SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0814-15T4

ANDREA FIORENTINO and
BONNIE FIORENTINO,

Plaintiffs-Appellants,

v.

LANDSTAR RANGER, INC. and
ROGER FALLOON,

Defendants-Respondents,

and

HANDLE WITH CARE, INC.,

Defendant.

Argued December 15, 2016 – Decided February 17, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4842-13.

Richard Grungo, Jr., argued the cause for appellants (Grungo Colarulo, attorneys; Mr. Grungo, on the briefs).

Ashley DeVita argued the cause for respondents (German, Gallagher & Murtagh, attorneys; Ms. DeVita, on the brief).

PER CURIAM

Plaintiffs Andrea and Bonnie Fiorentino[1] appeal from a September 11, 2015 Law Division order granting summary judgment in favor of defendants Landstar Ranger Inc. and Roger Falloon. As genuine issues of material fact exist in the record, we vacate the order granting defendants' motion and remand for further proceedings.

I.

We view the factual record in the light most favorable to plaintiff as the non-moving party. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). This case arises from a work-place accident that occurred on September 1, 2012, when plaintiff sustained serious bodily injuries while attempting to unload a slot machine delivered by Falloon. At the time of the accident, plaintiff worked for KGM Gaming, a manufacturer and supplier of products for the gaming industry. He would visit casinos and try to sell KGM's products and services. Although plaintiff's supervisor said plaintiff had "a lot of experience moving machines," plaintiff said he never had a job that required him to unload machines, and never received any training on how to

[1] For ease of reference, we refer to Andrea Fiorentino individually as plaintiff.

unload them; nevertheless, his "boss" told him he had to "help unload the tractor trailer."

Falloon was a professional driver with a commercial driver's license since the 1980s. He did not always unload his trailers, but he had "seen it for" thirty years. Around October 2000, he entered "into an independent contractor operating agreement with Landstar." The agreement stated Falloon would "furnish all transportation, loading and unloading, and other services necessary in connection with the accepted shipments." The agreement nonetheless reserved Landstar's "right to arrange for the loading or unloading of a shipment with [its] customers or another third party." The agreement further stated Falloon would "be responsible for the loading and unloading of all shipments transported under this Agreement at [Falloon's] expense." Falloon stated Landstar did not train him how to unload his trailer because "the customer always loads and unloads."

Falloon said he normally assumed customers were professionals and knew how to unload trailers properly, but he admitted he had to stop them from improperly loading or unloading his trailer "all the time." Landstar's safety director also admitted its drivers were "responsible for the safety in and around [their] truck[s]."

On September 1, 2012, KGM had six employees — four salesmen, including plaintiff, and two technicians — present at its

warehouse, for the purpose of unloading ninety-six slot machines scheduled for delivery from Landstar. In anticipation of the delivery, and not expecting the driver of the tractor-trailer delivering the machines would carry a ramp in his trailer, KGM arranged to rent a twelve-foot ramp from one its customers, defendant Handle With Care, Inc. (HWC).

One of the KGM salesmen present said Falloon attached the loading ramp to his trailer. Falloon denied this claim, but admitted he showed the KGM employees how to assemble the ramp, which came in two parts. Falloon further noted the KGM employees "weren't too knowledgeable of loading a truck."

Plaintiff and two other salesmen said Falloon was in the trailer when the accident occurred, and instructed plaintiff to walk down the ramp backwards to unload the slot machine, utilizing a hand truck. Plaintiff said Falloon even told him where to position the hand truck in relation to the slot machine. Falloon denied instructing plaintiff how to unload the slot machine, and further denied he was present in the trailer when plaintiff's accident occurred.

Plaintiff described taking two steps down the ramp — backwards, as instructed by Falloon — and then the slot machine "[r]an me right over." His right foot caught one of the hand truck's wheels, and then the slot machine pushed him off the ramp

towards the driver's side of the truck. He fell about three feet onto his back, with the hand truck in his hand and the slot machine on top of him. Eventually, two coworkers slid the slot machine off him. Plaintiff described the pain from his resulting injuries as "unbearable." His injuries included a fractured bone in his back, a torn rotator cuff and ripped tendon in his right shoulder, and related injuries.

At his deposition, Falloon said "you never" unload a trailer backwards down a ramp "because you could get ran over by what you're bringing down." He explained, "There's a big risk of falling over backwards, yes, depending on the load." This was part of his training; he also called it "common[ ]sense."

Falloon also acknowledged he carried his own sixteen-foot ramp on his truck. His ramp was almost identical to the one used during the accident, except his ramp was two feet longer. He preferred his longer ramp "[b]ecause you won't have to go down as fast, you can have more secure of your load," and "[y]ou have more control of whatever you're doing." After the accident, a KGM employee heard Falloon comment that "the ramp was too steep." According to plaintiff, Falloon then used a tape measure to measure the ramp, and commented, "This is a [twelve]-footer, should have been a [sixteen]-footer," and further stated he had the correct size ramp in his truck. After plaintiff's accident, no more

machines were unloaded with a hand truck; instead, a forklift was utilized to complete the unloading.

In 2013, plaintiffs filed a personal injury complaint against Falloon, Landstar, and HWC. Plaintiff retained a safety expert, George P. Widas, P.E., who reviewed the case and submitted a twenty-eight page report. He concluded:

> A reasonably certain significant causal factor in the happening of the subject injury event was the unsafe and dangerous condition created by the failure of Landstar/Roger Falloon to ensure proper and adequate training, equipment, and methods were used, as required by accepted safe practices, as required by the cited references, and standards, and as required by the criteria of Landstar.

Defendants did not submit any expert reports.

Near the end of discovery, all defendants moved for summary judgment, arguing they owed no duty of care to plaintiff. Following oral argument, the motion court granted defendants' motions, and dismissed plaintiffs' complaint with prejudice. In a written opinion issued on September 15, 2015, the court concluded defendants owed no duty to plaintiffs as a matter of law.[2] As to Fallon and Landstar, the court reasoned (1) the risk of plaintiff's injury was "not particularly high," (2) the foreseeability was "normal," (3) "nothing in the relationship between plaintiff and

[2] Plaintiffs subsequently settled with HWC. We therefore decline to address the court's decision to grant summary judgment to HWC.

[defendants] weighs in favor of imposing a duty, and (4) "the public interest weighs against imposition of a duty." The court further noted, "Also important is that the ramp was not Falloon's, and he did not have any control over it." This appeal followed.

II.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., 224 N.J. 189, 199 (2016) (citation omitted). "That standard mandates that summary judgment be granted 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting R. 4:46-2(c)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

We first address the threshold issue of whether defendants owed a duty of care to plaintiff. "To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008)). Whether a duty exists is a matter of law, Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 445 (1998), that poses "a question of fairness" involving "a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Kelly v. Gwinnell, 96 N.J. 538, 544 (1984) (quoting Goldberg v. Hous. Auth. of Newark, 38 N.J. 578, 583 (1962)). In reviewing a trial court's determination that a duty does or does not arise in a particular situation, we are not bound by the court's interpretation of the law or the court's view of the legal consequences of the alleged facts. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The duty analysis is "rather complex." J.S. v. R.T.H., 155 N.J. 330, 337 (1998). "[I]n its determination whether to impose a duty, [a court] must also consider the scope or boundaries of that duty." Id. at 339. Moreover, the court must recognize "the more fundamental question whether plaintiff's interests are entitled to protection against defendant's conduct." Id. at 338

(citation omitted). However, underlying factual determinations are necessary to make that assessment, including the relationship between the parties, the defendant's "responsibility for conditions creating the risk of harm," and whether the "defendant had sufficient control, opportunity, and ability to have avoided the risk of harm." Id. at 338-39 (citations omitted).

Here, material facts necessary to determine whether a duty should be imposed were disputed. Notably, this is not a case where a delivery driver pulls up with a load and has little or no contact with workers assigned to unload the truck. If that were the case, dismissal of the suit against Landstar and Falloon would have been proper.

Before undertaking its "duty" analysis, the motion court noted these facts, apparently treating them as established:

> Falloon was present at the scene of plaintiff's fall. He admitted that the ramp used was too short and that he had a more suitable one. However, plaintiff has only produced evidence that Fallon knew about the size of the ramp after plaintiff's fall. Also important is that the ramp was not Falloon's, and he did not have any control over it.

Our review of the record reveals disputes presented regarding these material facts, which supported the motion judge's conclusion. Accordingly, several issues of material fact preclude summary judgment in defendants' favor. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). We first note the

parties sharply dispute whether Falloon was present in the trailer when plaintiff's accident occurred. Plaintiff and two other KGM employees testified Fallon was present in the trailer, providing direct instruction to plaintiff when the accident occurred. Falloon denied he was in the trailer and denied providing any unloading instructions.

We also reject the court's conclusion that there was no evidence that Fallon knew about the size of the ramp before plaintiff's fall. Falloon admitted he helped the KGM employees assemble the two-part ramp, and one KGM employee testified Falloon attached the ramp to the trailer. Shortly after plaintiff's accident, a KGM employee said Falloon commented that the twelve-foot "ramp was too steep." Considering the evidence in the record, a jury could infer that Falloon was aware that plaintiff was about to encounter a dangerous situation — unloading heavy machines down a "too steep" ramp, with no experience in how to accomplish this task.

After incorrectly concluding there was no evidence that Fallon was aware of the size of the ramp before plaintiff's fall, the motion court failed to address adequately plaintiff's principal claim that Fallon provided improper unloading instructions. Instead, the court summarily dismissed this claim, concluding, "Fallon did not hold any power over plaintiff . . . .

[P]laintiff was free to reject any advice offered by Fallon in unloading the truck."

After he assisted in the assembly of the undersized ramp, Falloon then directed plaintiff to walk down the ramp backwards to unload the slot machine, according to plaintiff and two other KGM employees. Viewing the facts in the light most favorable to plaintiff, the motion court should have addressed whether Falloon owed a duty to plaintiff when he instructed him to walk backwards down a ramp that was "too steep," after assisting KGM workers to assemble the ramp and connect it to the trailer.

First, we examine "the relationship of the parties." Kelly, supra, 96 N.J. at 544. Here, defendants were delivering ninety-six slot machines to KGM. According to plaintiff and his fellow employees, when Falloon realized they did not know how to unload his trailer properly, Fallon directed them on how to connect the undersized ramp and transport the slot machines out of his trailer. Assuming plaintiff's contention is true, a jury could conclude defendants were responsible for the "conditions creating the risk of harm." J.S., supra, 155 N.J. at 339.

Second, we consider "the nature of the risk." Kelly, supra, 96 N.J. at 544. Here, Falloon admitted plaintiff's conduct created "a big risk of falling." Assuming Falloon told plaintiff to engage in this conduct, we find the nature of the risk significant in

this case. Moreover, if Fallon instructed plaintiff and he followed Fallon's instructions, this would support the argument that defendants "had sufficient control, opportunity, and ability to have avoided the risk of harm." J.S., supra, 155 N.J. at 339.

Third, we weigh the "public interest in the solution." Ibid. Plaintiff's proposed solution is effective and cost-efficient. He simply argues Falloon should not have instructed him to walk backwards down the ramp to unload the slot machines — an instruction Falloon concedes was improper — after assisting him and his fellow employees in attaching an undersized ramp.

Plaintiff argues that Thorne v. Miller, 317 N.J. Super. 554 (Law Div. 1998), provides support for his argument that it is reasonable to impose a duty of care based upon Falloon's conduct before the accident. In Thorne, the trial court held that a waving driver has a duty to exercise reasonable care when making a gesture to another driver to facilitate the flow of traffic. Id. at 561-62. The court held that "[i]f an operator of a motor vehicle gestures to a motorist to facilitate the movement of traffic, the waving driver is charged with the responsibility to do so with reasonable care, and may be subject to liability for foreseeable injuries if the remaining elements of negligence are met." Ibid.

We are convinced the court in Thorne correctly found that a motorist has a duty to exercise reasonable care when gesturing to

another motorist in order to facilitate the flow of traffic. See also La Russa v. Four Points at Sheraton Hotel, 360 N.J. Super. 156, 161 (2003) (citing Thorn with approval).

As noted, Falloon had no duty to assist plaintiff and his fellow workers in the assembly of their ramp, nor any duty to instruct plaintiff in the proper technique for unloading the heavy machines. Nevertheless, with his affirmative conduct, Falloon assumed the duty to exercise proper care. Thus, on remand the judge should charge the jurors, if they decide the disputed issue of material fact in favor of plaintiff – that Falloon instructed plaintiff regarding the technique for unloading the heavy machines – then Falloon had a duty to exercise reasonable care to provide plaintiff with proper instructions, considering all of the relevant information known to Falloon at the time.

In sum, we conclude the record presents genuine issues of material fact, precluding summary judgment. We therefore vacate the order granting defendants' motion and remand for further proceedings.

Vacated and remanded. We do not retain jurisdiction.