief for Appellant that Yoder had waived these arguments, the Superior Court's opinion nowhere concluded that these arguments had been waived. *See, e.g.*, Exhibit A hereto at 16 n.14 (recognizing that only this Court can overrule its own precedents in response to Yoder's argument that is the subject of the second Question Presented herein).

The third question presented herein — that McCarthy failed to strictly establish four of the five *McDonald* factors necessary to qualify as Yoder's statutory employer — was raised by Yoder in his opposition to McCarthy's motion for summary judgment and in his opposition to McCarthy's motion for post-trial relief (R.490a-506a; 1407a-08a, 1415a, 1420a, 1424a-25a) and was reasserted in Yoder's Brief for Appellee at pages 31-40 and 46-50.

V. QUESTIONS PRESENTED

1. Whether this Court should overrule its decision in *Fonner* v. *Shandon, Inc.*, 724 A.2d 903 (Pa. 1999), and hold that the General Assembly's 1974 amendments to the Workers' Compensation Act, making it mandatory for all employers to obtain workers' compensation coverage, necessitates denying "statutory employer" status to general contractors unless they in fact have been called on to pay workers' compensation benefits to the injured employee of a subcontractor?

2. Whether this Court should overrule its decision in *LeFlar* v. *Gulf Creek Indus. Park #2*, 515 A.2d 875, 879 (Pa. 1986), holding that the statutory employer defense is unwaivable in the nature of subject-matter jurisdiction, in a case such as this where the supposed statutory employer was not called on to pay any workers' compensation benefits?

3. Whether the Superior Court failed to properly apply the factors that must be strictly established under *McDonald* v. *Levinson Steel Co.*, 153 A. 424 (Pa. 1930), for a general contractor to qualify as a statutory employer in the light most favorable to the plaintiff as verdict-winner, necessitating at the very least a retrial at which the jury would resolve the disputed factual

issues concerning whether McCarthy qualifies as Yoder's statutory employer under the *McDonald* test?

VI. STATEMENT OF THE CASE

A. Introduction

In 1967, Pennsylvania Superior Court Judge J. Sydney Hoffman insightfully explained:

> Both the Supreme Court in *McDonald* and the Court of Appeals in *Jamison* recognized the very great care which must be exercised before allowing an employer to avoid his liability at common law by asserting that he is a statutory employer. Section 203 of the Workmen's Compensation Act, which was designed to extend benefits to workers, should not be casually converted into a shield behind which negligent employers may seek refuge.

Stipanovich v. Westinghouse Elec. Corp., 231 A.2d 894, 898 (Pa. Super. 1967). Despite the General Assembly's 1974 amendments to the Workers' Compensation Act requiring subcontractors to obtain workers' compensation insurance for their own employees before being permitted onto a construction site, negligent general contractors who did not pay workers' compensation benefits have unfairly and improperly been allowed to continue to exploit the "statutory employer" doctrine. Pennsylvania law unfairly allows general contractors to invoke the "statutory employer"

defense as a shield to seek refuge behind, to the detriment of this Commonwealth's injured workers, the subcontractors who employed them, and the workers' compensation insurers from whom those subcontractors have obtained the coverage the 1974 amendments require.

This case presents an ideal vehicle for this Court to finally restore sanity and reason to this controversial area of the law. Controversy over whether statutory employer immunity should be available to a general contractor under the very circumstances presented in this case has festered among Pennsylvania Justices and appellate Judges for over 40 years, including most recently in a concurring and dissenting opinion by Judge Daniel D. McCaffery in *Oster* v. *Serfass Constr. Co.*, No. 1052 EDA 2021, 2022 WL 3440490, at *8-*10 (Pa. Super. Aug. 17, 2022) ("**Only when a general contractor has assumed responsibility for an injured worker's benefits should it be entitled to immunity under the Act**.").

Next year will mark the 50th anniversary of the General Assembly's 1974 amendments to the Workers' Compensation Act requiring subcontractors to possess workers' compensation coverage for their own employees and requiring general contractors to ensure, before hiring a subcontractor, that the subcontractor possesses such coverage. This Court

erroneously held in *Fonner* v. *Shandon, Inc.*, 724 A.2d 903 (Pa. 1999), that the 1974 amendments to section 302(b) of the Act, 77 Pa. Stat. Ann. §462, were not sufficient to strip general contractors of statutory employer status in the absence of any similar amendment to section 203 of the act, 77 Pa. Stat. Ann. §52. For all the reasons set forth in the dissenting opinion in *Fonner*, 724 A.2d at 908-09, the time has come for this Court to revisit and overrule that decision. As demonstrated below, Justices Baer and Nigro, and Pa. Superior Court Judges Dan McCaffery, Musmanno, Melinson, and Shertz have all recognized the need for this Court to bring an end to the severe injustices that Pennsylvania's current statutory employer doctrine continues to perpetuate.

Second, this Court should grant review to overturn its decision in *LeFlar* v. *Gulf Creek Indus. Park* #2, 515 A.2d 875, 879 (Pa. 1986), which held that the workers' compensation bar is jurisdictional in nature and thus cannot be waived due to a failure to timely plead the defense, to the extent that *LeFlar* has been applied to make the statutory employer defense non-waivable even where the supposed statutory employer was not called on to pay any workers' compensation benefits. **Ordinarily, immunities from liability are not treated as jurisdictional bars to a court's ability to hear and**

decide a lawsuit, and there is no reason to confer upon the statutory employer defense jurisdictional status in a case such as this where the general contractor did not pay workers' compensation benefits to the employee of a subcontractor.

This case is also deserving of review for a third reason. In *Peck* v. *Delaware Cty. Bd. of Prison Inspectors*, 814 A.3d 185 (Pa. 2002), a majority of the Justices serving on this Court recognized that the five *McDonald* factors a defendant must satisfy to invoke statutory employer status must be "strictly" satisfied. *Id.* at 189; *id.* at 192 (Nigro, J., concurring). In this case and other recent cases, however, the Superior Court has failed to properly enforce that requirement, rendering it essentially a nullity. **With regard to four of the five *McDonald* factors in this case, defendant McCarthy failed to strictly and unequivocally satisfy its entitlement to statutory employer status.** This Court's review of that issue is likewise merited, and this case presents an ideal vehicle for such review.

B. Relevant Factual History

1. The accident and injuries giving rise to this suit

On October 25, 2016, plaintiff Jason Yoder, then 30 years old, suffered severe and permanent injuries when, while working as a roofing independent contractor, he fell through a hole located on the roof of the Norwood Public Library while working to replace the roof's cover. R.114a-15a, 151a. Defendant McCarthy Construction, Inc. was responsible for carpentry repairs to the roof and thus was responsible for promptly repairing the hole, which McCarthy failed to do. R.880a-81a.

McCarthy's negligence, the jury unanimously found, was the factual and legal cause of Yoder's devastating injuries. R.1343a, 1403a-04a. Plaintiff's treating physicians, including his orthopedic doctor, his pain management doctor, and his psychologist, all testified that Yoder is permanently disabled. R.1404a. As a result of the injuries and the resultant past and future medical care, along with his disability and inability to return to work, plaintiff's economic damages alone presented to the jury were approximately $4,000,000. *Id.* Based on the National Vital Statistics Reports (Life Tables), plaintiff's pain and suffering, including both past and future,

were estimated to last approximately 50 years from the date of the accident. *Id.*

In its appeal to the Superior Court, McCarthy did not challenge the sufficiency of the evidence supporting the jury's unanimous verdict holding that McCarthy's negligence was the cause of Yoder's injuries, nor did McCarthy argue that the evidence before the jury failed to support the jury's unanimous damages award.

2. Facts pertaining to McCarthy's invocation of the statutory employer defense

In *McDonald* v. *Levinson Steel Co.*, 153 A. 424, 426 (Pa. 1930), this Court set forth five elements that a defendant asserting the statutory employer defense must strictly establish in order to successfully invoke that defense. Those elements are:

> (1) An employer who is under contract with an owner or one in the position of an owner. (2) Premises occupied by or under the control of such employer. (3) A subcontract made by such employer. (4) Part of the employer's regular business intrusted to such subcontractor. (5) An employee of such subcontractor.

Id. at 426. **Because the trial court, at the motions *in limine* stage, entered an order precluding the jury from considering McCarthy's statutory**

employer defense, Yoder never had the opportunity to introduce evidence at trial to establish that McCarthy failed to satisfy four of the five *McDonald* prongs.

At the trial of this case, McCarthy failed to establish that Yoder was an employee of RRR at the time of his accident. Yoder testified at trial that he was working as an independent contractor on this project, that he set his own work schedule, and that he supplied his own tools to perform his work, which are hallmarks of how independent contractors operate. R.985a. Moreover, as the trial court correctly noted in its Pa. R. App. P. 1925(a) opinion in this case, at trial McCarthy itself single mindedly pursued a strategy of convincing the jury that Yoder worked as an independent contractor, rather than as an employee of RRR Contractors, seeking to limit McCarthy's damages for Yoder's lost earnings. *See* Exh. C hereto at 5-6.

McCarthy introduced into evidence that RRR was compensating Yoder as an independent contractor by reporting his earnings to the Internal Revenue Service using a 1099 form, which is intended for independent contractors, rather than a W–2 form, which is used for employees. R.3127a. McCarthy asked the jury to use Yoder's net earnings reported to the IRS on Schedule C of his tax returns, which reflected the deductions an independent

contractor is entitled to take against gross earnings for the costs of doing business, as the basis for determining Yoder's future earning losses. R.1326a-27a. The reason why McCarthy failed even to attempt to create any evidentiary record during the jury trial of this case in support of its contention that Yoder was an employee of RRR at the time of the accident was that McCarthy's trial strategy was to have the jury conclude that Yoder was an independent contractor when he sustained the injuries at issue in this suit.

The evidence before the jury also demonstrated that McCarthy's involvement in the library repair project was not that of a general contractor. The Borough of Norwood hired McCarthy to perform only the carpentry work and the roof replacement. R.168a-70a. Norwood separately hired other contractors who were responsible for the building's electrical systems and for the building's HVAC systems. R.917a-18a, 1880a. **Thus, Norwood acted as the general contractor, rather than McCarthy,** given Norwood's direct contracts with the electrical and HVAC contractors whose work was as integral to the library repair project as McCarthy's. R.1880a.

Indeed, McCarthy itself admitted it was not the general contractor on this library renovation project in a motion *in limine* that McCarthy filed in

the trial court on May 20, 2021. R.1878a-83a. In that motion, McCarthy's trial counsel averred:

> 4. The facts in this case show that McCarthy Construction, Inc. was not a general contractor but a prime carpentry contractor.
>
> 5. The owner of the property, the Borough of Norwood served as its own general contractor and entered into separate and distinct prime contracts with various trades including separate contracts with the carpenters, such as McCarthy Construction, HVAC contractor and electrician.

R.1880a.

At trial, McCarthy also failed to strictly establish the second prong to qualify as a statutory employer under the *McDonald* test: namely, that the "[p]remises [were] occupied or under the control of" McCarthy at the time of Yoder's accident. *See* 153 A. at 426. The evidence at trial established that if McCarthy had in fact been on the roof or in control of the roof at the time of Yoder's accident, either the hole through which he fell would have been immediately repaired before the accident or roofing operations would have been suspended until the hole could be repaired. R.880a-81a, 987a. On the contrary, the evidence at trial established that the Borough of Norwood, which McCarthy admitted was serving as general contractor (R.1880a), was in control of the premises.

Finally, the evidence at trial fails to support the conclusion that McCarthy strictly established the fourth prong to qualify as a statutory employer under the *McDonald* test: namely, that "[p]art of [McCarthy's] regular business [was] intrusted to [RRR]." *See* 153 A. at 426. Here, the evidence at trial failed to establish that roofing was a part of McCarthy's regular business or that it regularly hired roofers. Indeed, to the contrary, the evidence established that McCarthy never performs roofing services and virtually never hires roofers. R.878a.

Although the five-part *McDonald* test involves questions of fact that a jury should resolve where, as here, the parties dispute their applicability, in this case the trial court precluded the jury from resolving those disputed factual questions. It was thus especially improper when the Superior Court reversed the trial court's judgment after scouring the record to cherry-pick those facts needed to establish that McCarthy qualified as Yoder's statutory employer, improperly usurping the role of the jury.

C. Relevant Procedural History

The trial of this case began on the afternoon of June 7, 2021 (R.842a) and concluded with a unanimous jury verdict in plaintiff's favor, and against defendant McCarthy Construction, Inc., in the amount of $5,000,000 on the afternoon of June 22, 2021, slightly more than two weeks later. R.1343a.

Plaintiff filed his amended complaint in this case on September 20, 2018, following the trial court's entry of an order on September 17, 2018 granting plaintiff's motion for leave to file an amended complaint. R.111a-34a, 641a. McCarthy did not file its answer to the amended complaint until February 6, 2020, more than one year and four months later. R.135a-49a.

Given how late McCarthy filed its answer to the amended complaint, in which McCarthy among other things sought to assert a statutory employer defense, plaintiff promptly moved on February 25, 2020 to strike the answer as untimely. R.453a-65a. **After the motion to strike was fully briefed by the opposing parties, the trial court entered an order granting the motion to strike on June 22, 2020.** R.677a. **As a result, McCarthy failed to properly plead the statutory employer defense in this case.**

Despite the trial court's entry of an order striking McCarthy's answer to plaintiff's amended complaint, McCarthy nonetheless presented its

statutory employer defense to the trial court at the summary judgment stage, by means of pretrial motions *in limine*, during trial via motions for nonsuit and directed verdict, and post-trial in the form of a motion for judgment notwithstanding the verdict. At each stage, the trial court rejected McCarthy's assertion of the statutory employer defense.

Following the trial court's denial of its motion for post-trial relief, McCarthy timely appealed to the Superior Court. After briefing and oral argument, on January 31, 2023 the Superior Court issued a published opinion vacating the trial court's entry of judgment in plaintiff's favor and remanding for the entry of judgment in favor of defendant McCarthy under the statutory employer doctrine. *See* Exhibit A hereto.

The Superior Court agreed with McCarthy's argument that the statutory employer defense is jurisdictional in nature and thus not subject to waiver on appeal. Thus, the Superior Court disregarded McCarthy's failure to timely raise the defense in the trial court and excused McCarthy's failure to argue judicial estoppel, to establish Yoder's status as an employee of subcontractor RRR Contractors, until McCarthy's untimely motion for reconsideration of the trial court's order denying McCarthy's motion for post-trial relief. *Id.* at 13-16, 24 n.20.

The Superior Court also rejected Yoder's arguments that McCarthy failed to strictly satisfy four of the five *McDonald* factors necessary to establish an entitlement to statutory employer status. *See* Exhibit A hereto at 18-30. This aspect of the Superior Court's decision is examined in more detail below in support of the third Question Presented.

Following the Superior Court panel's reversal of the jury verdict in his favor, Yoder filed a timely application for reargument, which the Superior Court denied on April 11, 2023. *See* Exhibit B hereto.

VII. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. This Court Should Overrule Its Precedent Holding That A Contractor Which Did Not Pay Workers' Compensation Benefits Can Nevertheless Invoke The Statutory Employer Defense Against The Injured Employee Of A Subcontractor To Avoid Being Held Liable For The Contractor's Own Negligence

1. The General Assembly's 1974 amendments to the Workers' Compensation Act, which mandate subcontractors to possess workers' compensation insurance, necessitate this result, and the time has come for this Court to remedy the tremendous unfairness that the "statutory employer" doctrine continues to perpetuate

A doctrine that was intended to protect workers has been turned on its head to reward negligent general contractors to the great detriment of severely injured workers. Consequently, for over the past 40 years, numerous Pennsylvania appellate judges have strongly criticized the ability of a contractor that has not itself been called on to pay workers' compensation benefits to the injured employee of a subcontractor to nevertheless be able to avoid liability for the contractor's own negligence causing injury and damages by shielding itself under the statutory employer doctrine.

As Judge Shertz explained in his opinion dissenting from the Superior Court's ruling in *Crenshaw Constr. Inc.* v. *Ghrist*, 434 A.2d 756 (Pa. Super. 1981):

> Since 1974, however, the basis for the immunity has been eliminated since the amendments specifically provide that the general contractor is not liable, even in a reserve status, if the subcontractor has secured the requisite payment of compensation. In enacting these amendments, our Legislature has chosen to follow those jurisdictions which do not allow general contractors, who have no liability for workmen's compensation, to escape common law liability as well.
>
> The result effected by the 1974 amendments is sound and eminently fair. As pointed out in *Robinson, supra*, the pre-1974 immunity granted the general contractor was the benefit accorded to him for assuming the compensation burden, even if only on a reserve basis. **Where, however, as under sections 461 and 462 and the instant facts, such a burden is never assumed, neither logic nor equity support a continued grant of immunity. To hold otherwise, as aptly pointed out by the trial court, is tantamount to putting a general contractor in the position of "having its cake and eating it, too" and constitutes unwarranted judicial legislation.**

Id. at 765-66 (Shertz, J., dissenting) (emphasis added; citations omitted).

Less than ten years later, Judge Melinson issued a concurring opinion to the Superior Court's ruling in *Travaglia* v. *C.H. Schwertner & Son, Inc.*, 570 A.2d 513 (Pa. Super. 1989), observing:

> Under these sections, general contractors are completely insulated from tort liability for negligent or grossly negligent

> acts. Furthermore, as is clear from their language, these sections of the Workmen's Compensation Act "operate to relieve [the general contractor] from payment of [workmen's] compensation by placing that responsibility upon the subcontractor." As stated by Arthur Larson, James B. Duke Professor of Law at the Duke University School of Law, "in the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors upon subcontractors, if an employee of the lowest subcontractor on the totem pole is injured, **there is no practical reason for reaching up the hierarchy any further than the first insured contractor**." Larson, Workmen's Compensation Law, §49.14.
>
> **. . . . Our judicial system is based upon the concept that individuals and corporations alike will be held accountable for their mistakes and indiscretions. To allow general contractors to escape from any sort of liability for injuries to the employees of their subcontractors, without any examination of the circumstances of the injury, clearly runs counter to this fundamental concept.**

Id. at 519-20 (Melinson, J., concurring) (emphasis added; citations omitted).

More recently, in *Doman* v. *Atlas America, Inc.*, 150 A.3d 103 (Pa. Super. 2016), Judge Musmanno's opinion for the court explained:

> **We . . . agree that, following the 1974 amendments to the Act, the statutory employer doctrine no longer serves the remedial purpose of the Act.** Traditionally, the secondary liability imposed on statutory employers was meant to ensure that an injured worker will be afforded payment of benefits, even in the event of default by his primary employer. *See Patton*, 89 A.3d at 645; *see also Six L's Packing*, 44 A.3d at 1158–59 (stating that "the Legislature meant to require persons (including entities) contracting with others . . . to assure that the employees of those others are covered by workers' compensation insurance, on pain

> of assuming secondary liability for benefits payment upon a default."). The tort immunity associated with the imposition of secondary liability "reflects the historical *quid pro quo* between an employer and employee whereby the employer assumes liability without fault for a work-related injury . . . ." *Tooey v. AK Steel Corp.*, 81 A.3d 851, 860 (Pa. 2013) (citation omitted). **However, the Act was amended in 1974 to require that all employers provide workers' compensation coverage.** *See Fonner*, 724 A.2d at 905 (noting that, prior to 1974, the Act contained "elective compensation" language). Notwithstanding, the 1974 amendments allowed general contractors to remain insulated from tort liability, despite never being required to provide workers' compensation benefits to injured employees of subcontractors, and created a windfall immunity shield. **Thus, "the mandatory nature of workers' compensation has rendered the statutory employer doctrine obsolete[,] . . . [and] adversely impact[s] worker safety by eliminating the traditional consequences (money damages) when a general contractor's negligence harms a subcontractor's employee."** *See Patton*, 89 A.3d at 650–51 (Baer, J., concurring); *see also Travaglia v. C.H. Schwertner & Son, Inc.*, 570 A.2d 513, 518 (Pa. Super. 1989) ("**Section 203 of the [ ] Act, which was designed to extend benefits to workers, should not be casually converted into a shield behind which negligent employees may seek refuge.**").

Id. at 109-10 (emphasis added).

Justice Nigro added his voice to this chorus in his dissenting opinion in *Fonner* v. *Shandon, Inc.*, 724 A.2d 903 (Pa. 1999), stating:

> Since I find that the Majority's holding is contrary to the legislative intent of the 1974 amendments to the Act and allows for an unjust and inadequate result, I must dissent. The purpose of the 1974 amendments was to prohibit an employer, contractor or employee from rejecting application of the Act. In eliminating the "elective compensation" language from the Act, its

application became mandatory. The impetus of this change was to afford protection to employees. **The Legislature never intended that the amendments would allow a general contractor to escape civil liability if it did not pay for the injured employee's workers' compensation insurance. I find the clear meaning of the 1974 amendments was to place responsibility for workers' compensation benefits upon the general contractor only where the subcontractor or direct employer failed to do so. In reality, application of these amendments rarely, if ever, will result in the general contractor assuming responsibility for providing workers' compensation insurance because in the modern construction workplace, general contractors will rarely, if ever, award a contract absent the subcontractor showing proof of workers' compensation coverage. Common sense and logic dictate that the general contractor should not reap the benefits of civil liability immunity unless it undertakes responsibility of compensation coverage.** If however, a general contractor does assume responsibility for the payment of workers' compensation, then it should be afforded statutory employer immunity.

In the present matter, application of the 1930 *McDonald* five part test leads to the conclusion that Appellee should be deemed the statutory employer and thus immune from civil liability. **I submit, however, that in order to properly effectuate the legislative intent of the 1974 amendments and not foster an inadequate result, a sixth element should be considered. The sixth element requires the general contractor to show proof it assumed responsibility for providing workers' compensation to the injured employee before statutory employer immunity attaches. I believe the Legislature by its amendments essentially added the sixth element in order to prevent the type of inequitable result which occurred today.**

Id. at 908 (Nigro, J., dissenting) (emphasis added).

As persuasively recognized above, only this Court, and not the General Assembly, can rectify the pervasive injustice created by allowing a general contractor to invoke the statutory employer defense under the circumstances of this case. Adding that sixth element to the *McDonald* test can and will remedy this horrific injustice.

Nine years ago, Justice Baer agreed that the statutory employer defense was "**obsolete**" and unfair to both injured workers and their employers who are prohibited from seeking subrogation against those general contractors whose negligence causes workplace injuries. *See Patton v. Worthington Assocs., Inc.*, 89 A.3d 643, 650-52 (Pa. 2014) (Baer, J., concurring).

Most recently, Superior Court Judge Daniel D. McCaffery issued an opinion concurring in part and dissenting in part in *Oster* v. *Serfass Constr. Co.*, No. 1052 EDA 2021, 2022 WL 3440490 (Pa. Super. Aug. 17, 2022), explaining:

> Therefore, like my honorable colleagues on the Supreme Court and the *Doman* panel, I advocate for a change in the workers' compensation law. In my opinion, as suggested by Justice Nigro, the *McDonald* test should require a sixth element — proof that the general contractor either paid the injured worker's benefits, or prior to the injury, obtained a policy which would have covered the injured employee. Only when a general contractor

> has assumed responsibility for an injured worker's benefits should it be entitled to immunity under the Act. To do so would be in furtherance of the initial legislative intent which is to provide a failsafe for injured workers in the event of a lapse in workers' compensation insurance by the primary employer. **Imposing such a requirement would also promote public policy considerations of assuring safe worksites and providing maximum protection and compensation to injured workers.**

Id. at *10 (McCaffery, J., concurring in part and dissenting in part) (emphasis added).

Defendant McCarthy's argument for entry of judgment notwithstanding the verdict on this record involves the very scenario in which the statutory employer defense is least justifiable, even accepting as true McCarthy's factual averments, with which plaintiff disagrees. Yoder's supposed "employer," RRR Contractors, possessed workers' compensation coverage applicable to its actual employees on this project, as the 1974 amendments to the Workers' Compensation Act required. **Thus, McCarthy never had any potential liability to pay workers' compensation coverage to Yoder, even if Yoder had been working on the project as an employee of RRR, instead of in his actual role as an independent contractor.**

Because this case squarely presents the most discredited and highly controversial application of the statutory employer defense, this case

presents an ideal vehicle for this Court to consider whether to overrule its decision in *Fonner* v. *Shandon*, 724 A.2d 903 (Pa. 1999), in which this Court ruled that the 1974 amendments to the Workers' Compensation Act did not compel denying statutory employer status to a general contractor that did not pay workers' compensation benefits to the injured employee of a subcontractor.

The year 2024 will mark the 50th anniversary of the General Assembly's amendments to the Workers' Compensation Act that required subcontractors to maintain workers' compensation insurance and that required general contractors to ensure that all subcontractors possessed workers' compensation coverage for the subcontractor's employees before the general contractor could enter into a subcontract with the subcontractor.

The legislative inaction that has followed the General Assembly's amendments to the Workers' Compensation Act in 1974 and this Court's 1999 ruling in *Fonner* demonstrate that the time has come for this Court to intervene to finally put an end to the severe injustices that the current statutory employer regime perpetuates on the injured workers of this Commonwealth, their immediate employers, and the workers'

compensation insurers for their employers. The Petition for Allowance of Appeal should be granted.

2. Returning the "statutory employer" doctrine to its proper role, applying only when a general contractor is required to pay workers' compensation insurance to the employee of a subcontractor, will protect the rights of injured workers in this Commonwealth, of subcontractors, and of the workers' compensation insurers for subcontractors, which are wrongly denied their "absolute" right of subrogation under the current regime

The facts of this case vividly depict the tragic consequences of allowing a negligent general contractor to improperly use the statutory employer defense as a shield to hide behind to escape the consequences of its own undisputed negligence. Yoder is a Pennsylvania resident whose severe and permanent injuries will prevent him from ever working again. Based on those injuries and the resultant past and future medical care, along with his disability and inability to return to work, his economic damages alone presented to the jury were approximately $4,000,000. R.1404a. The jury in this case awarded to Yoder a total verdict of $5 million, representing its determination of the full amount of his loss. R.1343a.

By contrast, the workers' compensation settlement that Yoder received totaled $262,500. *See* Exhibit A hereto at 19 n.16. That workers' compensation recovery, representing approximately one-twentieth of his total losses, will be plainly insufficient to provide the necessary care and compensation that Yoder requires in the years ahead. Yet no other source of recovery now exists for Yoder to pursue other than seeking public welfare. In other words, the cost of Pennsylvania's unjust statutory employer regime is thrust on Pennsylvania's innocent citizenry rather than on the truly responsible party.

Defendant McCarthy, on the other hand, escapes scot-free from the consequences of its negligence, even though its workers' compensation insurer was not required to pay any benefits to Yoder whatsoever, since RRR Contractors possessed the required workers' compensation insurance coverage. **The current statutory employer scheme utterly fails to motivate general contractors to take the steps necessary to avoid negligently injuring this Commonwealth's construction workers, because the general contractor never faces any consequences for its own (here, undisputed) negligence.**

The unjust, antiquated statutory employer defense harms not only injured workers, but also subcontractors and their workers' compensation

insurers. Subcontractors must pay higher premiums for such insurance, because the workers' compensation insurance companies that insure subcontractors have no recourse to seek subrogation against general contractors if an employee of the subcontractor is injured by the negligence of a general contractor, improperly infringing upon the "absolute" right to subrogation that this Court has recognized. *See Frazier*, 52 A.3d at 247.

In this case, RRR Contractors obtained its workers' compensation insurance from the Pennsylvania State Workers' Insurance Fund (SWIF), an arm of the Commonwealth government. R.237a. The outcome of this case, therefore, directly injures the Commonwealth of Pennsylvania and its taxpayers another way, by infringing upon SWIF's otherwise absolute right of subrogation to be reimbursed from Yoder's recovery against defendant McCarthy as the actually negligent party whose conduct harmed Yoder.

Yoder and his counsel are not alone in believing that this Court should grant this Petition for Allowance of Appeal. In the aftermath of the Pa. Superior Court's ruling in this case, Yoder's lead trial counsel has been contacted by a who's who of leading Pennsylvania personal injury attorneys who have expressed their hope that Yoder will pursue Pa. Supreme Court

review in this case to seek the overruling of this Court's decision in *Fonner*.[2] **This case presents the all too rare instance where this Court can reach the correct result, remedy an obvious injustice in the law that has been permitted to persist for far too long, and inflict no real harm on any other party because the immunity that the statutory employer doctrine confers on general contractors is entirely undeserved.**

As explained above, the reasons for abolishing the statutory employer defense in the context of this case are as numerous and highly persuasive, far outweighing any benefits that could be hypothesized for keeping the current, outdated approach to the doctrine. Following the 1974 amendments to the Workers' Compensation Act, it is an extremely speculative and remote possibility that a general contractor's workers' compensation insurer could be called on to pay benefits to the injured employee of a subcontractor since subcontractors are mandated to have such coverage for their own

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[2] Those attorneys include Robert J. Mongeluzzi and Andrew R. Duffy of the Saltz Mongeluzzi law firm; Thomas J. Duffy of Duffy & Fulginiti; and James C. Haggerty of Haggerty, Goldberg, Schleifer & Kupersmith. In addition, the Pennsylvania Association for Justice filed an amicus brief in support of Yoder in the Superior Court arguing for *Fonner*'s overruling, and Yoder anticipates that PAJ and numerous unions and workers-rights organizations will file amicus briefs in support of Yoder on the merits once review is granted here.

employees. Speculation that general contractors pay more for workers' compensation coverage applicable to such a remote and speculative risk simply fails to justify keeping the current unjust approach to the statutory employer doctrine any longer.

To be clear, Yoder acknowledges that in the extraordinarily rare instance where a general contractor has actually paid workers' compensation benefits in a reserve status to the employee of a subcontractor, the general contractor would thereby qualify for statutory employer status and be entitled to immunity in tort under the Workers' Compensation Act, like every other "employer" who has actually paid workers' compensation benefits, based on the original *quid pro quo* recognized in the standard workers' compensation setting. But, in a case such as this, where the general contractor did not pay any workers' compensation benefits to the injured worker for a subcontractor, statutory employer status would not be conferred on the general contractor, which would remain liable in tort for its own negligence.

For all of these reasons, the Petition for Allowance of Appeal should be granted.

B. This Court Should Overrule Its Precedent Holding That The Statutory Employer Defense Is Unwaivable, In The Nature Of Subject-Matter Jurisdiction, In Cases Where The Supposed Statutory Employer Did Not Pay Workers' Compensation Benefits To The Subcontractor's Employee

This Court should also overturn its decision in *LeFlar* v. *Gulf Creek Indus. Park* #2, 515 A.2d 875, 879 (Pa. 1986), which held that the workers' compensation bar is jurisdictional in nature and thus cannot be waived due to a failure to timely plead the defense, to the extent that *LeFlar* has been applied to make the statutory employer defense non-waivable even where the supposed statutory employer was not called on to pay any workers' compensation benefits.

Ordinarily, immunities from liability are not treated as jurisdictional bars to a court's ability to hear and decide a lawsuit. Rather, they may entitle the defendant to judgment in its favor when properly invoked. *See Bisher* v. *Lehigh Valley Health Network, Inc.*, 265 A.3d 383, 400 n.10 (Pa. 2021) (recognizing that sovereign immunity can be waived); *Chemical Natural Resources, Inc.* v. *Republic of Venezuela*, 215 A.2d 864, 867 (Pa. 1966) ("Sovereign Immunity is in the nature of an affirmative defense; (a) it does not go to jurisdiction and (b) it can be waived.").

In this case, as explained above, McCarthy failed to timely plead the statutory employer defense in response to plaintiff's amended complaint, and McCarthy's extremely late-filed answer seeking to assert that defense was stricken as untimely. Further, as the Superior Court's decision in this case recognized, McCarthy did not assert judicial estoppel based on Yoder's recovery of workers' compensation benefits from RRR Contractors until McCarthy filed a prohibited motion for reconsideration of the trial court's denial of McCarthy's motion for post-trial relief. *See* Exhibit A hereto at 24 n.20. If the statutory employer defense were not deemed unwaivable, in the nature of subject matter jurisdiction, McCarthy's failure to properly plead and raise the defense would have proved fatal to its effort to invoke the defense here.

Given the procedural posture of this case — wherein McCarthy failed to timely plead the statutory employer defense in response to Yoder's amended complaint, which resulted in the trial court's striking of McCarthy's answer as untimely, and McCarthy failed to substantiate Yoder's recovery of workers' compensation benefits from RRR Contractors until *after* McCarthy's post-trial motion had been denied — this case presents the perfect vehicle for this Court to reconsider whether a general contractor

that was not called on to pay workers' compensation benefits to the injured employee of a subcontractor can nevertheless still invoke the statutory employer doctrine as a non-waivable defense in the nature of subject matter jurisdiction.

The Petition for Allowance of Appeal should be granted.

C. The Superior Court Is Failing To Properly Apply The Factors That Must be Strictly Established Under *McDonald* v. *Levinson Steel Co.*, 153 A. 424 (Pa. 1930), In Order For A General Contractor To Qualify As A Statutory Employer

This Court has long admonished that "courts should construe the elements of the *McDonald* test strictly and find statutory employer status only when the facts clearly warrant it." *Peck*, 814 A.2d at 189. **The Superior Court's ruling in this case demonstrates that the elements of the *McDonald* test that the Superior Court currently purports to apply bear no resemblance to the test that this Court actually announced in the *McDonald* case in 1930.**

As this Court ruled in *McDonald*:

> To create the relation of statutory employer . . . , all of the following elements essential to a statutory employer's liability must be present: (1) An employer who is under contract with an owner or one in the position of an owner. (2) Premises occupied

> by or under the control of such employer. (3) A subcontract made by such employer. (4) Part of the employer's regular business intrusted to such subcontractor. (5) An employee of such subcontractor.

McDonald, 153 A. at 426.

Here, with regard to the fifth *McDonald* factor, the trial court correctly concluded that McCarthy failed to clearly establish that Yoder was an employee of subcontractor RRR Contractors, Inc, rather than an independent contractor who RRR hired to work on this project.

In *Green* v. *Independent Oil Co.*, 201 A.2d 207 (Pa. 1964), this Court recognized:

> The hallmark of an employee–employer relationship is that the employer not only controls the result of the work but has the right to direct the manner in which the work shall be accomplished; the hallmark of an independent contractee–contractor relationship is that the person engaged in the work has the exclusive control of the manner of performing it, being responsible only for the result.

Id. at 210.

At trial, the jury heard Yoder testify that he worked as an independent contractor for RRR and was so working at the time of his accident. Yoder testified that he was engaged in a distinct profession and occupation, he controlled his own work including when he worked, he supplied his own

tools, and RRR paid him as an independent contractor rather than as an employee under a 1099 rather than a W-2. R.985a.

During McCarthy's counsel's cross-examination of Yoder, McCarthy made no effort whatsoever to contradict or cast any doubt on Yoder's testimony that he was working as an independent contractor at the time of the accident. This was because McCarthy at the jury trial of this case single mindedly pursued the strategy of establishing that Yoder was an independent contractor, rather than an employee of RRR Contractors, at the time of the accident in question in an effort to diminish any potential damages for Yoder's loss.

Yoder's testimony, which McCarthy failed to contradict through any other evidence that it presented to the jury during trial, is far more than sufficient to sustain the trial court's conclusion that Yoder was working as an independent contractor in the roofing trade at the time he sustained his injuries. Moreover, the fact that Yoder's tax returns for 2015 and 2016, prior to the accident, establishing that Yoder was an independent contractor were prepared by the accountant for RRR Contractors itself, which McCarthy wrongly characterizes as Yoder's employer, demonstrates that both RRR and Yoder shared the understanding that Yoder was in an independent

contractor relationship with RRR, rather than in an employer–employee relationship. R.1815a-35a. Notably, it was McCarthy that introduced Yoder's tax returns into evidence. R.3127a.

In seeking to minimize the damages for which it would be held responsible, defendant McCarthy itself placed before the jury again and again Yoder's tax returns, which confirmed that RRR was paying Yoder as an independent contractor rather than as an employee. R.1008a-10a, 1132a-33a, 1238a-43a, 3127a. Yoder reported to the Internal Revenue Service the money he received from RRR on Schedule C, which is what independent contractors use so that their net income can reflect deductible expenses incurred in running a business. R.1817a, 1823a.

All of the evidence actually before the jury in this case supports the trial court's conclusion that McCarthy failed to clearly establish that Yoder was an employee of RRR rather than hired by RRR as an independent contractor.

Notwithstanding the evidence at trial, here the Superior Court concluded that Yoder was judicially estopped from denying that he was an employee, rather than an independent contractor, of RRR Contractors at the time of his injuries because RRR subsequently paid him workers'

compensation benefits. **Yet Yoder had no opportunity at trial to demonstrate that RRR, after the accident, retroactively transformed him into an employee in order to improperly limit its own liability for Yoder's injuries and to ensure that Yoder had adequate medical insurance coverage for his grievous injuries.**

The record of this case also confirms that McCarthy is unable to strictly satisfy the first, second and fourth prongs of the *McDonald* test. To qualify as a statutory employer under the first prong of the *McDonald* test, McCarthy must establish that it was in the role of a general contractor on the Norwood Public Library construction project. McCarthy is unable to do so on this record. Norwood Borough, the owner of the property, entered into a contract with McCarthy only for the carpentry and roofing work on the library building. Separately, Norwood Borough entered into electrical and HVAC contracts for this project with other contractors. R.917a-18a. Thus, it was Norwood Borough, rather than McCarthy, that functioned in the role of general contractor for the library renovation project.

McCarthy itself admitted it was not the general contractor on this library renovation project in a motion *in limine* that McCarthy filed in the

trial court on May 20, 2021. R.1878a-83a. In that motion *in limine*, McCarthy's trial counsel averred:

> 4. The facts in this case show that McCarthy Construction, Inc. was not a general contractor but a prime carpentry contractor.
>
> 5. The owner of the property, the Borough of Norwood served as its own general contractor and entered into separate and distinct prime contracts with various trades including separate contracts with the carpenters, such as McCarthy Construction, HVAC contractor and electrician.

R.1880a.

McCarthy's entire statutory employer doctrine argument is based on the presumption that McCarthy served as general contractor on the library renovation project. Because the evidence in the trial court record fails to sustain that presumption, by McCarthy's own admission, the Superior Court should have rejected McCarthy's attempt to invoke the statutory employer doctrine to avoid liability to plaintiff for the life-altering injuries he sustained as a result of McCarthy's negligence.

To qualify as a statutory employer under the second prong of the *McDonald* test, McCarthy must have exercised actual control over the work area. *See Emery* v. *Leavesly McCollum*, 725 A.2d 807, 811 (Pa. Super. 1999). A mere showing of a right to control is insufficient to establish the control

element. *See Dougherty* v. *Conduit & Found. Corp.*, 674 A.2d 262, 266 (Pa. Super. 1996).

Here, the evidence before the jury clearly demonstrated that McCarthy neither controlled nor occupied the construction area in question. Indeed, Michael McCarthy of defendant McCarthy Construction testified at trial that if he was on the roof and had seen the hole through which Yoder fell, he would have immediately covered it over so that it would no longer present a falling hazard. R.880a-81a. This is direct testimony that McCarthy was not in control or possession of the roofing work site area.

Similarly, McCarthy cannot satisfy the fourth element of the *McDonald* test, which required McCarthy to establish that "[p]art of the [its] **regular business** [was] intrusted to such contractor." *McDonald*, 153 A. at 426 (emphasis added). The evidence before the jury established that McCarthy is a mom-and-pop carpentry subcontractor. R.892a. Here, the evidence at trial established that McCarthy is not a roofing company; it does drywall, it does flooring, it never does any roofing work, and it fails to hire roofers as a regular part of its business. R.877a-78a. **Thus, when it entrusted the roofing work on the Norwood Library renovation project to RRR Contractors,**

McCarthy was not entrusting "part of [McCarthy's] regular business" to RRR.

Instead of agreeing that it has to strictly satisfy this fourth element of the *McDonald* test to invoke the statutory employer defense, McCarthy urged the Superior Court to essentially nullify this prong of the inquiry by holding that whenever one contractor subcontracts to another any task that the first contractor agreed to undertake in particular construction project at issue, the first contractor has entrusted a regular part of its business to the subcontractor — and the Superior Court agreed. **In so ruling, the Superior Court essentially nullified the "regular part of the delegating contractor's business" prong from the statutory employer test, in direct contravention of Pennsylvania precedent requiring that each of the five parts of the *McDonald* test must be strictly satisfied.**

In other words, prongs one and three of the *McDonald* test — which require the existence of a general contract and a subcontract — already necessitate that the thing being subcontracted is something that the general contract had itself already specified to be accomplished. **If prong four — requiring that the thing being subcontracted is "[p]art of the [general contractor's] regular business" — required nothing more than what**

prongs one and three already required, it is difficult to see what purpose *McDonald* advanced in including that fourth prong. And this is not the first instance where the Superior Court has, instead of strictly insisting on its satisfaction, essentially construed prong four of the *McDonald* test out of existence. *See Dougherty*, 674 A.2d at 265 ("'Whenever the subcontracted work [is] an obligation assumed by the principal contractor under his contract with the owner' element four is met.") (quoting *O'Boyle* v. *J.C.A. Corp.*, 538 A.2d 915, 917 (Pa. Super. 1988)).

At the very least, the Superior Court should have remanded this case for a retrial at which the jury could consider and resolve the evidentiary disputes relating to whether McCarthy could satisfy four of the five McDonald prongs, as McCarthy requested alternative relief in its Pa. Superior Court appeal.

It would be reason enough to grant review in this case that the statutory employer doctrine, in the aftermath of the 1974 amendments to the Workers' Compensation Act, is no longer serving its intended lawful purpose under Pennsylvania law. But, even worse, the Superior Court has been affording statutory employer immunity to contractors, such as McCarthy, that have both failed to pay any workers' compensation

insurance to the injured employee of a subcontractor and that have failed to strictly establish their entitlement to statutory employer status under this Court's *McDonald* subparts.

For these reasons, the third Question Presented is also deserving of this Court's review.

VIII. CONCLUSION

For the foregoing reasons, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: May 11, 2023

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This Petition for Allowance of Appeal complies with the type-volume limitations of Pa. R. App. P. 1115(f) because this Petition contains 8,933 words, excluding the parts of the Petition exempted by Pa. R. App. P. 1115(g).

This Petition complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Book Antiqua font.

Dated: May 11, 2023

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: May 11, 2023

/s/ Howard J. Bashman
Howard J. Bashman

Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

EXHIBIT A

2023 PA Super 13

JASON YODER	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MCCARTHY CONSTRUCTION, INC.; CASTELLI MECHANICAL DESIGN AND CATANIA ENGINEERING ASSOCIATES, INC.	:	No. 1605 EDA 2021
v.	:	
AIR CONTROL TECHNOLOGY, INC.; AND RRR CONTRACTORS, INC.	:	

Appeal from the Judgment Entered July 22, 2021
In the Court of Common Pleas of Philadelphia County Civil Division at No(s): 180500769

BEFORE: PANELLA, P.J., BENDER, P.J.E., and SULLIVAN, J.

OPINION BY BENDER, P.J.E.: **FILED JANUARY 31, 2023**

Appellant, McCarthy Construction, Inc. ("McCarthy"), appeals from the $5,590,650.69 judgment entered in favor of Appellee, Jason Yoder, and

against McCarthy following a jury trial.[1, 2] In its appeal, McCarthy asks us, *inter alia*, to determine whether it qualifies as Mr. Yoder's statutory employer under the Workers' Compensation Act ("WCA")[3], such that it is immune from suit.

Pertinent to our review, under Section 302(b) of the WCA, 77 P.S. § 462, general contractors take on secondary liability for the payment of workers' compensation benefits to the injured employees of their subcontractors. ***See Patton v. Worthington Associates, Inc.***, 89 A.3d 643, 645 (Pa. 2014).[4] Thus, if the subcontractor-employers default, these general

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[1] McCarthy purports to appeal from "the [j]udgment entered on July 22, 2021; the [o]rder dated July 22, 2021, which denied and struck [McCarthy's] Motion to Vacate or Alternatively, Motion for Reconsideration; the 'Correction to Judgment Index' dated July 26, 2021; and all prior adverse orders and rulings." McCarthy's Notice of Appeal, 8/9/21, at 1. An appeal, however, properly lies from judgment. ***See Johnston the Florist, Inc. v. TEDCO Const. Corp.***, 657 A.2d 511, 514 (Pa. Super. 1995) (*en banc*) (stating that "an appeal to this Court can only lie from judgments entered subsequent to the trial court's disposition of any post-verdict motions") (citation omitted); ***see also Bollard & Associates, Inc. v. H&R Industries, Inc.***, 161 A.3d 254, 256 (Pa. Super. 2017) ("An order denying reconsideration is unreviewable on appeal.") (citations omitted); ***Rohm and Haas Co. v. Lin***, 992 A.2d 132, 149 (Pa. Super. 2010) ("Once an appeal is filed from a final order, all prior interlocutory orders become reviewable.") (citation omitted). We have amended the caption accordingly.

[2] The other parties listed in the caption are no longer involved in the case. ***See*** McCarthy's Brief at 12.

[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041; 2501-2710.

[4] ***See*** 77 P.S. § 462 ("Any employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an
(Footnote Continued Next Page)

contractors must pay workers' compensation benefits to the subcontractor-employees. ***See id.*** As such, although they are not the actual employers of the subcontractor-employees, general contractors are considered "statutory employers" of the subcontractor-employees due to their treatment under the WCA. ***See id.***[5] Our legislature's "purpose in imposing this status upon general contractors was remedial, as it wished to ensure payment of workers' compensation benefits in the event of defaults by primarily liable subcontractors." ***Id.*** (citation and footnote omitted).

In exchange for assuming secondary liability for the payment of workers' compensation benefits, statutory employers under Section 302(b) have immunity in tort for work-related injuries sustained by subcontractor-employees. ***See id.***[6] To establish this statutory-employer relationship so that

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employe or contractor, for the performance upon such premises of a part of such employer's regular business entrusted to that employe or contractor, shall be liable for the payment of compensation to such laborer or assistant unless such hiring employe or contractor, if primarily liable for the payment of such compensation, has secured the payment thereof as provided for in this act. Any employer or his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses from another person if the latter is primarily liable therefor.") ("Section 302(b)").

[5] Statutory-employer status is also imposed under Section 302(a), codified at 77 P.S. § 461, of the WCA. ***See Patton***, 89 A.3d at 645 n.3. However, Section 302(a) is not at issue in this matter.

[6] ***See*** 77 P.S. § 52 ("An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall
(Footnote Continued Next Page)

the statutory employer is immune from a suit for negligence, our Supreme Court has held that the following five elements must be present:

> (1) An employer who is under contract with an owner or one in the position of an owner[;] (2) Premises occupied by or under the control of such employer[;] (3) A subcontract made by such employer[;] (4) Part of the employer's regular business [e]ntrusted to such subcontractor[;] (5) An employee of such subcontractor.

McDonald v. Levinson Steel Co., 153 A. 424, 426 (Pa. 1930). If these elements are met, statutory employers enjoy immunity "by virtue of statutory-employer status alone, such that it is accorded even where the statutory employer has not been required to make any actual benefit payment." ***See Patton***, 89 A.3d at 645 (citing ***Fonner v. Shandon, Inc.***, 724 A.2d 903, 907 (Pa. 1999)) (footnote omitted).

For the following reasons, we determine that McCarthy qualifies as Mr. Yoder's statutory employer under the five-part ***McDonald*** test and is therefore entitled to tort immunity. Accordingly, we are compelled to reverse the judgment entered in favor of Mr. Yoder and remand for the entry of judgment in favor of McCarthy.

Facts

The Norwood Public Library entered into a contract with McCarthy — a carpentry company — to remove and replace the library's roof, in addition to

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be liable to such laborer or assistant in the same manner and to the same extent as to his own employe.") ("Section 203"); ***see also*** 77 P.S. § 481(a) (stating that the liability of an employer under the WCA shall be exclusive and in place of any and all other liability) ("Section 303").

completing other projects at the library. ***See*** Trial Court Opinion ("TCO"), 2/11/22, at 1. McCarthy, in turn, subcontracted with roofing company, RRR Contractors, Inc. ("RRR"), for part of the roofing work. ***Id.*** Mr. Yoder worked for RRR. ***Id.*** On October 25, 2016, Mr. Yoder sustained critical injuries after he fell through an uncovered hole in the roof of the library while working there as a roofer. ***Id.***

With respect to the events leading up to the unfortunate accident and Mr. Yoder's resulting injuries, the trial court recounted:

> In accordance with [Occupational Safety and Health Administration ("OSHA")] safety procedures required of the general or prime contractor on the jobsite, McCarthy … had the nondelegable duty to provide a safe work site under [OSHA] requirements. McCarthy … admitted that it was [its] responsibility to patch the hole in the roof in "tongue and groove" style[,] as this is an established specialty for carpenters, not roofers, and RRR did not have the skill to have filled in the hole. Pursuant to OSHA standards, any adequate hole cover needed to be capable of sustaining twice the weight of any individual worker, equipment and tools which would be imposed on it at any time or that any cover be secured against accidental movement by a worker or the elements moving it out of the way.
>
> On the date of the accident, Mr. Yoder climbed a ladder to access the roof and saw an OSHA[-]mandated red-flag perimeter set up around the roof[,] signifying that the workplace was safe and secure according to OSHA guidelines. Mr. Yoder began working independently by ripping off the roof as other workers collected the material. The foreman of the job, Dave Adams[of RRR], asked him to deliver foam board insulation to anyone working on the roof that needed it. Mr. Yoder tucked the 4x8 foot rectangular boards underneath his arm and began walking toward the people who needed the board. As he was walking, Mr. Yoder fell through an unmarked and uncovered hole in the roof.
>
> Mr. Yoder was rushed to a Trauma II [C]enter (for the most severe injuries that are not life threatening) by ambulance where he was intravenously administered fentanyl and dilaudid for his agonizing

> and severe pain. On November 4, 2016, he was transferred to inpatient rehabilitation at a [L]evel I Trauma Center where he continued to receive potent analgesics intravenously during treatment for his injuries.
>
> From falling through an uncovered hole on the roof and hitting the ground on his back twenty feet below him, Mr. Yoder suffered severe and permanent disabling injuries including: a burst fracture of his T12 vertebrae, a right transverse L4 vertebrae process fracture, pubic fractures, a fractured sacrum, aggravation of left hip degenerative changes, T7-T8 disc protrusion and degenerative disc disease with aggravation, radial tears of the annulus at T9-T10 and T10-T11, lumbar radiculopathy, left lower extremity, chronic pain syndrome, spondylosis with myopathy, sacroiliitis[,] and post-traumatic arthritis. Mr. Yoder will require pain management for the rest of his life because of his progressively debilitating injuries.

Id. at 1-3 (internal citations omitted).

Procedural History

On May 10, 2018, Mr. Yoder filed a complaint against McCarthy, along with other parties no longer in the case, contending McCarthy was negligent.[7] McCarthy filed an answer, affirmative defenses, and a cross-claim, in which it raised that Mr. Yoder's "claims are barred or limited by the exclusivity provisions of the Pennsylvania Workers['] Compensation Law." Answer, 8/20/18, at 7 ¶ 4 (unpaginated).

Subsequently, on September 20, 2018, Mr. Yoder filed an amended complaint. On January 28, 2020, McCarthy filed a motion for summary judgment, claiming that it was Mr. Yoder's statutory employer and immune from suit. The next week, on February 6, 2020, McCarthy filed an answer

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[7] The record in this case is voluminous. Therefore, in our recitation of this case's procedural history, we focus on the events most relevant to this appeal and omit many other matters from our discussion.

with new matter and new matter cross-claims to Mr. Yoder's amended complaint, wherein it represented that it "asserts all of the defenses available to it under the Pennsylvania Worker[s'] Compensation Act and avers that [Mr. Yoder's] remedies are limited exclusively thereto and the present action is barred." Answer, 2/6/20, at ¶ 73.

On February 25, 2020, Mr. Yoder filed a motion to strike McCarthy's answer and new matter as untimely, given that it was filed over 16 months after the filing of Mr. Yoder's amended complaint. Shortly thereafter, on February 27, 2020, Mr. Yoder filed a response to McCarthy's motion for summary judgment, arguing, among other things, that genuine issues of material fact exist.

On April 22, 2020, the trial court denied McCarthy's motion for summary judgment without providing any explanation for doing so.[8] Later, on June 22, 2020, the trial court granted Mr. Yoder's motion to strike McCarthy's answer to the amended complaint and new matter.[9]

Leading up to trial, the parties filed forty motions *in limine*. ***See*** N.T., 6/7/21, at 21. Of note, in one such motion, McCarthy sought to preclude evidence on liability based on the statutory-employer defense. In another motion, Mr. Yoder sought to preclude McCarthy from raising the statutory-employer defense at trial, or submitting any questions regarding the defense

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[8] This motion was denied by the Honorable Daniel J. Anders.

[9] This motion was granted by the Honorable Denis P. Cohen.

to the jury, because McCarthy had purportedly waived the defense by failing to plead it.

The case proceeded to a jury trial.[10] After the jury was selected, on June 7, 2021, the trial court heard oral argument on some of the parties' motions *in limine*. There, the trial court determined that, although the statutory-employer defense is not waivable, McCarthy failed to "meet any of the prongs of the test to establish that [it] was the statutory employer of Mr. Yoder…." N.T., 6/7/21, at 155. Accordingly, the trial court subsequently issued an order denying McCarthy's motion *in limine* to preclude evidence on liability based on the statutory-employer defense, stating that McCarthy fails to meet the requirements to qualify as a statutory employer and therefore cannot take advantage of the defense. In addition, the trial court granted Mr. Yoder's motion *in limine* to preclude the statutory-employer defense, directing that McCarthy "shall be precluded from raising the statutory[-employer] defense at trial in any manner whatsoever, including preclusion from submitting any questions to the jury concerning the statutory[-]employer defense, as … McCarthy … does not meet the requirements…." Order, 6/8/21, at 1 (unpaginated; single page).

Following Mr. Yoder's case-in-chief, McCarthy moved for a nonsuit based on, *inter alia*, statutory-employer immunity, which the trial court denied. N.T., 6/17/21, at 5-8. Later, after McCarthy had presented its case, McCarthy

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[10] The Honorable Angelo Foglietta presided over the trial.

similarly moved for a directed verdict based on statutory-employee immunity, which the trial court again denied. N.T., 6/22/21 (A.M.), at 76-79. Thereafter, the trial court likewise denied McCarthy's request to charge the jury on the statutory-employer defense. N.T., 6/22/21 (P.M.), at 14.

On June 22, 2021, the jury returned a unanimous verdict in favor of Mr. Yoder in the amount of $5,000,000. N.T., 6/22/21 (P.M.), at 158-60. In reaching this result, the jury determined that McCarthy was negligent, McCarthy's negligence was a factual cause of Mr. Yoder's injuries, and that Mr. Yoder was not comparatively negligent. ***Id.*** at 158.

Following trial, Mr. Yoder filed a motion for delay damages, which McCarthy opposed. Additionally, McCarthy filed a post-trial motion requesting, *inter alia*, judgment notwithstanding the verdict ("JNOV") or a new trial based on statutory-employer immunity. Mr. Yoder filed a response in opposition.

The trial court denied McCarthy's post-trial motion in its entirety on July 14, 2021. On July 16, 2021, McCarthy filed a motion to vacate the trial court's July 14, 2021 order denying its post-trial motion without briefing, or in the alternative, for reconsideration of the trial court's denial of statutory-employer immunity. Mr. Yoder responded in opposition, urging the trial court to strike McCarthy's July 16, 2021 motion as McCarthy was purportedly using it as a vehicle to improperly supplement the evidentiary record and engage in post-trial briefing. On July 22, 2021, the trial court denied and struck McCarthy's July 16, 2021 motion. That same day, the trial court also issued an order

granting Mr. Yoder delay damages in the amount of $590,650.69. Judgment was entered in favor of Mr. Yoder in the amount of $5,590,650.69, on July 22, 2021.

McCarthy subsequently filed a timely notice of appeal. Both the trial court and McCarthy complied with Pa.R.A.P. 1925(b). In its Rule 1925(a) opinion, the trial court proffered the following explanation as to why it ascertained as a matter of law that McCarthy was not entitled to statutory-employer immunity:

> McCarthy … did not and cannot succeed with the non-waivable statutory employer defense because [it] fail[s] to meet the fifth prong of the test established in ***McDonald***…, which is utilized to determine whether an organization is a statutory employer.
>
> Before an employer will be considered a statutory employer for purposes of the statutory[-]employer immunity defense under the [WCA], the following five elements must be present: (1) an employer who is under contract with an owner or one in the position of an owner; (2) premises occupied by or under the control of such employer; (3) a subcontract made by such employer; (4) part of the employer's regular business entrusted to such subcontractor; and (5) [the plaintiff is] an employee of such subcontractor.
>
> Because an independent contractor can never be a statutory employee, the elements of the ***McDonald*** test governing the determination of whether an employer is a statutory employer within the meaning of the [WCA] cannot be met where a contractor is an independent contractor. Pennsylvania does not have an established rule to determine whether a particular … working relationship can be classified as employer-employee or owner-independent contractor but instead promulgates certain guidelines or factors. The factors which are considered, none being dispositive, include the following:
>
> > (1) control of manner in which the work is done; (2) responsibility for result only; (3) terms of agreement between the parties; (4) nature of the work/occupation; (5)

> skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplies the tools/equipment; (8) whether payment is by time or by the job; (9) whether work is part of the regular business of employer; and, (10) the right to terminate employment.
>
> Here, [Mr.] Yoder was properly found to be an independent contractor of RRR…. Mr. Yoder testified that he understood his agreement with RRR … to be that of an independent contractor. He testified that he was doing "service work" for RRR…[,] which entailed going to job sites himself, using his own tools, and controlling his own time on the job. Remarkably, [McCarthy] proffers no evidence to support [Mr.] Yoder's status as an employee of RRR…. In fact, throughout this litigation, McCarthy … relied on Mr. Yoder's IRS 1099 form to show the amount of money that he was entitled to recover based upon his yearly earnings. While tax forms are not dispositive of independent contractor status, McCarthy[']s] use of Mr. Yoder's independent contractor tax forms to show how much money he earned is inapposite and unconvincing of their own point that Mr. Yoder was an *employee* of RRR … in light of the other circumstances in this case and lack of evidence that Mr. Yoder was in fact an employee of RRR…. Thus, this [c]ourt concluded that [Mr.] Yoder was an independent contractor of RRR … and not an employee.

TCO at 4-6 (citations and footnotes omitted; emphasis in original). In addition, for the same reasons, the trial court determined that it did not err or abuse its discretion in denying McCarthy's motion for a new trial based on the preclusion of evidence, jury interrogatories, and jury instructions regarding the statutory-employer defense. ***Id.*** at 6.

Issues

Presently, on appeal, McCarthy raises the following issues for our review:

> 1. Whether [JNOV] is required because [McCarthy] is clearly entitled to statutory[-]employer immunity?
>
> 2. Whether, in the alternative, this Court should order a new trial at which statutory[-]employer immunity will be litigated?

> 3. Whether a new trial is required because the trial court erroneously precluded highly relevant video surveillance?
>
> 4. Whether a remand is required to recalculate delay damages because the trial court erred in awarding such damages for the period of Pennsylvania's Covid-related judicial emergency?

McCarthy's Brief at 9.[11]

First Issue

In McCarthy's first issue, it asserts that JNOV is required because it is clearly entitled to statutory-employer immunity. ***Id.*** at 20. We recognize:

> There are two bases upon which a JNOV can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
>
> When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict…. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact…. A JNOV should be entered only in a clear case.

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[11] In addition to the briefs of McCarthy and Mr. Yoder, the Pennsylvania Association for Justice filed an *amicus curiae* brief on behalf of Mr. Yoder, and the Pennsylvania Defense Institute and the Philadelphia Association of Defense Counsel filed an *amici curiae* brief in support of McCarthy.

Sheard v. J.J. DeLuca Co., Inc., 92 A.3d 68, 74 (Pa. Super. 2014) (cleaned up).[12] Further, "[a]s a general rule, absent any concession, the status of an individual (*e.g.*[,] 'general contractor,' 'independent contractor,' 'subcontractor') presents a question of law." ***Id.*** at 75 (citation omitted).

Waiver

Before delving into our review of whether McCarthy qualifies as a statutory employer under the ***McDonald*** test and is entitled to judgment as a matter of law, we initially observe that McCarthy's failure to timely plead the statutory-employer defense in response to Mr. Yoder's amended complaint does not result in waiver. This Court has previously explained:

> [T]he [WCA] deprives the common pleas courts of jurisdiction of common law actions in tort for negligence against employers and is not an affirmative defense which may be waived if not timely pled. The lack of jurisdiction of the subject matter may be raised at any time and may be raised by the court *sua sponte* if necessary. To the extent that prior appellate decisions have held to the contrary, they are expressly overruled.
>
> ***LeFlar v. Gulf Creek Indus. Park No. 2***, … 515 A.2d 875, 879 ([Pa.] 1986) (internal citation omitted). ***See also Shamis v. Moon***, 81 A.3d 962, 970 (Pa. Super. 2013).
>
> "Subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented. Jurisdiction is a matter of substantive law." ***Midwest Financial Acceptance Corp. v. Lopez***, 78 A.3d 614, 627 (Pa. Super. 2013) (citation

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[12] Notably, where it has been determined after trial that statutory-employer immunity applies, this Court has entered JNOV in favor of the statutory employer. ***See Sheard***, 92 A.3d at 79 (concluding that the defendant was entitled to JNOV by way of statutory-employer immunity); ***see also Patton***, 89 A.3d at 650 (remanding the matter "for any further actions as may be necessary to conclude it").

> omitted). "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." ***Mid–City Bank & Trust Co. v. Myers***, … 23 A.2d 420, 423 ([Pa.] 1942) (citing ***Cooper v. Reynolds***, 77 U.S. 308 … (1870)).
>
> Our Supreme Court extended ***LeFlar*** to allow the initial assertion of sovereign immunity, even in a petition for reargument following the Supreme Court's adjudication of an appeal to that Court. ***See Tulewicz v. Southeastern Pennsylvania Transp. Authority***, … 592–94, 606 A.2d 427, 428–29 ([Pa.] 1992) (citing ***LeFlar***, ***supra***; ***In re Upset Sale***, … 560 A.2d 1388 ([Pa.] 1989)). Nevertheless, "non-waivable" issues must still be raised within the scope of the proceedings. ***See Bell v. Kater***, 943 A.2d 293 (Pa. Super. 2008), *appeal denied*, … 960 A.2d 454 ([Pa.] 2008) (finding waiver of co-employee workers' compensation immunity, when it was first asserted eleven months following denial of petition for Supreme Court review, because it was no longer timely); ***City of Philadelphia Police Dept. v. Civil Service Com'n of City of Philadelphia***, 702 A.2d 878, 880 n.3 (Pa. Cmwlth. 1997) (finding waiver of governmental immunity when first raised after conclusion of proceedings, to frustrate collection of final judgment).
>
> Once the litigation and all appellate avenues are exhausted, the court is no longer competent to address what was otherwise non-waivable immunity. ***Bell***, ***supra***. As long as the proceedings continue, however, even throughout the appellate process, the relevant court may consider a claim of statutory employer immunity in the first instance. ***Tulewicz***, ***supra***.

Sheard, 92 A.3d at 75-76.[13]

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[13] ***See also Shamis***, 81 A.3d at 970 ("[T]he [WCA] deprives the common pleas courts of jurisdiction of common law actions in tort for negligence against employers. Thus, it could be argued that — even on appeal — this Court has the obligation to *sua sponte* raise the statutory[-]employer defense, craft an argument in favor of or against its applicability, and resolve the issue — all without briefing or argument by the parties and all without a focused, structured presentation before the trial court.") (cleaned up); ***see also***
(Footnote Continued Next Page)

To illustrate, in ***Sheard***, the defendant pled statutory-employer immunity under the WCA in its new matter. ***Id.*** at 71, 78. In the plaintiff's reply, the plaintiff generally denied that assertion, without any further elaboration. ***Id.*** The case proceeded to a jury trial, where the jury rendered a verdict in favor of the plaintiff. ***Id.*** Neither the plaintiff nor the defendant raised the issue of statutory-employer immunity at trial. ***Id.*** at 78. Following trial, the defendant filed a timely post-trial motion, in which it raised various issues unrelated to statutory-employer immunity, and reserved the right to supplement the post-trial motion upon receipt of the notes of testimony from trial. ***Id.*** at 71. Thereafter, the defendant moved to amend its post-trial motion to request JNOV based on statutory-employer immunity, which the plaintiff opposed. ***Id.*** at 71-72. Upon review, the trial court denied the defendant's request for JNOV based on statutory-employer immunity, determining that the defendant waived the issue by failing to have presented evidence on it at trial. ***Id.*** at 72, 78.

On appeal, this Court ascertained that the defendant had not waived the issue. Relying on ***LeFlar***, ***supra***, we reasoned that the defendant's assertion of statutory-employer immunity "implicated the trial court's competency to hear and decide this action. Owing to its foundational nature, plus the fact that the proceedings were still open, we conclude [the defendant] did not

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Grimm v. Grimm, 149 A.3d 77, 86 (Pa. Super. 2016) (noting that "a party cannot waive an issue relating to the trial court's lack of subject matter jurisdiction").

waive the issue of immunity." ***Id.*** at 78 (citations omitted). In addition, we noted that "both parties fully briefed the issue in post-trial motions and were given the opportunity to conduct oral argument on the issue. Whether the immunity issue was presented to a jury is irrelevant, because statutory[-]employer immunity, interpretation of contracts, or vertical privity of the individuals and entities, are all questions of law." ***Id.*** (citation omitted). From there, upon applying the relevant law and looking at the entire record (including averments made in the plaintiff's complaint, as well as a subcontract attached as an exhibit to the defendant's amended post-trial motion), we discerned that the defendant was entitled to JNOV by way of statutory-employer immunity, due to its status as a general contractor and the plaintiff's status as a subcontractor's employee. ***Id.*** at 78-79.

In sum, ***Sheard*** demonstrates that statutory-employer immunity may be raised at any time so long as the proceedings are still open. Thus, in the case *sub judice*, McCarthy's failure to timely plead the statutory-employer defense in response to Mr. Yoder's amended complaint is inapposite. McCarthy has not waived the defense.[14]

Scope of Review

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[14] Mr. Yoder argues that our Supreme Court should overturn ***LeFlar*** "to the extent that ***LeFlar*** has been applied to make the statutory[-]employer defense non-waivable even where the supposed statutory employer was not called on to pay any worker[s'] compensation benefits." Mr. Yoder's Brief at 56. If and until that happens though, we are, of course, "duty-bound to effectuate [our Supreme Court's] decisional law." ***Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.***, 20 A.3d 468, 480 (Pa. 2011) (citations omitted).

Next, we note that our review of McCarthy's first issue is not confined to only the jury trial record, but instead includes the pre- and post-trial record, too. ***See Sheard***, 92 A.3d at 78, 78 n.3 (considering averments made in the plaintiff's complaint, as well as a subcontract attached as an exhibit to the defendant's amended post-trial motion, in determining that JNOV should be entered in favor of the defendant on the basis of statutory-employer immunity). We further agree with McCarthy that, if our review was confined to only the jury trial record, it "would essentially preclude appellate review of [McCarthy's] entire claim because the pre[-]trial record would be irrelevant and the [jury] trial record could not, by court order, contain more detailed evidence regarding the defense" due to the trial court's order granting Mr. Yoder's motion *in limine*. McCarthy's Reply Brief at 13; ***see also id.*** at 16 (noting that McCarthy "had no obligation or ability to formally move [relevant] documents into the trial record after the [c]ourt strictly prohibited the statutory[-]employer defense and any related jury fact-finding").[15] Thus, we look at the entire record in assessing McCarthy's first issue.

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[15] We also agree with McCarthy's distinguishment of ***Xtreme Caged Combat v. Zarro***, 247 A.3d 42 (Pa. Super. 2021), and ***Whitaker v. Frankford Hosp. of City of Philadelphia***, 984 A.2d 512 (Pa. Super. 2009), which Mr. Yoder relies upon to support his position that only the jury trial record should be considered. McCarthy explains:

> [Mr. Yoder] maintains that, "[o]nce this case proceeded to trial and [McCarthy] presented a defense, the trial court's refusal to grant [it] summary judgment and a compulsory nonsuit became moot." [Mr. Yoder's Brief at 25-26 (citing ***Xtreme Caged Combat***, ***supra***, and ***Whitaker***, ***supra***)]. Based on this

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McDonald Test

With those preliminary matters out of the way, we now proceed to assessing whether McCarthy satisfies the ***McDonald*** test. Because the trial

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> principle, [Mr. Yoder] argues that "the record that McCarthy created at trial lacks the evidence on which McCarthy bases its entitlement to [JNOV] in reliance on the statutory[-]employer defense." ***Id.***[at] 26-27.
>
> As ***Whitaker*** and ***Xtreme Caged Combat*** make clear, where summary judgment is denied and ***the same claim*** then proceeds to trial, post-trial and appellate review must focus on whether [JNOV] is required, not on whether summary judgment or nonsuit were improperly denied. ***Whitaker***, 984 A.2d at 517 (explaining that [the] defendant sought but was denied summary judgment on whether [the] plaintiff "failed to establish that their conduct caused Ms. Monaghan's injuries" and that claim proceeded to trial, with the result that [the] defendant was found liable); ***Xtreme Caged Combat***, 247 A.3d at 50-51 & n.7 (explaining that summary judgment is moot because "the factual record at trial supersedes the denial of summary judgment"). In such cases, where ***the same claim*** on which summary judgment was denied then proceeds to trial, it makes sense that the subsequent trial record supplants the pre[-]trial record.
>
> This principle has no application to this case, however, because the trial court denied summary judgment on the statutory[-]employer defense — which should have meant only that the defense must proceed to trial — but then inexplicably prohibited [McCarthy] "from raising the statutory[-employer] defense at trial ***in any manner whatsoever***, including preclusion from submitting any questions to the jury concerning the statutory[-]employer defense." The court also specifically denied defense counsel's alternative request for the presentation of evidence and jury fact-finding on the ***McDonald*** test….

McCarthy's Reply Brief at 9-11 (some citations omitted; emphasis in original). Because the trial court did not permit McCarthy to raise the statutory-employer defense at trial, we are persuaded by McCarthy's argument that this Court's rulings in ***Whitaker*** and ***Xtreme Caged Combat*** do not apply to this matter and do not require us to consider only the jury trial record.

court focused upon McCarthy's failure to satisfy the fifth ***McDonald*** element — *i.e.*, that Mr. Yoder was an employee of RRR — in its Rule 1925(a) opinion, we begin our assessment by evaluating that element.

*Fifth **McDonald** Element*

With respect to the fifth ***McDonald*** element, McCarthy argues that Mr. Yoder was not an independent contractor of subcontractor, RRR, but instead an employee of RRR. ***See McDonald***, 153 A. at 426 (setting forth that the injured worker must be the employee of a subcontractor). Significantly, to support that Mr. Yoder was an employee of RRR, McCarthy points out that Mr. Yoder sought and obtained workers' compensation benefits from RRR, with his claim resolved in a "Compromise and Release Agreement by Stipulation Pursuant to Section 449 of the [WCA,]" dated October 10, 2017. McCarthy's Brief at 24-25 (citation omitted); ***see also*** RRR's Answer, New Matter, and New Matter Cross-Claim to McCarthy's Joinder Complaint, 1/13/20, at Exhibit B ("Compromise and Release Agreement").[16] McCarthy notes that the

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[16] Section 449 of the WCA, codified at 77 P.S. § 1000.5, contemplates, *inter alia*, that the employer or insurer submit the proposed compromise and release by stipulation to the workers' compensation judge for approval. Here, in the Compromise and Release Agreement, the workers' compensation judge is asked to approve the settlement. ***See*** Compromise and Release Agreement at 3 (misnumbered pages). Further, in RRR's answer, new matter and new matter cross-claim to McCarthy's joinder complaint, RRR alleged that Mr. Yoder "executed, filed with [the Pennsylvania Department of Labor and Industry, Bureau of Workers' Compensation ('Bureau')], and received the Bureau's approval of[] a Compromise and Release Agreement … wherein … he agreed to accept the sum of $262,500.00…." RRR's Answer, New Matter, and New Matter Cross-Claim to McCarthy's Joinder Complaint at 6 ¶ 6 (citing,
(Footnote Continued Next Page)

Compromise and Release Agreement "identified [Mr. Yoder] as the 'employee' and RRR … as the 'employer,' and fully resolved [Mr. Yoder's] claim for $262,500." McCarthy's Brief at 25 (citation omitted). McCarthy also advances that, as part of the Compromise and Release Agreement, Mr. Yoder formally resigned his employment with RRR. ***Id.***[17] In addition, we observe that Mr. Yoder was represented by counsel when entering into the Compromise and Release Agreement and submitting his resignation.

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among other things, the Compromise and Release Agreement). In Mr. Yoder's reply to this allegation, he responded, *verbatim*: "Denied as the exhibits as writings speak for themselves. By way of further response, the cited documents have no bearing on whether or not RRR waived the [i]mmunity [d]efense." Mr. Yoder's Reply to RRR's New Matter to McCarthy's Joinder Complaint, 1/22/20, at 3 ¶¶ 5-8. Thus, Mr. Yoder did not specifically dispute that the Compromise and Release Agreement received approval.

[17] Specifically, the resignation signed by Mr. Yoder stated:

> I, JASON YODER, … do hereby tender my resignation ***as an employee of RRR***…, and any and all affiliates and subsidiaries thereof, effective immediately. I hereby acknowledge that I am represented by counsel, and that this resignation is voluntary, tendered of my own free will, and not for reasons of a necessitous and compelling nature. By this resignation, I hereby forever waive and relinquish any and all rights to assert any claim or demand for re-employment, seniority, unemployment compensation, benefits, tenure, and all rights to assert any claim to any benefits of employment with RRR…, and any and all affiliates and subsidiaries thereof, with the sole exception of any benefits which have already vested as of the date of this resignation, such as pension or retirement benefits.

See RRR Contractor's Answer, New Matter, and New Matter Cross-Claim to McCarthy's Joinder Complaint at Exhibit C (capitalization in original; emphasis added).

McCarthy contends that Mr. Yoder's "demand for and receipt of workers' compensation benefits conclusively established that he was an employee — not an independent contractor — of RRR … because 'an independent contractor is not entitled to [such] benefits because of the absence of a master/servant relationship.'" ***Id.*** at 25-26 (quoting ***Universal Am-Can, Ltd. v. W.C.A.B. (Minteer)***, 762 A.2d 328, 330 (Pa. 2000); original brackets omitted; brackets added). McCarthy says that, because Mr. Yoder demanded and received benefits as an employee, he is judicially estopped from now claiming that he was not an employee of RRR. ***Id.*** at 26.

In response, Mr. Yoder does not deny that he received workers' compensation benefits from RRR, nor does he argue that judicial estoppel would not apply if we were to consider the documents.[18] Instead, he argues that McCarthy "failed to make the [Compromise and Release A]greement and resignation part of the jury trial record of this case[,]" and did not preserve an argument that taking judicial notice of those documents would be proper. Mr. Yoder's Brief at 44 (emphasis omitted); ***see also id.*** at 45.

We reject this argument by Mr. Yoder. For the reasons set forth *supra*, we have already determined that our scope of review is not limited to the jury

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[18] We note that, at Mr. Yoder's deposition, he acknowledged that he made a claim for workers' compensation for this accident, that the claim was resolved and settled, that he received a final, lump-sum payment, and that he was living off of the proceeds from that settlement. ***See*** McCarthy's Motion for Summary Judgment, 1/28/20, at Exhibit B (Dep. of Mr. Yoder) at 188-93, 199. Further, when arguing the motions *in limine* at trial, McCarthy's counsel pointed out that Mr. Yoder had received workers' compensation benefits from RRR, and Mr. Yoder did not dispute that claim. N.T., 6/7/21, at 141-42.

trial record and, consequently, we have no need to take judicial notice of the Compromise and Release Agreement and resignation, as they are part of the record.

Further, upon considering these documents, we agree with McCarthy that judicial estoppel applies. Our Supreme Court has explained that:

> "As a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained." ***Trowbridge v. Scranton Artificial Limb Company***, … 747 A.2d 862, 864 ([Pa.] 2000) [((opinion announcing the judgment of the Court)] (citing ***Associated Hospital Service of Philadelphia v. Pustilnik***, … 439 A.2d 1149, 1151 ([Pa.] 1981)).[19]
>
> In ***Trowbridge***, we reviewed the question of whether judicial estoppel barred a claim made by an individual pursuant to the Pennsylvania Human Relations Act (PHRA) that her job termination resulted from illegal discrimination under the PHRA, when she was receiving Social Security disability benefits based on her sworn statement that she was unable to work because of her disabling condition. We reiterated that the purpose of judicial estoppel is "to uphold the integrity of the courts by 'preventing parties from abusing the judicial process by changing positions as the moment requires.'" ***Trowbridge***[, 747 A.2d] at 865…. In ***Tops Apparel Mfg. Co. v. Rothman***, 244 A.2d 436 ([Pa.] 1968), our Court stated that "[a]dmissions … contained in pleadings, stipulations, and the like are usually termed 'judicial admissions' and as such cannot be later contradicted by the party who made

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[19] Our High Court acknowledged, however, that "[w]hether successful maintenance of the prior inconsistent position of litigant is strictly necessary to implicate judicial estoppel in every case, or whether success should instead be treated as a factor favoring the doctrine's application, is the subject of some uncertainty." ***In re Adoption of S.A.J.***, 838 A.2d 616, 620 n.3 (Pa. 2003) (citations omitted). The Court explained that, "[w]hile some prior decisions of this Court appear to indicate that it is always a requirement, others seem to suggest that a broader application of the doctrine may be appropriate." ***Id.*** (citations omitted). Because we determine that Mr. Yoder successfully maintained his position, ***see*** *infra*, we need not confront whether successful maintenance is merely a factor or a strict requirement.

> them." ***Id.*** at 438 (internal footnote omitted). In ***Tops***, we noted our longstanding reliance on this principle and stated that "[w]hen a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice." ***Id.*** at 438, n.8.... "Federal courts have long applied this principle of estoppel where litigants play 'fast and loose' with the courts by switching legal positions to suit their own ends." ***Trowbridge***[, 747 A.2d] at 865....

In re Adoption of S.A.J., 838 A.2d at 620-21 (some internal citations omitted). ***See also Black v. Labor Ready, Inc.***, 995 A.2d 875 (Pa. Super. 2010) (determining that a company was judicially estopped from claiming that it was the plaintiff's employer, making it immune from civil suit, where the company had previously successfully maintained that it was not the plaintiff's employer in earlier workers' compensation proceedings).

Here, Mr. Yoder represented in the Compromise and Release Agreement that he was an employee of RRR, not an independent contractor. He successfully maintained that position, as holding himself out as an employee of RRR enabled him to receive workers' compensation benefits. ***See Universal Am-Can, Ltd.***, 762 A.2d at 330 ("An independent contractor is not entitled to benefits because of the absence of a master/servant relationship. [E]mployee or independent contractor status is a crucial threshold determination that must be made before granting workers' compensation benefits. It is a claimant's burden to establish an employer/employee relationship in order to receive benefits.") (citations omitted). Now, in this action, he claims that he was not an employee of RRR but, instead, an

independent contractor who RRR hired to work on the project. ***See*** Mr. Yoder's Brief at 32.

We do not see how, at the time of the accident, Mr. Yoder could be ***both*** an employee of RRR and an independent contractor of RRR. In addition, Mr. Yoder does not make any attempt in his brief to explain, reconcile, or otherwise justify these seemingly inconsistent positions, despite having the opportunity to do so. As such, we conclude that Mr. Yoder is judicially estopped from now claiming that he was an independent contractor of RRR. Instead, given his receipt of workers' compensation benefits, we determine that he was an employee of RRR at the time of the accident.[20] McCarthy, therefore, has satisfied the fifth ***McDonald*** element.[21]

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[20] Based on our review of the record, it appears that McCarthy did not specifically raise the theory of judicial estoppel until its July 16, 2021 motion, which the trial court later struck. However, because statutory-employer immunity is non-waivable and may be raised *sua sponte*, ***see*** *supra*, McCarthy's failure to raise this theory earlier in the litigation does not preclude us from considering it now.

[21] Mr. Yoder and the trial court both emphasize that McCarthy did not proffer evidence at trial to support its position that Mr. Yoder was an employee of RRR, and instead relied heavily upon Mr. Yoder's IRS 1099 tax forms, which tend to support that he was an independent contractor of RRR (and not RRR's employee). ***See*** Mr. Yoder's Brief at 36, 37 (observing that McCarthy "placed before the jury again and again [Mr.] Yoder's tax returns, which confirmed that RRR was paying [Mr.] Yoder as an independent contractor rather than as an employee[,]" and that McCarthy "did not attempt to prove that [Mr.] Yoder was an employee of RRR at the time of the accident only to have the trial court somehow prohibit McCarthy from doing so"); TCO at 5-6 (similarly observing that McCarthy "relied on Mr. Yoder's IRS 1099 form to show the amount of money that he was entitled to recover based upon his yearly earnings[,]" and
(Footnote Continued Next Page)

*First **McDonald** Element*

Although the trial court did not discuss the other ***McDonald*** elements in its Rule 1925(a) opinion, we examine them to see if McCarthy likewise satisfies them.[22] The first ***McDonald*** element requires "[a]n employer who is under contract with an owner or one in the position of an owner." ***McDonald***, 153 A. at 426. "This part of the ***McDonald*** test consists of three distinct sub-elements: (1) an employer; (2) a contract, and; (3) an owner or one in the position of an owner." ***Peck v. Delaware County Board of Prison***

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that McCarthy "proffer[ed] no evidence to support [Mr.] Yoder's status as an employee"). We deem these points uncompelling.

Initially, given the trial court's ruling that McCarthy was precluded from raising the statutory-employer defense at trial in any manner whatsoever, it would make sense that McCarthy would not proceed to proffer evidence at trial that Mr. Yoder was RRR's employee. Notwithstanding, and counter to the arguments made by the trial court and Mr. Yoder, the record shows that McCarthy ***did*** press Mr. Yoder at trial as to whether he was an employee of RRR. ***See*** N.T., 6/14/21 (A.M.), at 84-85 (McCarthy's counsel asking Mr. Yoder if it was true that, at the time of the accident, he was an employee of RRR); N.T., 6/10/21 (P.M.), at 145-46 (asking Mr. Yoder if he would have continued his employment with RRR if not for the accident, to which Mr. Yoder indicated in the affirmative); ***id.*** at 155 (asking Mr. Yoder if he received an employee manual from RRR). Further, with respect to the tax forms, McCarthy persuasively argues that it "used the forms to cast doubt on [Mr. Yoder's] claimed earnings and the projections of his economic expert, not to establish that he was an independent contractor." McCarthy's Reply Brief at 21 (citations omitted). Finally, and arguably most importantly, we reiterate that our scope of review on this issue encompasses the whole record, so we are not confined to the evidence McCarthy introduced at trial anyway.

[22] Recall that, in prior rulings, the trial court had previously stated that McCarthy did not satisfy ***any*** of the ***McDonald*** elements.

Inspectors, 814 A.2d 185, 190 (Pa. 2002) (opinion announcing the judgment of the Court).

Here, the record shows that McCarthy was under contract with the Norwood Borough, the owner of the library where the accident occurred. ***See*** McCarthy's Exhibit 30 (Contract between McCarthy and Norwood Borough) (hereinafter, "Contract"). The contract identifies McCarthy as the 'Contractor,' and the Norwood Borough as the 'Owner.' ***Id.*** at 1 (unpaginated). In the contract, McCarthy agrees to remove and replace the library's existing roof, and perform various other tasks, for a grand total of $117,590.00. ***Id.*** at 3 (unpaginated).[23] Thus, it appears that McCarthy has met the first ***McDonald*** element, as it has a contract with the owner.

Mr. Yoder, however, argues that McCarthy has not fulfilled this element. He claims:

> To qualify as a statutory employer under the first prong of the ***McDonald*** test, McCarthy must establish that it was in the role of a general contractor on the Norwood Public Library construction project. McCarthy is unable to do so on this record. Norwood Borough, the owner of the property, entered into a contract with McCarthy only for the carpentry and roofing work on the library building. Separately, Norwood Borough entered into electrical and HVAC contracts for this project with other contractors. Thus, it was Norwood Borough, rather than McCarthy, that functioned in the role of general contractor for the library renovation project.

Mr. Yoder's Brief at 46-47 (citation to reproduced record omitted).

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[23] In addition, the subcontract between McCarthy and RRR similarly states that "Contractor [(McCarthy)] and Norwood Borough (hereinafter 'Owner') have entered into a contract … for the construction of Norwood Library Renovation & Roof Replacement…." McCarthy's Motion for Summary Judgment, 1/28/20, at Exhibit D ("Subcontract") at 1.

Assuming *arguendo* that McCarthy was only responsible for the carpentry and roofing work on the library as Mr. Yoder contends, Mr. Yoder offers no authority to support his claim that McCarthy must be the general contractor of the library renovation project to qualify as a statutory employer under the first element of the ***McDonald*** test. Moreover, our own research reveals that Mr. Yoder's assertion is inaccurate under the relevant law. This Court has previously explained:

> The classic statutory[-]employer situation is in the construction industry, where a property owner hires the general contractor, who hires a subcontractor to do specialized work on the jobsite, and an employee of the subcontractor is injured in the course of his employment. In those situations, the general contractor who meets the five-part ***McDonald*** test qualifies as the statutory employer of the subcontractor's employee, and is immune from suit by that employee. ***Moreover, under the [WCA], a contractor need not be the general contractor on a construction project to qualify as a statutory employer. A contractor who is not the general contractor may still qualify for statutory employer status so long as the contractor can establish the elements of the McDonald test.***

Braun v. Target Corp., 983 A.2d 752, 764-65 (Pa. Super. 2009) (cleaned up; emphasis added). ***See also McCarthy v. Dan Lepore & Sons Co., Inc.***, 724 A.2d 938, 941 (Pa. Super. 1998) ("Under the [WCA], a contractor need not be the general contractor on a construction project to qualify as a statutory employer. This Court has stated that a general contractor's subcontractor on a construction project may also qualify as a 'statutory employer' with respect to its own subcontractor's employees.") (citations and footnote omitted); ***Grant v. Riverside Corp.***, 528 A.2d 962, 966 (Pa. Super. 1987) ("[I]t is not mandatory that a contractor be the general contractor on a construction

project to qualify as a statutory employer. A subcontractor under contract with the owner or with a contractor in the position of the owner, in sole or common control of the job premises, that subcontracts a part of its regular business to a second subcontractor, could qualify as a statutory employer of the second subcontractor's employees.") (citation omitted).

Thus, McCarthy does not need to have been the general contractor on the project, so long as the other elements of the ***McDonald*** test are established. Because McCarthy has a contract with the owner, we deem the first ***McDonald*** element satisfied.

*Second **McDonald** Element*

The second ***McDonald*** element requires that McCarthy occupy or control the premises. ***See McDonald***, 153 A. at 426 (calling for "[p]remises occupied by or under the control of such employer"). We have explained that, "[u]nder the second prong of ***McDonald***, an employer's occupancy or control must be actual, but need not be exclusive. An employer satisfies the second prong by proving either occupancy ***or*** control and it is not required to prove both." ***Braun***, 983 A.2d at 764 (internal citations and brackets omitted; emphasis in original).

Though only occupancy or control is required, we conclude that McCarthy has established both. Initially, with respect to occupancy, this Court has agreed that "an employer effectively occupied the premises when its supervisor was present at the site on a daily basis and when its employees were regularly present on the premises at the same time as the

subcontractor's employees." ***Kelly v. Thackray Crane Rental, Inc.***, 874 A.2d 649, 657 (Pa. Super. 2005) (citing ***Al–Ameen v. Atlantic Roofing Corp.***, 151 F.Supp.2d 604, 607 (E.D. Pa. 2001)). ***Accord Braun***, 983 A.2d at 765 (finding occupancy requirement satisfied where the company's project manager was on site every day and easy to locate, and where the company kept a trailer on site).

Further, regarding control, this Court has stated that the contractor need not have control over the entire job premises, but only the part of the job premises where the injury occurred. ***See McCarthy***, 724 A.2d at 942. We have also conveyed that "the fact that the subcontractor used its own supervisors to directly oversee the subcontractor's employees does not mean the general contractor did not retain actual control over the project and premises in general." ***Emery v. Leavesly McCollum***, 725 A.2d 807, 811 (Pa. Super. 1999) (*en banc*) (citation omitted). To exemplify, this Court has found the control requirement satisfied where the contractor had an on-site project superintendent who coordinated the work of various subcontractors and was responsible for overseeing the entire project, including the overall safety of the job site and that OSHA regulations were followed. ***Emery***, 725 A.2d at 811, 811 n.3. ***See also Pastore v. Anjo Construction Co.***, 578 A.2d 21, 26 (Pa. Super. 1990) (determining that the second ***McDonald*** element was satisfied where the contractor had the "responsibility and authority to direct, manage and/or operate the construction project where the injury occurred" and where the contractor's foreman helped to address problems arising out of

the subcontractor's work); ***Uhzo v. Top Gun Construction, Inc.***, 2021 WL 1292781, at *5 (Pa. Super. filed Apr. 7, 2021) (deeming the second ***McDonald*** element satisfied where the contractor had a trailer on the premises and a project manager/superintendent who did scheduling and oversaw the entire worksite and subcontractors).[24]

> Here, Mr. Yoder specifically alleged in his amended complaint that:
>
> [McCarthy], individually and by its agents, servants, workmen and/or employees designed, maintained, possessed, developed, managed, supervised, and/or controlled the construction including of the roof at Norwood Library….

Amended Complaint, 9/20/18, at ¶ 3. ***See also id.*** at ¶ 18 (stating that McCarthy "undertook the supervision and control of the construction which was being undertaken at the [p]roperty, and in connection therewith, established plans, recommendations, designs and specifications for the performance of said construction work at the [p]roperty"); ***id.*** at ¶ 19 (averring that McCarthy "was on site and responsible to see and oversaw that the work performed on the [p]roperty was done according to the construction documents and pursuant to applicable industry practices and standards").

In addition, the trial court recognized that McCarthy was responsible for the safety of the job site. TCO at 1. It conveyed that, "[i]n accordance with OSHA safety procedures required of the general or prime contractor on the job site, McCarthy … had the nondelegable duty to provide a safe work site

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[24] ***See*** Pa.R.A.P. 126(b) (stating that an unpublished non-precedential memorandum decision of the Superior Court filed after May 1, 2019, may be cited for its persuasive value).

under [OSHA] requirements. McCarthy … admitted that it was their responsibility to patch the hole in the roof in 'tongue and groove' style as this is an established specialty for carpenters, not roofers, and RRR did not have the skill to have filled in the hole." ***Id.*** (citations omitted).[25]

Further, at trial, Michael McCarthy — an employee of McCarthy — testified that he was on the roof at the time Mr. Yoder fell. N.T., 6/8/21, at 34-35. Michael McCarthy stated that McCarthy did work on the roof and confirmed that part of its job was to use tongue-and-groove to close any hole on the roof. ***Id.*** at 49, 53-54. He explained that, on the day of the incident, he and others from McCarthy "were patching holes throughout the roof, rotted wood, anything that was damaged from … age or water issues. And we were also patching three holes from the HVAC units." ***Id.*** at 94. In addition, Michael McCarthy noted that McCarthy was also doing work inside of the library, both upstairs and downstairs, including carpentry, painting, and ceiling work. ***Id.*** at 48-49. As a general contractor, Michael McCarthy agreed that McCarthy oversaw its subcontractors and scheduled them, and that — with respect to the library project — it was McCarthy's job to communicate effectively with the subcontractor roofers in order to complete the project. ***Id.*** at 37-39, 41-42, 50.

Dave Adams of RRR — the foreman on the day of the incident — also testified that McCarthy was the general contractor of the library project, and

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[25] Tongue-and-grove refers to "one by six pieces of wood, lumber, and they snap into each other and you nail them down." N.T., 6/8/21, at 49.

that carpenters employed by McCarthy were also working on the roof. N.T., 6/17/21 (A.M.), at 32-33, 56, 60-61. Mr. Adams noted that it was McCarthy's responsibility to fill in any holes, and that he told McCarthy's carpenters to fill and cover the hole through which Mr. Yoder fell. ***Id.*** at 32-33, 47.

McCarthy also points out that, in his opening statement at trial, Mr. Yoder's counsel stated the following:

> This is a case about job site safety. It's a lawsuit against McCarthy…. McCarthy … entered into a contract. We all know what a contract is, a promise, with a governmental agency, the Borough of Norwood, it was a contract that they entered into in which they promised, they agreed pursuant to that contract, they would be responsible for safety, the safety of the workers in doing the work that they were paid to do. And most importantly, they were responsible for ***supervising*** to assure that the work was done not only safely[,] but in compliance with the safety standards.

N.T., 6/7/21 (Opening Statements), at 3 (emphasis added); ***see also id.*** at 8 (Mr. Yoder's counsel stating that "[Mr. Yoder] knows that no worker, whether the general contractor or prime contractor such as McCarthy, is to permit any workers to be working on a site in which there are any holes. Because OSHA says you can't do that, it has to be filled immediately. And they were ***supervising*** the site") (emphasis added); ***see also id.*** at 19-20 (Mr. Yoder's counsel conveying: "[T]he evidence is going to show[,] and you're going to hear the witnesses explain to you[,] that when you have multi-employers on site, such as McCarthy … and other contractors, they had to be responsible through the coordination of work so when one contractor finishes, the general contractor is right there because they know the schedule of work

to make sure the area is safe"); ***id.*** at 23 (McCarthy's counsel explaining: "You're going to hear that McCarthy knew that when the curb was taken down, there would be a hole.[26] And McCarthy knew, and this is important, prior to Mr. Yoder's falling, McCarthy knew that hole was on that roof. They knew it. They failed to comply with their contract, they failed to comply with OSHA, and they failed miserably with respect to their duties and responsibilities. And we're going to prove that to you"); N.T., 6/22/21 (P.M.), at 33 (Mr. Yoder's closing argument: "Michael McCarthy explained to you that McCarthy … acts as the general contractor. Their superintendent was Mr. Scott Novak. [Michael McCarthy] explained to you that part of what a general contractor does is they coordinate the work, they know what the plans are, they know what the work schedule is going to be and they know what their job responsibilities are. They knew that curb was coming off and they knew that only … McCarthy had the carpenters and only McCarthy were the ones that were contracted and paid to fill that hole"); ***id.*** at 35-36 ("McCarthy was paid … money to do construction work, including … replacing the roof. Remember the contract said that you are being paid not only to put on a new roof, you're being paid to ***supervise*** the work that we're paying you to do, and you're

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[26] For context, Michael McCarthy conveyed that, prior to the library construction starting, there were air-conditioning units on the roof that had to be removed. N.T., 6/8/21, at 51. He agreed that, once the air-conditioning units were removed, they would leave curbing. ***Id.*** He also confirmed that, when that curbing would be removed, there would be holes in the roof. ***Id.*** ***See also*** N.T., 6/10/21 (P.M.), at 58 (Mr. Yoder's explaining that "[a] curb could either be wood or metal. AC [u]nits will sit on top of it").

being paid to protect the workers doing the work that we're paying you to do.") (emphasis added).

Based on the foregoing, we conclude that McCarthy has satisfied the second ***McDonald*** element. Not only did McCarthy occupy the site in that it was doing work both on the roof and inside of the library, it also communicated with the subcontractors to ensure the library project's completion and had responsibility for the safety of the job site. Further, Mr. Yoder's counsel emphasized to the jury multiple times that McCarthy acted as the general contractor on the project, coordinating, scheduling, and supervising the work to be done.[27] As such, McCarthy meets the second ***McDonald*** element, as it both occupied and controlled the job site.

Third ***McDonald*** *Element*

The third ***McDonald*** element calls for a subcontract made by McCarthy. ***McDonald***, 153 A. at 426 (demanding "[a] subcontract made by such

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[27] Mr. Yoder argues that McCarthy does not meet the second ***McDonald*** element because Michael McCarthy testified that, "if he was on the roof and had seen the hole through which [Mr.] Yoder fell, he would have immediately covered it over so that it would no longer present a falling hazard. This is direct testimony that McCarthy was not in control or possession of the roofing work site area." Mr. Yoder's Brief at 48-49 (citation omitted).

We disagree with Mr. Yoder's analysis. Assuming *arguendo* that Michael McCarthy did not see and immediately cover the hole, this fact does not demonstrate that McCarthy was not in control or possession of the roofing work site area under the applicable case law. ***See*** *supra*. Further, if we were to accept Mr. Yoder's argument, a contractor would never be in control or possession of a job site if an undetected hazard was also present, which would make satisfying the second ***McDonald*** element extremely difficult.

employer"). Mr. Yoder does not dispute that McCarthy meets this requirement. Indeed, the record shows that McCarthy entered into a contract with RRR to, *inter alia*, "[r]emove and dispose of existing roofing systems down to existing wood roof deck." ***See*** Subcontract at 'Exhibit B: Scope of Work.' Additionally, in its contract with Norwood Borough, McCarthy identified RRR as its subcontractor. ***See*** Contract at 6 (Subcontractor Declaration Form) (unpaginated). Thus, we deem the third ***McDonald*** element satisfied.

Fourth ***McDonald*** *Element*

The fourth ***McDonald*** element demands that McCarthy entrusted a part of its regular business to RRR. ***See McDonald***, 153 A. at 426 (mandating "[p]art of the employer's regular business [e]ntrusted to such subcontractor"). This Court has determined that the fourth ***McDonald*** element "is met when the subcontracted work is an obligation assumed by a principal contractor under its contract with the owner, or one in the position of an owner." ***Braun***, 983 A.2d at 764 (citation omitted); ***see also Shamis***, 81 A.3d at 970-71 ("[S]ince we cannot examine the underlying contract between the owner and Geppert Brothers, we cannot determine the fourth ***McDonald*** element: whether, at the time Mr. Shamis was hurt, he was engaging in work that was [p]art of [Geppert Brothers'] regular business [e]ntrusted to [M.L. Jones].") (internal quotation marks and citations omitted); ***McCarthy***, 724 A.2d at 943 ("[The fourth ***McDonald***] requirement is met when the subcontracted work is an obligation assumed by a principal contractor under its contract with the owner, or one in the position of an owner. Here, TUP employed Henco as the

general contractor for a new clinical research building. Henco contracted with Lepore to perform the exterior masonry work on the building. Lepore then subcontracted with Hamada to waterproof the exterior masonry work that Lepore had completed pursuant to its contract with Henco. Thus, the requisite vertical relationship between Henco, Lepore, and Hamada is established.") (citations omitted); ***O'Boyle v. J.C.A. Corp.***, 538 A.2d 915, 917 (Pa. Super. 1988) ("[T]he only element in dispute is whether the structural concrete work was a part of Driscoll's regular business which it entrusted to Hoffer, the subcontractor who was O'Boyle's employer. This element, as a general rule, is satisfied wherever the subcontracted work is an obligation assumed by a principal contractor under his contract with the owner. Thus, Driscoll was a statutory employer if it had contracted with the owner to do work which included the structural concrete work and thereafter subcontracted that work to the subcontractor who was O'Boyle's employer.") (cleaned up).

Here, Norwood Borough contracted with McCarthy to, among other things, "[r]emove and [r]eplace existing roof w[ith]new E.POM [r]oof with tapered insulation[.]" Contract at 3 (unpaginated). As mentioned *supra*, McCarthy then subcontracted with RRR to perform roofing work. ***See*** Subcontract at 'Exhibit B: Scope of Work' (McCarthy's contracting with RRR to to, *inter alia*, "[r]emove and dispose of existing roofing systems down to existing wood roof deck" and "[p]rovide rigid insulation, and tapered insulation with minimum slope of ¼" per foot as required for drainage"). As such, it appears that McCarthy satisfies the fourth ***McDonald*** element.

Nevertheless, Mr. Yoder contends that:

> [T]he evidence at trial established that McCarthy is not a roofing company, never does any roofing work, and fails to hire roofers as a regular part of its business. Thus, when it entrusted the roofing work on the Norwood Library renovation project to RRR…, McCarthy was not entrusting "part of [McCarthy's] regular business" to RRR.
>
> The evidence before the jury established that McCarthy is a mom-and-pop carpentry subcontractor. It does drywall, it does flooring, but it never does roofing. A company in the business of working as a general contractor on construction projects of this nature would hire roofers all the time as a regular part of its business. Here, by contrast, the evidence of record establishes that McCarthy never hires roofers. In fact, McCarthy hired roofers on this job and this job only.
>
> Instead of agreeing that it has to strictly satisfy this fourth element of the ***McDonald*** test to invoke the statutory[-]employer defense, McCarthy urges this Court to essentially nullify this prong of the inquiry by holding that whenever one contractor subcontracts to another any task that is required to complete a task that the first contractor agreed to undertake, the first contractor has entrusted a regular part of its business to the subcontractor. This Court should reject McCarthy's effort to eliminate the "regular part of the delegating contractor's business" prong from the statutory[-]employer test, in direct contravention of Pennsylvania precedent requiring that each of the five parts of the ***McDonald*** test must be strictly satisfied.

Mr. Yoder's Brief at 49-50 (citations to reproduced record omitted).

We are unpersuaded by Mr. Yoder's argument. To begin with, he proffers and discusses no case law to substantiate that McCarthy must regularly perform roofing, or regularly hire roofers, to meet the fourth ***McDonald*** element. Further, as set forth above, our review of relevant cases supports that the key question is whether McCarthy's contract with Norwood Borough obligated it to perform roofing work. ***See Braun***, ***supra***; ***Shamis***,

supra; ***McCarthy***, ***supra***; ***O'Boyle***, ***supra***. The contract did so here. Finally, the portion of the record that Mr. Yoder cites to establish that McCarthy never hires roofers is unconvincing of that point. There, Michael McCarthy testified to the following:

> [Mr. Yoder's counsel:] In terms of what McCarthy does, McCarthy has employees who are carpenters; would that be correct?
>
> [Michael McCarthy:] Yes.
>
> [Mr. Yoder's counsel:] They have people that do painting?
>
> [Michael McCarthy:] Yes.
>
> [Mr. Yoder's counsel:] You have laborers?
>
> [Michael McCarthy:] Yes.
>
> [Mr. Yoder's counsel:] Does McCarthy do any type of tar roofs?
>
> [Michael McCarthy:] No.
>
> [Mr. Yoder's counsel:] Asphalt roofs?
>
> [Michael McCarthy:] No.
>
> [Mr. Yoder's counsel:] Rubber roofs?
>
> [Michael McCarthy:] No.
>
> [Mr. Yoder's counsel:] Is McCarthy in the business of doing roofing?
>
> [Michael McCarthy:] We subcontract the roofing out.
>
> [Mr. Yoder's counsel:] But does McCarthy do roofing in the business of roofing?
>
> [Michael McCarthy:] Like I said, we subcontract that out.
>
> [Mr. Yoder's counsel:] That wasn't my question. Am I correct that McCarthy does not put down roofs?
>
> [Michael McCarthy:] Correct.

[Mr. Yoder's counsel:] McCarthy does not have any roofers on staff?

[Michael McCarthy:] Correct.

[Mr. Yoder's counsel:] From 1998 up through October 2016, when Mr. Yoder was injured, had you worked for McCarthy … on jobs in which McCarthy … was the general contractor?

[Michael McCarthy:] Yes.

[Mr. Yoder's counsel:] Am I correct that you worked on over a hundred jobs in which McCarthy was the general contractor?

[Michael McCarthy:] Yes, I wouldn't say exactly a hundred, but give or take.

[Mr. Yoder's counsel:] [A]m I correct that your understanding as to what McCarthy did as a general contractor is that they oversaw the subcontractor?

[Michael McCarthy:] Yes. If, in fact, we are the general contractor on that job, we oversee our subcontractors.

[Mr. Yoder's counsel:] So the answer to my question was yes?

[Michael McCarthy:] Yes.

[Mr. Yoder's counsel:] Are you familiar with what is referred to as the coordination of work?

[Michael McCarthy:] Yes.

[Mr. Yoder's counsel:] In the approximate hundred jobs that you've had before in which McCarthy was the general contractor, whoever [*sic*] saw the coordination of work, am I correct that Scott Novak was the employee of McCarthy who had that job?

[Michael McCarthy:] Yes.

[Mr. Yoder's counsel:] And, unfortunately, Mr. Scott Novak has passed away; is that correct?

[Michael McCarthy:] Yes.

[Mr. Yoder's counsel:] Mr. Novak had been with McCarthy … for approximately 35 years?

[Michael McCarthy:] Yes.

> [Mr. Yoder's counsel:] Am I correct that Scott Novak's title was superintendent?
>
> [Michael McCarthy:] Yes.
>
> [Mr. Yoder's counsel:] Am I correct that the duties and responsibilities of the superintendent was to be responsible for all scheduling with subcontractors?
>
> [Michael McCarthy:] I don't think he was solely responsible for that. My brother, Pat, who works at the office, handles a lot of the scheduling also.

N.T., 6/8/21, at 36-39.

The above-stated testimony does not support Mr. Yoder's argument that McCarthy never hired roofers, nor does it establish that McCarthy was not in the business of working as a general contractor on construction projects of this nature. Therefore, for the foregoing reasons, we determine that McCarthy fulfills the fourth ***McDonald*** element.

Conclusion

Because McCarthy meets all five elements of the ***McDonald*** test, we are constrained to conclude that it is Mr. Yoder's statutory employer, rendering it immune from tort liability.[28] While we express our displeasure with having to disturb the jury's verdict, taking away Mr. Yoder's damages award, we are bound by controlling law to reverse the judgment entered in favor of Mr. Yoder and remand for the entry of judgment in favor of McCarthy.

Judgment vacated. Case remanded for judgment to be entered in favor of McCarthy. Jurisdiction relinquished.

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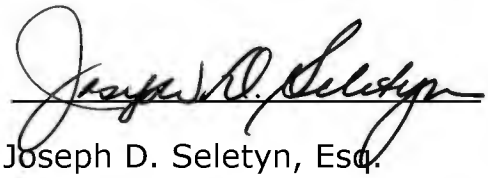
[28] In light of our disposition, we need not address McCarthy's remaining issues.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/31/2023

EXHIBIT B

Filed 04/11/2023

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

JASON YODER	:	No. 1605 EDA 2021
	:	
v.	:	
	:	
MCCARTHY CONSTRUCTION, INC.; CASTELLI MECHANICAL DESIGN AND CATANIA ENGINEERING ASSOCIATES, INC.	:	
	:	
v.	:	
	:	
AIR CONTROL TECHNOLOGY, INC.; AND RRR CONTRACTORS, INC.	:	

ORDER

IT IS HEREBY ORDERED:

THAT the application filed February 14, 2023, requesting reargument of the decision dated January 31, 2023, is DENIED.

PER CURIAM

EXHIBIT C

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

JASON YODER	:	
Plaintiff	:	MAY TERM, 2018
	:	NO.: 0769
v.	:	
	:	
McCARTHY CONSTRUCTION, INC.	:	
Defendants	:	1605 EDA 2021
	:	SUPERIOR COURT NO.

OPINION OF THE TRIAL COURT

This is the appeal of the Defendant McCarthy Construction following a jury's determination that McCarthy Construction, Inc. was responsible for the safety of the jobsite where Jason Yoder was critically injured after he fell through an uncovered hole in the roof of the Norwood Public Library while he was working there on October 25, 2016.

After contracting with the Norwood Public Library to renovate the inside and replace the library's roof, carpentry company McCarthy Construction Inc. subcontracted with roofing company RRR Construction for part of the roof removal; Mr. Yoder, with 11 years' of roofing experience, was an independent contractor for RRR construction. ***N.T. 06/10/21 at 45-46.***

In accordance with OSHA safety procedures required of the general or prime contractor on the jobsite, McCarthy Construction had the nondelegable duty to provide a safe work site under Occupational Safety and Health Administration ("OSHA") requirements. ***N.T. 06/08/21 at 94; N.T. 06/09/21 at 56, 71-72.*** McCarthy Construction admitted that it was their responsibility to patch the hole in the roof in "tongue and groove" style as this is an established specialty for carpenters, not roofers, and RRR did not have the skill to have filled in the hole. ***N.T. 06/08/21 at 61, 93-94; N.T. 06/09/21 at 72.*** Pursuant to OSHA standards, any adequate hole cover needed to be capable of sustaining twice the weight of any individual worker, equipment and tools which

would be imposed on it at any time or that any cover be secured against accidental movement by a worker or the elements moving it out of the way. ***N.T. 06/08/21 at 111-12.***

On the date of the accident, Mr. Yoder climbed a ladder to access the roof and saw an OSHA mandated red-flag perimeter set up around the roof signifying that the workplace was safe and secure according to OSHA guidelines. ***N.T. 06/10/21 at 58-59.*** Mr. Yoder began working independently by ripping off the roof as other workers collected the material. ***N.T. 06/10/21 at 62-63.*** The foreman of the job, Dave Adams, asked him to deliver foam board insulation to anyone working on the roof that needed it. ***Id. at 64-65.*** Mr. Yoder tucked the 4x8 foot rectangular boards underneath his arm and began walking toward the people who needed the board. ***Id. at 70-74.*** As he was walking, Mr. Yoder fell through an unmarked and uncovered hole in the roof. ***Id. at 75.***

Mr. Yoder was rushed to a Trauma II center (for the most severe injuries that are not life threatening) by ambulance where he was intravenously administered fentanyl and dilaudid for his agonizing and severe pain. ***N.T. 05/24/21 at 74-75.*** On November 4, 2016, he was transferred to inpatient rehabilitation at a level I Trauma Center where he continued to receive potent analgesics intravenously during treatment for his injuries. ***Id. at 77.***

From falling through an uncovered hole on the roof and hitting the ground on his back twenty feet below him, Mr. Yoder suffered severe and permanent disabling injuries including: a burst fracture of his T12 vertebrae, a right transverse L4 vertebrae process fracture, pubic fractures, a fractured sacrum, aggravation of left hip degenerative changes, T7-T8 disc protrusion and degenerative disc disease with aggravation, radial tears of the annulus at T9-T10 and T10-T11, lumbar radiculopathy, left lower extremity, chronic pain syndrome, spondylosis with myopathy, sacroiliitis and post-traumatic arthritis. ***N.T. 05/24/21 at 24-25.*** Mr. Yoder will require pain

management for the rest of his life because of his progressively debilitating injuries. ***N.T. 05/24/21 at 92; 06/04/21 at 27.***

This case was tried in front of a jury from June 7, 2021 through June 22, 2021 and resulted in a $5,000,000 jury verdict in favor of the Plaintiff Jason Yoder and against Defendant McCarthy Construction, Inc. On June 28, 2021, the plaintiff filed a motion for delay damages which was granted by this Court on July 22, 2021, resulting in a total verdict of $5,590,650.69.

On July 1, 2021, Defendant McCarthy Construction filed a motion for Post Trial Relief, to which the Plaintiff Answered in Opposition on July 12, 2021. On July 14, 2021, this Court denied Defendant's motion in its entirety. On July 16, 2021, McCarthy Construction filed a motion for reconsideration and an answer to Plaintiff's motion for delay damages. On July 19, 2021, Plaintiff filed a reply in support of its motion for delay damages filed a response to defendant's motion for reconsideration the following day. On August 9, 2021, Defendant filed a notice of appeal to the Superior Court and on August 11, 2021, this Court issued a 1925(b) Statement. On August 24, 2021, Defendant raised the following five issues on appeal:

I. **The Court Erred As A Matter Of Law And Abused Its Discretion In Denying Defendant's Numerous Motions For Judgment As A Matter Of Law Based On The Statutory Employer Defense.**

II. **Even If Judgment As A Matter Of Law Was Not Required Based On The Statutory Employer Defense, Which It Was, The Court Erred As A Matter Of Law And Abused Its Discretion In Denying Defendant's Motion For A New Trial Based On The Preclusion Of Evidence, Jury Interrogatories, And Jury Instructions Regarding The Defense.**

III. **The Court Erred As A Matter Of Law And Abused Its Discretion When It Denied And Struck Defendant's Motion To Vacate Or Reconsider The Court's Denial Of Defendant's Motion For Post-Trial Relief.**

IV. **The Court Abused Its Discretion In Denying Defendant's Motion For A New Trial Based On The Erroneous Preclusion Of Video Surveillance.**

V. **The Court Erred As A Matter Of Law And Abused Its Discretion In Awarding Delay Damages For The Period Of Pennsylvania's Covid-19– Related Judicial Emergency**

Defendant's first contention on appeal, that this Court erred as a matter of law and abused discretion by "denying Defendant's numerous motions for Judgment as a Matter of Law based on the statutory employer defense" fails. McCarthy Construction filed motions for summary judgment, nonsuit, directed verdict and post-trial relief[1] based upon statutory employer immunity.

Defendant McCarthy Construction, Inc. did not and cannot succeed with the non-waivable statutory employer defense because they fail to meet the fifth prong of the test established in ***McDonald v. Levinson Steel Co., 153 A. 424, 425 (Pa. 1930)***, which is utilized to determine whether an organization is a statutory employer.[2]

Before an employer will be considered a statutory employer for purposes of the statutory employer immunity defense under the Workers' Compensation Act, the following five elements must be present: (1) an employer who is under contract with an owner or one in the position of an owner; (2) premises occupied by or under the control of such employer; (3) a subcontract made by such employer; (4) part of the employer's regular business entrusted to such subcontractor; and (5) [Plaintiff is] an employee of such subcontractor. ***77 P.S. § 52; Gillingham v. Consol Energy, Inc., 51 A.3d 841 (Pa.Super. 2012).***

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[1] On January 28, 2020, McCarthy Construction moved for summary judgment based upon statutory employer immunity pursuant to the Workers Compensation Act, ***77 P.S. §52, §462***. The Honorable Daniel Anders denied this motion.

On June 7, 20201, this Court denied McCarthy Construction's motion *in limine*: "McCarthy meets none of those tests. None of those prongs, the five prong tests that you just elucidated from that case." ***N.T. 06/07/21 at 155;*** "And I'm ruling that you have not met any—that your argument does not meet any of the prongs of the test to establish that your clients was the statutory employer of Mr. Yoder, okay." ***Id;*** "My ruling is that your client did not meet the requirements to be considered a statutory employer in order to take advantage of the Worker's Comp defense, okay." ***Id.***

[2] In ***McDonald***, the Court also clarified the terms used in the statute in a contractor/subcontractor relationship, as who the legislature intended should be included within the class of statutory employers. After discussion of the terms, the Court reasoned:

"As thus understood, section 203 would read: 'An employer [principal contractor] who permits the entry upon premises occupied by him or under is control of a laborer * * * hired by * * * a contractor [subcontractor], for the performance upon such premises of a part of the employer's [principal contractor's] regular business entrusted to such * * * contractor [subcontractor], shall be liable * * * in the same manner * * * as to his own employee' ***McDonald v. Levinson Steel Co., 153 A. 424, 426 (Pa. 1930).***

Because an independent contractor can never be a statutory employee, the elements of the *McDonald* test governing the determination of whether an employer is a statutory employer within the meaning of the Workers' Compensation Act cannot be met where a contractor is an independent contractor. ***77 P.S. §52.*** Pennsylvania does not have an established rule to determine whether a particular relationship is working relationship can be classified as employer-employee or owner-independent contractor but instead promulgates certain guidelines or factors. ***Hammermill Paper Co. v. Rust Engineering Co., 243 A.2d 389, 392 (Pa. 1968).*** The factors which are considered, none being dispositive, include the following:

> (1) control of manner in which the work is done; (2) responsibility for result only; (3) terms of agreement between the parties; (4) nature of the work/occupation; (5) skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplies the tools/equipment; (8) whether payment is by time or by the job; (9) whether work is part of the regular business of employer; and, (10) the right to terminate employment.

Am. Rd. Lines v. Workers' Comp. Appeal Bd. (Royal), 39 A.3d 603, 611 (Pa.Cmwlth.2012); accord Hammermill.

Here, Jason Yoder was properly found to be an independent contractor of RRR Construction. Mr. Yoder testified that he understood his agreement with RRR Construction to be that of an independent contractor.[3] He testified that he was doing "service work" for RRR Construction which entailed going to job sites by himself, using his own tools, and controlling his own time on the job. ***N.T. 06/10/21 at 50-51.*** Remarkably, Defendant proffers no evidence to support Jason Yoder's status as an employee of RRR Construction. In fact, throughout this litigation, McCarthy Construction relied on Mr. Yoder's IRS 1099 form to show the amount of

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[3] Mr. Yoder testified that RRR Construction filed tax returns for him and that he was paid as an independent contractor:
Q: In the time that you were working for Triple R, were you paid?
A: Yeah.
Q: How were you paid?
A: I was 1099. I was an independent contractor.
N.T. 06/10/21 at 51.

money that he was entitled to recover based upon his yearly earnings. ***N.T. 06/10/21 at 142-149.*** While tax forms are not dispositive of independent contractor status,[4] McCarthy Construction's use of Mr. Yoder's independent contractor tax forms to show how much money he earned is inapposite and unconvincing of their own point that Mr. Yoder was an *employee* of RRR Construction in light of the other circumstances in this case and lack of evidence that Mr. Yoder was in fact an employee of RRR Construction. Thus, this Court concluded that Jason Yoder was an independent contractor of RRR Construction and not an employee. It is respectfully requested that this decision be affirmed on appeal.

Defendant's second issue on appeal, that this Court "erred as a matter of law and abused its discretion in denying Defendant's motion for a new trial based on the preclusion of evidence, jury interrogatories and jury instructions regarding the statutory employer defense" is inaccurate.

For the reasons set forth by this Court in response to Defendant's first issue on appeal, McCarthy Construction, Inc. was not a statutory employer. Therefore, McCarthy Construction was not entitled to use the statutory employer defense and this Court ruled accordingly at each interval where counsel raised this defense. Consequently, this Court respectfully requests that the Superior Court affirm this Court's ruling on appeal and find that the decision to preclude evidence, jury interrogatories, and jury instructions regarding the statutory employer defense was proper.

Next, Defendant's fourth contention on appeal[5]—that this Court erroneously precluded evidence of video surveillance is egregiously misrepresented. This Court considered and discussed the "erroneously precluded" video surveillance evidence with counsel on June 10, 2021, June 14, 2021, June 16, 2021, and June 17, 2021, June 21, 2021, and June 22, 2021.

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[4] ***Baum v. W.C.A.B., 721 A.2d 402 (Pa. Cmnwlth. Ct. 1998).***

[5] For cohesion of argument, Defendant's third issue on appeal is addressed last.

The admission of evidence is within the sound discretion of the trial court; these rulings will not be overturned absent an abuse of discretion or misapplication of the law. ***Maisano v. Avery, 204 A.3d 515, 523 (Pa.Super. 2019).*** An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused. ***Schuenemann v. Dreemz, LLC, 34 A.3d 94, 100–01 (Pa. Super. 2011).***

Defense counsel had two private investigating firms surveil Mr. Yoder. ***N.T. 06/16/21 at 6.*** Over the course of fifteen days and of one hundred and twenty-three hours of video surveillance, they returned approximately thirteen or fourteen minutes of footage in which Mr. Yoder was on camera. ***N.T. 06/10/21 at 37.*** Of particular issue was a seven-minute portion of footage depicting Mr. Yoder inside the BJS Wholesale Club ("BJ's") filmed by BJ's surveillance camera which was obtained by private investigation firm Insight Investigations. ***Id. at 8.***

As gatekeeper, this Court determined twice, through separate and independent rulings as the circumstances regarding this video changed, that the video footage taken by the BJ's surveillance camera was inadmissible. ***N.T. 06/10/2021 at 36; N.T. 06/22/21 at 32-33.***

First, through agreement of counsel, this Court ruled that the BJ's surveillance portion of the video would not be admissible to the jury as the footage was in an altered [sped up] state. ***N.T. 06/10/2021 at 36.***[6] Following this ruling, defense counsel obtained a copy of the video in real-time. ***N.T. 06/14/21 at 4; N.T. 06/16/21 at 108-09.*** Plaintiff's counsel then filed a Temporary Restraining Order ("TRO") and a Complaint alleging that the evidence was obtained under false

[6] THE COURT: All right. So here's my ruling: My ruling is that it's already been stipulated that any video from BJ's Market will not be displayed by counsel for defendant because its at various speeds and not the actual speed that the individual was moving. So they already said they're not going to play that.
N.T. 06/10/21 at 36.

pretenses. ***06/10/21 at 5.*** This Court ruled that it would honor and rule consistent with the Order on the TRO— "I'll honor the order saying it's kept out. But until that time, my ruling [that the video is admissible] stands." ***N.T. 06/14/21 at 5***. As Counsel continued to argue their position regarding this portion of the video, this Court reiterated: "But you filed a TRO. It will be heard, I assume. I'm not going to delay the trial for that. But if it's heard and there's a ruling that it's to be kept out, then I'll honor the ruling." ***Id. at 7.***

The TRO was denied by the Honorable Daniel Anders. However, following Plaintiff's counsel's alert that the video was obtained under false pretenses on June 16, 2021 and an *in-camera* hearing during which the testimony of the worker who was responsible for releasing the footage confirmed those circumstances regarding its release, this Court decided that the determinative issue was not whether the TRO regarding the video's release was granted or denied but instead was under what circumstances the video was released, and ultimately denied the admission of this portion of video footage. ***N.T. 06/16/21 at 8.***

This Court provided support on the record regarding the admissibility of the BJ's Wholesale Club video:

> THE COURT: Here's the bottom line. The bottom line is if this individual formed the mistaken belief from what she was told by your investigator that she was releasing this video under the circumstances that it is a valid ongoing police investigation and but for that fact, she would not have released it, then what your investigator said to her is irrelevant, because I assume she's going to say if I knew that it was not a police investigation, it was just a civil lawsuit, we're under orders not to release it and I shouldn't have released it. So its irrelevant what your investigator said he told her. Now if she said yeah I gave it to him, I shouldn't have, but I wasn't misled, I made a mistake, then we're under another circumstance. So, she's the individual that I want to speak to. You know, I'm assuming that your investigator is going to say I never said I was a police officer I said I'm an investigator.

N.T. 06/21/21 at 12-13.

On June 21, 2021, the Court instructed counsel that whether the video would or would not be admissible depended on the testimony of BJ's asset production supervisor, Ms. Brobst, "assuming that [Ms. Brobst, BJ's asset production supervisor,] comes in and she testifies the way you're saying she will, then we may or may not be able to play that video." ***N.T. 06/21/21 at 152.*** The next day, Ms. Brobst testified before this Court that on April 26, 2021, while working, a senior assistant manager at BJ's Wholesale Club paged her and told her there was a detective there to see her. ***N.T. 06/22/21 at 14-16.*** While Ms. Brobst does not remember the exact way that the private investigator introduced himself to her, he did say that he was an officer, and she believed that he was a detective or police officer with a governmental agency. ***Id. at 16.*** She testified that if she knew that he was a private investigator and not a police officer, she would have informed her manager differently. ***Id.*** Despite e-mailing the video two times to someone at "Insight Investigations," she did not know it was not going to a police officer or someone from a governmental agency. ***Id. at 22.***[7] On June 18, 2021, Ms. Brobst filed a police report regarding the release of this evidence following BJ's management direction. ***Id. at 24.***

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[7] THE COURT: All right. How many times did you send the video to either Mike Corsaro or someone else--
THE WITNESS: Twice.
THE COURT: From Insight Investigations?
THE WITNESS: TWICE.
THE COURT: Okay. And you knew at that time that you weren't sending it to a police officer or governmental agency; correct?
THE WITNESS: No, I did not know it. I thought he was an officer. I really did.
THE COURT: Did you think it was unusual that you were sending it to a private investigating firm?
THE WITNESS: Well, he gave me the card, but he wrote his e-mail on the back and I didn't know what Insight was. I didn't. I didn't know what it was.
THE COURT: and you didn't think it was unusual that a police officer, that you thought was a police officer, would give you a card that had the name of a private investigating firm?
THE WITNESS: He didn't give me the card.
THE COURT: The card you had, ma'am.
THE WITNESS: Yeah, the other guy gave me the card. I didn't even really look at the other side of it until afterwards because I knew I needed to send it to that email on the back. And all it had was insight and it didn't say the total title, which it didn't dawn on me. But what dawned on me was they kept being persistent about coming in and trying to get in my office to get video.
N.T. 06/22/21 at 21-24 [emphasis added].

This Court provided reasoning to counsel:

> THE COURT: Like I said, I don't think Ms. Brobst is being one hundred percent credible. I think she was basically doing a CYA. **But be that as it may, she indicated that she was under the assumption that this person was a police officer or detective from some other governmental agency. That's the information that she relayed to her regional manager, who authorized the release of the original video.**
>
> She also indicated that when the second person came in, who did identify himself as being from Insight Investigations, by virtue of the fact that he gave her a card with his name on it and where he's from, she then forwarded these e-mails to a private investigating firm.
>
> She didn't say, most notably, that if this person was from a private investigating firm as opposed to a governmental agency that she absolutely would not have even considered giving him video. **She said she still would have had to have called her regional manager to get permission to do so.**
>
> **So the fact that this person may or may not have identified themselves as a police officer, or whether this person was under the mistake and belief that his person was police officer because he said I'm an investigator is not dispositive of the fact pursuant to this witness's testimony.** I guess I would have to hear form the regional manager. I don't want to delay this trial any longer since it's been delayed numerous times... Out of an abundance of caution, I'm going to rule that the video is not admissible.

N.T. 06/22/21 at 32-33 [emphasis added].

As shown, this Court considered the evidence over the course of many discussions spanning several days and held an *in-camera* hearing related to its introduction. Ultimately, the testimony provided to this Court was that the regional manager, responsible for the evidence's release, was informed that the requesting party was that of a governmental agency police officer which was the determinative factor regarding its release. Accordingly, as the introduction of evidence is within the sound discretion of the trial court, and this Court has fully articulated the reason for its legitimate exclusion on the record, it is respectfully requested that the decision to exclude this evidence be affirmed on appeal.

Defendant's fifth contention on appeal, that this Court erred in awarding delay damages for the period that the Court was closed due to the Covid-19 pandemic, similarly must be denied. This Court awarded Plaintiff Jason Yoder delay damages pursuant to Pa.R.C.P. 238 which states, "At the request of the plaintiff in a civil action seeking monitory relief for bodily injury... damages for delay **shall** be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury. . . and **shall** become part of the verdict, decision or award" ***Pa.C.R.P. 238(a)(1)(emphasis added)***. The Court intends for delay damages to help "alleviate court congestion by promoting earlier settlement of claims." ***Schrock v. Albert Einstein Medical Center, 589 A.2d 1103, 1106 (Pa. 1991).*** The Court can award delay damages even if the defendant did nothing to delay trial, if trial was delayed because of a crowded court docket, or due to other factors which were not the fault of plaintiff or of any party. ***Id.***

Here, the plain language of the rule indicates that delay damages are appropriate due to delay that is not the fault of any party, such as a court closure due to a pandemic and accordingly, defense counsel's assertion that delay damages are improper should be denied. Further, the Court's closure did not prevent defense counsel from picking up the telephone, scheduling a zoom hearing, or sending a text message to opposing counsel indicating the desire to make an offer to settle this case. In fact, the Court's closure could have served as encouragement to settle and the fact that it did not does not entitle defendant to a reward when the underlying purpose of delay damages is to discourage dilatory conduct.

Finally, Defendant's third issue, that this Court erred as a matter of law and abused discretion when it Denied and Struck Defendant's Motion To Vacate Or Reconsider The Court's

Denial Of Defendant's Motion For Post-Trial Relief was not raised in the Post Trial Motion and accordingly is waived for purposes of appeal.

Therefore, for the reasons foregoing in this Opinion, it is respectfully requested that the Superior Court find that this Court did not err as a matter of law or abuse its discretion pertaining to any of Defendant McCarthy Construction Inc.'s five issues on appeal in this matter and affirm this Court's decisions accordingly.

BY THE COURT:

J.
ANGELO J. FOGLIETTA

Date: Feb. 10th, 2022

Certificate of Service

On this date, the **10th day of February, 2022**, a true and correct copy of the attached 1925(a) Opinion was filed by this Court with the Civil Appeals Unit for service upon all attorneys of record via the Court's electronic filing system.

J.

ANGELO J. FOGLIETTA

EXHIBIT D

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JASON YODER	:	
	:	
v.	:	MAY TERM, 2018
	:	NO. 00769
MCCARTHY CONSTRUCTION, INC.	:	

ORDER

AND NOW, this 22ND day of JULY 2021, upon consideration of Plaintiff's Motion for Delay Damages, AND DEFENDANT'S RESPONSE THERETO it is hereby **ORDERED** and **DECREED** that the verdict of the jury in the amount of $5,000,000.00 is hereby molded to reflect the addition of delay damages in the amount of $590,650.69, for a total verdict of $5,590,650.69.

BY THE COURT:

J.

A. 3

EXHIBIT E

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JASON YODER	:	
	:	
v.	:	**MAY TERM, 2018**
	:	**NO. 00769**
MCCARTHY CONSTRUCTION, INC.	:	

ORDER

AND NOW, this 14TH day of JULY 2021, upon consideration of the Motion for Post-Trial Relief of Defendant, McCarthy Construction, Inc., and Plaintiff's Response in Opposition thereto, it is hereby **ORDERED** and **DECREED** that the Motion is **DENIED IN ITS ENTIRETY**.

BY THE COURT:

ANGELO J. FOGLIETTA, J.

180500769-Yoder Vs Mccarthy Construction, Inc. Etal

18050076900443

Case ID: 180500769
Control No.: 21070272

A. 1

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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Dated: May 11, 2023

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