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WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

Guillermo Sanunga, Plaintiff, vs. Bristol Developers, Inc., Perfect Body and Fender, Co d/b/a Perfect Body Co., Inc., Coach USA, Inc., Joseph M. Sanzari, Inc., United Rentals, Inc., Sky Jack Equipment Services, Inc., AMA Realty, LP, et al Defendants.	: Superior Court of New Jersey : Hudson County: Law Division : Docket No. HUD-L-1127-13 **OPINION**

Date of Oral Argument: **September 4, 2015**
Date of Decision: **October 1, 2015**

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SARKISIAN, J.S.C.

Summary of Motion and Statement of Facts

Presently before the Court is Co-Defendant United Rentals' ("United Rentals") motion for summary judgment, pursuant to R. 4:46-2, seeking to dismiss Plaintiff Guillermo Sanunga's ("Plaintiff") complaint and all cross-claims averred against it by Co-Defendant Bristol Developers, Inc. ("Bristol") and/or Sky Jack Equipment Services, Inc. ("Sky Jack").[1]

[1] While United Rentals' motion coupled its motion for summary judgment with various motions in limine for trial, now scheduled for October 13, 2015, this opinion only addresses the summary judgment motion and the Court will address the motions in limine in a separate written opinion.

Plaintiff opposes United Rentals' motion for summary judgment, claiming a genuine issue of material fact exists as to United Rentals' negligence, but it does not oppose United Rentals' motion for summary judgment as to Plaintiff's claim for punitive damages, and liability under the New Jersey Products Liability Act.

This matter arises out of a workplace accident on March 7, 2011, where Plaintiff fell off a scissor lift, manufactured by Sky Jack and leased from United Rentals, while working for Bristol Developers on a construction project at 9501 Fairview Avenue, in North Bergen, New Jersey, to disassemble steel panels from bus paint booths. Each steel panel is approximately 12-feet by 3-feet (12' x 3') and weighs approximately 80 pounds. Plaintiff filed his original complaint in this matter on March 5, 2013. Plaintiff's second amended complaint, filed on September 12, 2013, avers the following counts:

1. **Count 1**: Negligence and Recklessness
2. **Count 2**: Failure to Comply with Local, State, and Federal Laws
3. **Count 3**: Strict Liability
4. **Count 4**: Workplace Safety Negligence
5. **Count 5**: Failure to Comply with Local, State, and Federal Laws Regulating Workplace Safety
6. **Count 6**: Products Liability
7. **Count 7**: Laidlow Count

All of the defendants, other than United Rentals, the moving party, have previously been dismissed by summary judgment, specifically:

1. **Bristol Developers, Inc.**: Plaintiff's employer, a Contractor hired to demolish, construct, install and/or remove a portion of a commercial premises on 9501 Fairview Avenue in North Bergen, NJ (dismissed via summary judgment by order and written opinion, dated July 27, 2015).

2. **Joseph M. Sanzari, Inc.**: Part-owner of the commercial premises on 9501 Fairview Avenue in North Bergen, NJ (dismissed via summary judgment by order dated May 8, 2015).

3. **Coach USA, Inc.**: Part-owner of the commercial premises on 9501 Fairview Avenue in North Bergen, NJ (dismissed via summary judgment on May 29, 2015).

4. **Perfect Body Co., Inc.**: Part-owner of the commercial premises on 9501 Fairview Avenue in North Bergen, NJ (dismissed via summary judgment by order dated May 29, 2015).

5. **AMA Realty, LP**: Part-owner of the commercial premises on 9501 Fairview Avenue in North Bergen, NJ (dismissed via summary judgment by order dated September 4, 2015).

6. **9440 Fairview Avenue Properties, LLC**: Owner, tenant, lessee and/or developer of the commercial premises on 9501 Fairview Avenue in North Bergen, NJ (dismissed via summary judgment by order dated May 8, 2015).

7. **Sky Jack Equipment Services, Inc.:** Manufacture of the scissor lift that Plaintiff fell off of on March 7, 2011 (dismissed via summary judgment by order dated September 4, 2015).

Brian Danz, a Bristol employee and one of Plaintiff's supervisors at the construction site, developed the plan in which two (2) scissor lifts would be used so Bristol employees would place detached panels on the second lift and the panels could be lowered to the ground where another Bristol employee would pick up the removed panels and load them onto a forklift. To disassemble the platforms, Plaintiff allegedly had to reach over the railings two and a half to three feet (2-1/2 to 3') and unbolt approximately 28 to 34 bolts using hand tools and an electric saw.

Bristol rented the scissor lift from United Rentals. United Rentals Sales Representative James Schoening visited Bristol's work site to help Bristol select the proper equipment for its project. However, Mr. Danz did not provide Mr. Schoening with a list of certified scissor lift operators, and Mr. Schoening did not ask for one. Furthermore, Mr. Schoening also did not (1) inquire with anyone from Bristol how they intended to disassemble the paint booths; (2) did not offer training to Mr. Danz or any of the Bristol workers; and (3) did not provide or offer any other familiarization with the lift to Mr. Danz or any of the Bristol workers.

Eric Hernandez was the United Rentals' employee who dropped off the scissor lift at Bristol's work site. Generally, Mr. Hernandez showed United Rentals' customers the owner's manual, how to start the machine, and where the harness and lanyard attachment points were located. Mr. Danz did not provide Eric Hernandez with a list of certified scissor lift operators, and Mr. Hernandez did not ask for one. Mr. Hernandez did not ask Mr. Danz for aerial lift credentials for any of the Bristol workers who Bristol planned to operate the scissor lift. There is also no evidence that Mr. Hernandez offered training

or familiarization to Mr. Danz or any of the Bristol workers who were expected to operate the scissor lift.

Plaintiff has produced expert reports from (1) Kenneth Shinn and Anthony Lusi, Jr. of LuMark Consulting, which is a consulting firm that provides its clients training services for industrial equipment such as scissor lifts, (2) Dr. Joseph McGowan, a biomechanical expert, from McGowan and Associates, and (3) Dr. Gary Bakken, an ergonomics, biomechanics, safety, and systems engineering expert, in support of his claims against United Rentals.

Kenneth Shinn and Anthony Lusi, Jr. of LuMark Consulting found the accident should have never happened because (1) United Rentals did not provide equipment familiarization; (2) United Rentals provided a scissor lift to an untrained operator; and (3) United Rentals provided the wrong tool for the task to be completed. Kenneth Shinn and Anthony Lusi, Jr. cited to ANSI.SIA A92.6-2006 industry standards, which states in relevant part:

> **5. Responsibilities of Dealers**
>
> **5.1 Basic Principles**: Sound principles of safety, training, inspection, maintenance, application, and operation consistent with all data available regarding the parameters of intended use and expected environment shall be applied in the training of operators, in maintenance, application, safety provisions and operation of the aerial platform will be carrying personnel
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> **5.7 Training**: The dealer shall offer appropriate training to facilitate owners, users, and operators to comply with requirements set forth in this standard regarding inspection, maintenance, use, application, and operation of the aerial platform.
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> **5.8 Familiarization on Delivery**: Upon delivery by sale, lease, rental or any form of use, the dealer shall have responsibility with the person designated by the receiving entity for accepting the aerial platform to:
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> 1) identify the weather resistant compartment (for manual storage);
> 2) confirm the manuals, as specified by the manufacturer, are on the aerial platform;
> 3) review control functions; and
> 4) review safety devices specific to the model aerial platform being delivered.
>
> **5.11 Record Retention and Dissemination**: the dealer shall retain the following records for at least 4 years: . . . (8) name of person(s) receiving familiarization with the aerial platform upon each delivery unless this individual has been provided with familiarization on the same model, or one having characteristics consistent

> with the one being delivered, within the prior 90 days; and (9) Name of person[s] providing familiarization with the aerial platform upon each delivery.

(Lumark Consulting Expert Report. at 32-37 in Plaintiff's Cert, Ex. 19).

Dr. McGowan found that it is unambiguous that the injury sustained by Plaintiff is consistent with a head-leading fall from an elevated platform and that if Plaintiff had fall-protection with industry specific guidance, specifically with a four-foot, non-shock absorbing lanyard, full-body harness, and secured to a tie-off, Plaintiff would not have fallen. Dr. McGowan found that:

> United Rentals, according to the record, did not mandate the use of fall protection in conjunction with the subject incident, did not provide protective equipment, and did not make specific offer of the sale of protective equipment in conjunction with the subject rental. Had any of these courses of action been followed with result of Mr. Sanunga being equipped with appropriate fall protection at the time of the incident, he would not have fallen and his injuries would not have occurred

(McGowan Expert Report at 34 in Plaintiff's Cert., Ex. 5).

Dr. Bakken found that Defendant United Rentals' and Bristol's procedures were unreasonably dangerous at the time of the subject incident. Dr. Bakken found United Rentals failed to develop and implement procedures, including familiarization and rental procedures, consistent with its stated mission and business ethics regarding customer safety by providing Bristol with appropriate scissor lift use knowledge, which caused Bristol to perform scissor lift activity without a worker safety plan, without training, without providing personal fall protection, and appropriate task supervision. Dr. Bakken further found that as a result of United Rentals' defective procedures listed above, Mr. Sanunga was in a situation that required him to make safety decisions based on his observations of Mr. Danz's scissor lift operation without personal fall protection or guardrails. Mr. Sanunga was also asked to make task performance decisions based on his own inherent self-initiative and "hard-worker" characteristics.

I. Summary Judgment

Summary Judgment is appropriate when "the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2; See also, Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 528-29 (1995). "All inferences of doubt are drawn against the movant in favor of the opponent of the motion." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1955).

Judicial review of a summary judgment motion requires a discriminating search of the record to determine whether there exists a genuine dispute of material fact. Millison v. El. Du Pont Nemours & Co., 101 N.J. 161, 167 (1985). A genuine dispute of fact exists when the evidential materials considered "in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. "Mere assertions in the pleadings are not sufficient to defeat a motion for summary judgment." Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J.Super. 369, 383 (App. Div. 1960).

a. Claims Without Opposition

Plaintiff does not oppose United Rentals' motion for summary judgment dismissing Plaintiff's claims for punitive damages and liability under the New Jersey Products Liability Act.

b. Negligence and the Products Liability Act

Negligence is a fact which must be shown and which will not be presumed." Long v. Landy, 35 N.J. 44, 54 (1961). Under a theory of negligence, a plaintiff must demonstrate: (1) defendants owed a duty to the plaintiff, (2) the defendants breached that duty, (3) the plaintiff suffered an injury, and (4) the defendants' breach was the proximate cause of the plaintiff's injury. Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div. 1977).

To determine whether a person owes a reasonable duty of care toward another, the Court must conduct a fact-specific and principled analysis to identify, weigh, and balance the relationship of the parties, the nature of the risk involved, the opportunity and availability to exercise care, and the public interests in the proposed solution. Filipowicz v. Diletto, 350 N.J. Super. 552, 559 (App. Div. 2002). New Jersey courts will also assess the level of duty owed in consideration of public policy. "Ultimately, the matter turns on whether the imposition of a duty satisfies an abiding sense of basic fairness under all the circumstances in light of considerations of public policy." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

United Rentals argue in support of dismissal of the remaining count against them that (1) Plaintiff's negligence count is subsumed by the Products Liability Act, N.J.S.A. 2A:58C-2; (2) United Rentals neither owed Plaintiff a duty of care nor breached a duty of care to Plaintiff; and (3) Bristol, not United Rentals, proximately caused Plaintiff's injuries and subsequent damages.

The PLA was enacted in 1987 to create a unified statutorily defined theory of recovery for harm caused by a product. Sinclair v. Merck & Co., Inc., 195 N.J. 51, 67 (2008). This law is derived from the common law principle of strict liability, which shifts the focus from conduct, as in a negligence case, to the product. See Suter v. San Angelo Foundry & Machine Company, 81 N.J. 150, 169 (1979).

In New Jersey, the liability of a manufacturer, seller, or lesser of a defective product is engrafted in the Product Liability Act. N.J.S.A. 2A:58C-2. The Products Liability Act states:

> [a] manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

N.J.S.A. 2A:58C-2.

A Products Liability Action is defined as:

> any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

N.J.S.A. 2A:58C-1(b)(3).

United Rentals is not the manufacturer of the subject scissor lift, but is subject to the terms and conditions of the Products Liability Act because it falls under the definition of a "product seller." A product seller is defined as:

> any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce.

N.J.S.A. 2A:58C-8.

However, a product seller, such as United Rentals, is liable only if:

> (1) The product seller has exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect in the product which caused the injury, death or damage; or

> (2) The product seller knew or should have known of the defect in the product which caused the injury, death or damage or the plaintiff can affirmatively demonstrate that the product seller was in possession of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product which caused the injury, death or damage; or
>
> (3) The product seller created the defect in the product which caused the injury, death or damage.

N.J.S.A. 2A:58C-9(d).

The Products Liability Act has a specific section of the Act that deals with defective warnings. See N.J.S.A. 2A:58C-4. According to the New Jersey legislature:

> [i]n any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician . . . .

N.J.S.A. 2A:58C-4.

Notwithstanding case law which interprets this "unified statutorily defined theory of recovery for harm caused by a product to lead the Court under the facts presented in those cases to dismiss negligence claims because they are subsumed under the PLA, see, e.g. In re Lead Paint Litigation, 191 N.J. 405 (2007); Koruba v American Honda Motor Co., 396 N.J. Super. 517 (App Div 2007), it is unclear whether "training" falls under the purview of "warnings and instruction."

The Appellate Division in Grier v. Cochran Western Corp., 308 N.J. Super. 308 (App. Div. 1998) issued dicta that training could be required under a manufacturer's and/or product seller's obligations under N.J.S.A. 2A:58C-4 when the Appellate Division upheld a jury's verdict that said a defendant manufacturer's instructions and warnings were adequate, in part because it provided free training. The Appellate Division stated:

[t]he statute does not require that warnings be put in a particular place or transmitted by a particular means. Repola v. Morbark Indus., Inc., 934 F.2d. 483, 491 (3rd Cir. 1991); see also, Ramos v. Silent Hoist and Crane Co., 256 N.J. Super. 467, 482-483, 607 A.2d. 667 (App. Div. 1992). Rather, the statutory rule focuses on the intended user, the characteristics of the product, and the milieu in which the product will be used. What a manufacturer may be reasonably required to do in order to transmit information to a consumer/user of a product may be quite different from what is required of a manufacturer of a product intended for use by many people over an extended period of time in an industrial environment. **Where, as here, the intended user is an employee, the Legislature's reference to the "characteristics" of the product and the "ordinary knowledge common to the persons by whom the product is intended to be used" an understanding that proper use of sophisticated, multi-functional workplace machinery may require training.** Repola v. Morbark Indus., Inc., 934 F.2d. 483, 491 (3rd Cir. 1991); see also, Ramos v. Silent Hoist and Crane Co., 256 N.J. Super. 467, 482-483, 607 A.2d. 667 (App. Div. 1992). This reflects the majority rule. As the Reporters to the new Restatement of Products Liability phrased it:

> There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to rely [sic] [relay] warnings. The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.

[Restatement (Third) of Torts: Products Liability § 2, comment i (Proposed Final Draft, April 1997).]

Grier, 308 N.J. Super. at 317-18 (emphasis added).

The Court in Grier goes on to state:

The evidence in this case disclosed that a warning was contained on the first page of defendant's "Operation and Maintenance Manual" which was provided to purchasers when they bought the machine. The warning stated:

> WARNING: STOP BELT DRIVE THEN RAISE GUARD RAIL BEFORE CLIMBING A RAISED CONVEYOR TO CLEAR A PIECE OF JAMMED FREIGHT OR LUGGAGE, OR LOWER CONVEYOR ASSEMBLY SO THAT JAM MAY BE CLEARED BY A TECHNICIAN STANDING ON THE GROUND OR VEHICLE BODY WALKWAY. FAILURE TO OBSERVE THIS WARNING CAN RESULT IN INJURY TO PERSONNEL.

Another warning was the guardrail itself which defendant painted "OSHA yellow" to highlight its availability and required use. In addition, defendant offered free training to each airline who bought its beltloader. Continental, plaintiff's employer,

> declined this offer. Instead, Continental chose to train its ramp agents on the use of the beltloader, including when to use the safety guardrail.

Grier, supra, 308 N.J. Super. at 317-18.

Although the Products Liability Act is an exclusive remedy for personal injury claims arising out of product use, the Products Liability Act does not preclude negligence claims for a manufacturer or product seller's conduct. Ramos v. Silent Hoist and Crane Co., 256 N.J. Super. 467 (App. Div. 1992). In Ramos, supra., the plaintiff had sued the defendant, an electrician who was the designer and installer of the electrical connections and the electrical switch to a rotating capstan at a shipping dock and who was under an annual contract "to supply labor, material and equipment to provide inspection, repairs, maintenance and wiring on all electric equipment", after the plaintiff's hand became trapped in the capstan and a messenger line wrapped around plaintiff's body, causing multiple fractures. The Appellate Division found that a defendant was not subject to strict liability under the Products Liability Act, but could be liable under common law negligence because it was neither a "manufacturer" or "seller" of the capstan and because his negligence, negligently designing and installing electric connections, was independent of the "defective" capstan.

The concept articulated in Ramos, supra, has been applied in multiple contexts, in both state and federal court, involving negligent conduct independent of the "defective" product.

For example, the U.S. District Court for the District of New Jersey in Thomas v. Ford Motor Co., 70 F. Supp. 2d. 521 (D.N.J. 1999) allowed a negligence claim to proceed against Ford Motor Co. arising from its alleged negligent installation of an airbag that improperly deployed because Ford's alleged negligence did not arise from the alleged defective product itself. See Thomas, supra, 70 F. Supp. 2d. at 528-30. The U.S. District Court reasoned:

> Regardless of whether the 1995 amendment imposes liability on product sellers or relieves them from liability, the amendment presupposes the existence of a defective product. For example, liability is imposed on an installer under the terms of the Act if the installer installs a product known to be defective. The Ramos case, however, addressed a different situation. Ramos involved a circumstance in which there was no defective product, but only a defective installation. Put another way, it involved the improper installation of an otherwise properly functioning product. While the 1995 amendment brings installers within the ambit of the Product Liability Act in instances where installers trade in defective products, the amendment to the Act was not adopted to bring installers within the coverage of the Act for improperly installing properly-functioning products.

> Consequently, I shall deny Ford's motion to dismiss Count VI of the Complaint for failure to state a claim upon which relief may be granted. Thomas may be entitled to relief on a claim for negligent installation pled separately from any Product Liability Act claim since it may yet be proved that Ford improperly installed otherwise well-functioning and non-defective airbag components.

Thomas, supra, 70 F. Supp. 2d. at 528-30.

In Universal Underwriters Ins. Group v. Public Service Electric & Gas, 103 F. Supp. 2d. 744 (2000), the U.S. District Court for the District of New Jersey dismissed Plaintiff's Products Liability Count against PSE&G, but let stand the negligence count against PSE&G for its alleged failure to implement proper procedures and train personnel to manage and supervise its infrastructure that provided electricity to customers, after an electrical issue caused an explosion resulting in Plaintiff's home burning down. The U.S. District Court said:

> The basis of Plaintiff's products liability claim against PSE&G is that a design defect rendered the product unreasonably unsafe. Specifically the design defect alleged by the Plaintiff is PSE&G's "failure to have procedures and properly trained [personnel] which directly affects the safety of the product at issue." (*See* Pl.'s Br. at 8 n.2) However the facts that Plaintiff cites in support of this assertion focus not on any defect inherent in the product itself, but rather in PSE&G's alleged failure to act promptly and efficiently in shutting off its electrical service.
>
> Although neither the New Jersey Supreme Court nor the Appellate Division have addressed the issue of whether an electric company may be held strictly liable under the NJPLA, the Court need not address this important legal issue because it finds that the conduct complained of by the Plaintiff is not cognizable under the Act. In Ridenour v. Bat Em Out, 309 N.J. Super. 634, 707 A.2d 1093, 1097 (N.J. Super. Ct. App. Div. 1998), New Jersey's appellate division held that a negligence standard applied to claims related to the maintenance and installation of a change making machine. In addition to the negligent maintenance and installation claims raised against the owner and provider of the machine, the Ridenour court permitted the plaintiff to pursue a failure to warn claim under the NJPLA. By so doing the appellate division implicitly recognized that claims related to the maintenance of a product fell outside the scope of New Jersey's Product Liability Act, which subsumes all common-law negligence claims grounded upon injuries resulting from defective products. Were the Ridenour court to conclude that claims based on improper maintenance and installation were actionable under the NJPLA, the negligence claim would have been subsumed by the Act. Thus Ridenour makes it clear that actions based upon conduct related to the improper installation and maintenance of a product are not subject to strict tort liability.
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> Here the Court finds that the claim asserted by the Plaintiff is not related to a defect in the product (i.e. the electricity), but rather to the maintenance and oversight of PSE&G's emergency response service. This conclusion is supported by an examination of Plaintiff's brief and expert reports, which do not allege that the fire

> was caused by any defect in the electricity, but rather by PSE&G's failure to promptly discontinue electrical service to the building. Because this conduct relates to the maintenance of the electrical service, and not a defect inherent in the product, it does not qualify as harm caused by a product" and is therefore not cognizable under the NJPLA.

Universal Underwriters Ins. Group, supra, 103 F. Supp. 2d. at 747-48.

Here, the Court finds Plaintiff's negligence claim is not subsumed by the Products Liability Act. Plaintiff is not arguing that the manufacturer's scissor lift's warnings were inadequate. Plaintiff is arguing that but-for United Rentals' negligence in failing to adequately train and familiarize Bristol and its employees, Plaintiff would not have fallen off the subject scissor lift and sustained the injuries he did. The Court finds United Rentals' duty to train and/or familiarize its customers with its product line is an independent duty, like the duty to adequately maintain and/or install a product in Universal Underwriters Ins. Group, supra, and Thomas, supra, that is external to the Product Liability Act's requirement that products sellers provide adequate warnings of known dangers.

Second, United Rentals argues it does not owe a duty of care to Plaintiff. The Court is not persuaded by this argument.

"To determine whether a person owes a reasonable duty of care toward another, the court must conduct a fact-specific and principled analysis to identify, weigh, and balance the relationship of the parties, the nature of the risk involved, the opportunity and availability to exercise care, and the public interests in the proposed solution." Filipowicz, supra, 350 N.J. Super. at 559. "Ultimately, the matter turns on whether the imposition of a duty satisfies an abiding sense of basic fairness under all the circumstances in light of considerations of public policy." Hopkins, supra, 132 N.J. at 439. The Supreme Court has found that "proof of an industry custom is not dispositive of the question of duty." Wellenheider v. Rader, 49 N.J. 1, 7 (1967). "The standard of conduct is reasonable care, that care which a prudent man would take in the circumstances." Wellenheider, supra, 49 N.J. at 7. The primary question is whether "common knowledge and ordinary judgment will recognize unreasonable danger." Wellenheider, supra, 49 N.J. at 8.

Here, Plaintiff has produced expert testimony from Kenneth Shinn and Anthony Lusi, Jr. of LuMark Consulting, which cites to (1) the ANSI requirements, and (2) United Rentals' own aspirations to train and familiarize its customers with industrial equipment such as scissor lifts, that in the Court's view, establishes a duty of care that is owed to Plaintiff. Common knowledge, ordinary judgment, and public policy recognize that allowing people to operate industrial scissor lifts while untrained on its OSHA regulated

safety features creates a reasonable danger that is harmful to the public and is something the common law should seek to prevent through negligence and tort principles.

Plaintiff in their opposition, presented as an exhibit, the slides of a power point presentation at a safety conference United Rentals held on an undisclosed date, but not specifically invited to or attended by Bristol. It presented to the attendees, the services that United offers including to "provide various levels of training as a service to our customers to assist the customer in training responsibilities for their employees." Types of training include instruction and familiarization, which require the completion of job specific equipment training. Familiarization includes the demonstration of controls and safety devices, discussion of safe operation, and ensuring the availability of written instruction such as decals, operator's manuals, and safety handouts.

Accordingly, the Court finds that United Rentals owed Plaintiff a duty of care to familiarize and train Bristol's employees.

Third, United Rentals argues it did not breach a duty because the duty to Plaintiff is "circumscribed" due to the dangerous activity and United Rentals' conduct could not have proximately caused Plaintiff's injuries. See Ramos, supra, ("not every workplace injury where the plaintiff volunteers to perform a dangerous task is automatically compensable").

These arguments, however, are better left to the jury. Proximate cause is defined as a "cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about . . . and further as a cause which naturally and probably led to and might have been expected to produce the accident complained of." Scafidi v. Seiler, 119 N.J. 93, 101 (1990) (internal quotations omitted). "Ordinarily, the issue of proximate cause should be determined by the factfinder" unless "reasonable minds could not differ on whether that issue has been established." Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (internal quotations and citations omitted). Here, United Rentals' role in distributing dangerous, scissor lifts into the stream of commerce provides it with a duty to ensure the lessors and purchasers of its products are adequately trained to safely use their products. Any issue with whether the duty is circumscribed and/or whether Bristol, not United Rentals, proximately caused Plaintiff's injuries is something that is better left to the jury.

Conclusion

Based upon the foregoing, Defendant United Rentals' motion for summary judgment is denied as to Plaintiff's negligence count (Count One) and granted as to all

other counts either, by consent, or as not having applicability to this Defendant. Nothing in this conclusion should be construed as limiting the trial court in any determination that the jury may be instructed that United Rentals' violation of any regulation or statute is evidence of negligence.

SO ORDERED,

Hon. Barry P. Sarkisian, J.S.C.