SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3869-19

PHILIP PANTANO and
PHYLLIS PANTANO,

Plaintiffs-Appellants/
Cross-Respondents,

v.

NEW YORK SHIPPING ASSOCIATION, CONTAINER SERVICES, INC., HYSTER-YALE GROUP, INC., 303 DOREMUS URBAN RENEWAL, NAP REALTY CORPORATION, EASTERN LIFT TRUCK CO., INC., METROPOLITAN MARINE MAINTENANCE CONTRACTORS' ASSOCIATION, INC., and PORT TECHNICAL TRAINING INSTITUTE,

Defendants,

and

MARINE TRANSPORT, INC.,

Defendant-Respondent/
Cross-Appellant.

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Argued April 25, 2022 – Decided June 8, 2022

Before Judges Sumners, Vernoia and Petrillo.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6659-15.

Matthew A. Schiappa argued the cause for appellants/cross-respondents (Lomurro, Munson, Comer, Brown & Schottland, LLC, attorneys; Matthew A. Schiappa, of counsel and on the briefs).

Patrick B. Minter argued the cause for respondent/cross-appellant (Donnelly Minter & Kelly, LLC, attorneys; Patrick B. Minter, of counsel; Jared J. Limbach, on the brief).

PER CURIAM

Plaintiffs Philip Pantano and Phyllis Pantano appeal from a May 15, 2020 Law Division post-trial order granting a defense motion for a directed verdict and vacating a jury verdict and award against defendant Marine Transport, Inc. (MT). In addition, MT cross-appeals from a June 29, 2018 Law Division order denying its motion for summary judgment.

The personal injury at issue in this case occurred on November 19, 2013. A piece of industrial equipment known as a "genset" (a power source for

refrigerated shipping containers) fell off a forklift and injured Philip[1] while he was at work. This accident led to the eventual amputation of Philip's foot. He was employed at the time of the accident by defendant Container Service of New Jersey, Inc. (CSNJ). The forklift was being operated by Lawrence Giamella, an employee of MT. Plaintiffs allege Giamella was negligent in his operation of the forklift. CSNJ and MT have shared ownership.

Prior to trial, MT unsuccessfully moved for summary judgment claiming that at the time of the accident, Giamella was a borrowed servant of CSNJ. After the close of plaintiffs' case, MT moved for a directed verdict pursuant to Rule 4:40-1. The trial court, with consent of all parties, reserved decision until after a jury verdict was returned. The jury found MT 70% liable; found Philip 30% liable; and awarded $1,230,000 in damages. [1] Post-trial briefs followed.

In granting MT's directed verdict, the trial court concluded that the facts established at trial satisfied it that Giamella was a servant borrowed by CSNJ from MT, and, primarily for that reason, granted the motion absolving MT of all liability. Although the judge noted that he was making a decision on facts that were "not really in dispute" the very question of whether or not Giamella was a

[1] Our reference to Philip Pantano by his first name is done to avoid confusion with his wife, Phyllis Pantano, and is not intended to convey any disrespect towards him.

borrowed servant was a disputed fact. No aspect of that ultimate issue was submitted to the jury, a point explored at oral argument on appeal. Before the trial court, despite the court's express reservation, the parties insisted that matter be resolved on a motion for a directed verdict under Rule 4:40-1. The trial court proceeded how and when it did with the express consent, and at the request, of counsel.

Both sides agreed that there would be no appeal based upon the submission of the issue to the court for a ruling and neither party has appealed this aspect of what transpired below. By all indicators, despite the unconventionality of it, the parties wanted the court to address whether Giamella was a borrowed servant on a directed verdict motion, and not the jury nor the court as a fact finder.

In doing so, the parties consented to having the court consider the question of Giamella's status pursuant to a legal standard that (a) gives the benefit of the doubt to the plaintiffs by requiring all reasonable inferences be drawn in plaintiff's favor; (b) does not allow for fact finding; (c) precludes any weighing of the evidence; (d) prohibits consideration of witness credibility; and (e) asks only if there is enough evidence that could support a finding in the non-moving party's favor. See Lechler v. 303 Sunset Ave. Condo. Ass'n., 452 N.J. Super.

574, 582 (App. Div. 2017) (quoting Dolson v. Anastasia, 55 N.J. 2, 5-6, (1969)). While the court was not obliged to yield to this request, neither was it foreclosed from doing so. Whether leaving this issue to the court for disposition under this standard was a prudent defense decision is a question outside our province. This was the parties' choice.

The question presented on direct appeal is whether at the time of the accident Giamella was a borrowed servant employed by CSNJ or did MT retain sufficient direct or shared control over him to be held vicariously liable for his conduct as addressed in Galvao v. G.R. Robert Constr. Co., 179 N.J. 462 (2004). Plaintiffs primarily argue that there was ample support in the record that MT retained at least broad control over Giamella such that MT was responsible for his negligence under a respondeat superior theory. Moreover, plaintiffs assert that the court failed to appreciate the dual control paradigm that was evident here and that allows for an imposition of liability on MT. Embedded in this argument is the assertion of legal error by the trial court in failing to use the directed verdict standard in making its decision.

Also before the court is MT's cross-appeal contending that its motion for summary judgment should have been granted. That motion sought dismissal

based on the expiration of the statute of limitations.[2] The motion was denied based upon the discovery rule, the fictious party pleading rule, and the relation back doctrine, as set forth in Rule 4:26-4 and Rule 4:9-3.

We have considered the record and the arguments made by the parties both in their briefs and at oral argument. We conclude that the order vacating the jury verdict and entering judgment for MT should be reversed and the order denying MT's motion for summary judgment should be affirmed.

I.

A. The parties

On the day he was injured, Philip was employed as a chassis mechanic by CSNJ. CSNJ operated its business from a commercial and industrial facility located at 303 Doremus Avenue in Newark, near Port Newark/Elizabeth, where it is a co-tenant with MT. CSNJ is in the business of repairing equipment for steamship lines. Its mechanics are members of the International Longshoremen's Association (ILA).

[2] The motion also argued for dismissal based on the ultimately successful claim that Giamella was a borrowed servant by CSNJ at the time of the accident and, therefore, MT could not be vicariously liable for his conduct. Although rejecting this argument when presented in a motion for summary judgment, the trial court eventually accepted it when granting the Rule 4:40-1 motion which is the basis of the plaintiffs' appeal.

MT is a trucking company, and its drivers transport shipping containers from its Newark location (shared with CSNJ) to other locations along the eastern seaboard. On the day of the accident, Giamella was on the payroll of MT. For the entire time Giamella was on MT's payroll, he performed services exclusively for CSNJ as a refrigeration mechanic, repairing gensets.

On its website, MT described the two companies as affiliated, and it advertised the services offered by both businesses at the Doremus Avenue location, stating:

> In conjunction with [CSNJ] an affiliated company[,] our Newark facility operates a container depot located within minutes of Port of Newark/Elizabeth. Our [six-plus] acre site has lift on lift off capability as well as overnight reefer plugin service. We provide repair services to many steamship lines within the Port of New York. Our yard is fenced and lighted with security personnel on site [twenty-four seven].
>
> Our seasoned well-respected ILA dry and reefer mechanics can perform repairs both major and minor. If you need further information regarding our depot services you can reach Sam Santomo or Joe Valente [at] [phone number].
>
> [(Emphasis added).]

The record reflects that Giamella's employment situation was not unusual. That is, mechanics on MT's payroll often performed services exclusively for CSNJ for a period of time after they were hired, before transitioning to

employment with CSNJ. Moreover, CSNJ mechanics often performed services for MT on weekends. Both CSNJ and MT were operated by a single person, Robert Castelo.[3]

Occasionally, Philip and other CSNJ mechanics performed work on weekends for MT. For this work they were paid by MT at a lower wage rate than they would have received had they been paid under CSNJ's contract with the ILA, which required compensation at time-and-a-half for members working on Saturdays, Sundays, and holidays.[4]

B. The accident

On the afternoon in question, Philip requested help from Giamella to move the genset. Gensets weigh thousands of pounds, so a forklift is needed to move them and, as the primary genset mechanic, Giamella was typically the one to move gensets around the yard. Giamella had experience operating forklifts in this job and from previous employment. However, prior to the day of the

[3] Castelo exclusively owned CSNJ, and he co-owned MT with two of his siblings.

[4] The mechanics working on weekends and being paid by MT were repairing MT's equipment. Although that is not spelled out in the trial record, it is explained in the summary judgment record. Santomo, who was employed by CSNJ, testifed that MT engaged in this practice with the express purpose of saving money by paying the mechanics directly, at a lower wage rate than if MT had purchased their labor through CSNJ.

accident, neither MT nor CSNJ had sent him for forklift training.[5] Giamella told Philip that he would help him. However, he could not move the genset until another employee moved a trailer chassis that was blocking the genset. Giamella then returned to what he had been doing, and about fifteen minutes later he heard a boom. He looked over and saw Philip sitting in a forklift, with the genset laying on its back on the ground.

Giamella asked Philip what he was doing and noted he told Philip he would move the genset for him. Philip told Giamella to get in the forklift so they could set the genset upright. Giamella then got into the forklift while Philip wrapped a chain around the genset and looped the chain over the metal forks on the forklift. When Philip indicated that it was okay to lift the genset, and when he stepped back from the genset as Giamella had asked him to do, Giamella tilted the forks back and up. However, as Giamella was lifting the genset, the chain slid off and the genset fell to the ground. The genset landed on Pantano's left foot. Unfortunately, the injury led to the amputation of Philip's foot.

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[5] At some point following the accident, Giamella was sent to forklift training by MT. Plaintiffs' expert opined that MT's failure to provide Giamella with forklift training violated the standard of care, as set forth in a regulation promulgated by the Occupational Safety and Health Administration (OSHA), 29 C.F.R. § 1910.178(l), which contributed to Giamella's negligence in operating the forklift on the date of the accident.

C. Plaintiffs' theory of liability and the underlying facts

Plaintiffs' theory of liability as to MT is simple: Giamella was employed by MT; Giamella's negligence caused Philip's injuries; and MT is therefore liable for its negligence in failing to train Giamella, which led to Giamella's negligence in operating the forklift.[6]

In support of this argument, plaintiffs introduced numerous pieces of evidence indicating that Giamella was employed by MT, including: (1) MT hired Giamella and performed pre-employment background checks on him; (2) MT paid Giamella's wages and employee benefits; (3) Giamella was not a member of the ILA, as would be required for him to be employed by CSNJ; and (4) MT provided Giamella with training in the operation of forklifts, albeit only after the accident that resulted in Pantano's injuries, and before that time neither MT nor CSNJ provided him with such training. In addition, plaintiffs noted that after the accident Castelo told an insurance company that Giamella was employed by MT.

MT did not dispute any of these facts. However, it maintained that Giamella worked at CSNJ as a "borrowed servant," with CSNJ exercising both

[6] This was how the case was argued by plaintiffs' counsel in the opening statement and in summation, and it is how the court explained the case in the jury charge.

broad and on-the-spot control of his work, and therefore MT could not be held vicariously liable for Giamella's negligence. In this regard, both Castelo and CSNJ manager Santomo testified that it was Castelo's practice to hire new mechanics through MT and put them through a vetting period before they were hired by CSNJ and sponsored for membership in the ILA.

Santomo testified that the ILA was aware of this practice. However, other testimony cast doubt upon this assertion, or at least called into question whether the ILA was aware of the full extent of the practice under which CSNJ arguably violated the ILA contract that provided for a thirty-day vetting period, and CSNJ avoided paying higher wages and benefits to its employees and other protections afforded to union members.

For example, Marcus Burgess, who was hired by MT but worked as a mechanic for CSNJ, testified that when a union representative came to the worksite, he was instructed to go to the lunchroom or stay out of the way until the union representative left. Santomo did not deny this was true, although he denied ever telling Burgess to hide. Moreover, Santomo admitted never telling the union representative how long the vetting practice continued, which was often many months; he said the union representative "[n]ever asked."

In any event, Santomo testified that Giamella was hired by MT and worked for CSNJ pursuant to this vetting system. Giamella testified that at his initial interview he was told by MT that he would be sponsored to join the ILA, and then would earn a higher wage and better benefits although that transition did not occur during the nine months he worked there.

Throughout his employment with MT, Giamella performed services exclusively for CSNJ, where he worked in the refrigeration unit. In performing that work, Giamella used his own small tools. The more expensive tools and equipment were owned and provided by CSNJ, including the forklift Giamella used when Philip was injured.

Giamella was supervised exclusively by CSNJ employees, including Jeff Stoffer, who Giamella testified oversaw his work on an hour-to-hour basis, and Santomo, who was in charge of the entire CSNJ operation. Santomo was the person who hired Giamella, and he was the person to whom Giamella submitted repair orders. Santomo testified that no employee at MT had the authority to fire Giamella.

The record, however, reflects some fluidity in Stoffer and Santomo's work. That is, notwithstanding his employment with CSNJ, Stoffer also performed work for MT. Moreover, despite his employment with CSNJ,

Santomo was identified on MT's website as someone to contact "regarding our depot services," with a CSNJ phone number listed, and he also had an MT email address.

D. MT's motion for summary judgment

On November 29, 2016, plaintiffs filed a third amended complaint asserting a claim against MT.[7] This filing was slightly more than three years after the accident. In this version of the complaint, plaintiffs continued to allege that the forklift operator was an employee of CSNJ. However, they no longer assigned a name to him. Plaintiffs identified MT as an affiliated company of CSNJ and a co-tenant with CSNJ at 303 Doremus Avenue, and they asserted that MT had been negligent in failing to ensure that CSNJ employees exercised care in operating forklifts on the property, resulting in Philip's injuries, and was grossly negligent in its own actions and omissions.

In its answer and amended answer to the third amended complaint, MT did not identify Giamella as the forklift driver, nor did it state that it was

[7] In the initial complaint, the first amended complaint, and the second amended complaint, plaintiffs misidentified the driver of the forklift as a person named "George" and alleged he was employed by CSNJ. The record does not contain copies of CSNJ's answers to these complaints, nor any indication that CSNJ informed plaintiffs of the correct identity of the forklift driver (Giamella) and his general employer (MT).

Giamella's general employer. Instead, MT admitted that plaintiff was employed by CSNJ.

In their fourth amended complaint filed on June 12, 2017, plaintiffs correctly identified the forklift driver as Giamella, and asserted that Giamella was employed by MT, with both MT and CSNJ responsible for the alleged negligence.

In its answer to the fourth amended complaint, MT admitted that plaintiff was employed by CSNJ. However, it asserted that it was "without knowledge or information sufficient to admit or deny the allegations" that Giamella, an employee of MT, was the driver of the forklift. MT denied liability on plaintiffs' causes of action.

In its summary judgment motion, MT argued that the claims asserted against it were time-barred because they were not filed within the two-year statute of limitations, N.J.S.A. 2A:14-2(a). MT raised this issue as an affirmative defense in both of its answers.

In their opposition papers, plaintiffs and their counsel certified that it was not until November 2016 that they first learned: (1) the forklift driver, Giamella, was employed by MT—even though CSNJ had certified it employed Giamella in its answers to interrogatories; and (2) MT was a co-tenant with CSNJ on the

Doremus Avenue property, as set forth in a triple net lease produced by another defendant during discovery. It was the lease information, received before the employment information, that prompted plaintiffs to move for leave to file a third amended complaint adding MT as a defendant.

In ruling on the summary judgment motion the court rejected MT's statute of limitations defense, finding that plaintiffs' claims against MT were not time-barred because they related back to the original complaint, which was filed within time. In so ruling, the court relied upon Rule 4:9-3 and 4:26-4.

The court first explained that Philip "avoided the statute of limitations violations because he successfully availed himself of the fictitious party rule under 4:26-4." That is, plaintiffs filed the original complaint within the two-year limitations period, named fictitious parties in the complaint (including failing to fully identify the name of the forklift driver who caused Philip injuries), and provided sufficient identifying information to put MT on notice of its potential liability for those injuries.

The court also found that plaintiffs acted with due diligence in naming MT as a defendant as soon as they received discovery materials that indicated MT's involvement. Again, the court cited the confusion in the record as to which

company employed which individuals as a contributing factor to the delay in adding MT as a defendant.

Finally, the court found that MT would not be prejudiced by permitting the claims against it to proceed, notwithstanding that MT was not named as a defendant until roughly three years after the date of the accident, the court noted:

> As indicated, this is a unique situation. In this case, both of the defendants are owned by the same person. They operate . . . on property pursuant to a shared lease agreement. MT's own website says that they perform services with [CSNJ]. They identify them as a related company or a related entity and the parties in this case do not dispute that, sometimes, their workers from respective companies are shared between the companies.
>
> Mr. [Castelo], as the [c]ourt indicated at oral argument and was acknowledged by the parties, has been defending the plaintiff's lawsuit against his one company, defendant, [CSNJ], based upon an injury . . . at a site that the companies share in connection with work that was being shared by the companies. Thus, defendant, MT . . . or Mr. [Castelo] can reasonably expect it to be adequately prepared to defend claims against defendant, MT, as well. The owner also has always known that the workers are shared in some capacity and, thus, it may have been possible that the defendant, MT, could be sued or that one of his MT employees could be named or could be the fictitious defendants identified in the complaints throughout.

The court was further satisfied that the claims against MT should be deemed timely because even if plaintiffs did not strictly comply with the

fictitious party rule, Rule 4:26-4, or the relation-back rule, Rule 4:9-3, the court had the authority to relax strict compliance with the rules in the interests of justice.

E. The trial and MT's Rule 4:40-1 motion for judgment

Trial commenced on December 2, 2019. The parties agreed that the trial judge would determine the borrowed servant issue. The record reflects repeated interactions between the court and counsel on this issue, including some initial hesitation by the trial court. This agreement affected the way the case was tried; for example, by defining what evidence and arguments were presented to the judge versus the jury.

Following the close of plaintiffs' case, MT moved for judgment under Rule 4:40-1 on the borrowed servant issue, and the court reserved decision. After the verdict was entered in favor of plaintiffs, the court entered judgment in MT's favor, concluding MT could not be held liable under the test set forth in Galvao, 179 N.J. at 462

In its decision, the court presented the issue as:

> [W]hether the individual forklift operator, [Giamella], who was hired as an employee of MT should be determined to be a special employee of [CSNJ], thus shielding MT from liability under the doctrine of respondeat superior. CSNJ is a non-party to this litigation because [plaintiff] was an employee of CSNJ

> so there would be a worker's compensation bar to any suit. If[,] however, Giamella is determined to be an employee of MT, then MT could be held liable for his negligence and from the verdict would be partially responsible.

Applying the Galvao test, the court first found that MT did not exercise either broad or on-spot control over Giamella. Instead, such control was exercised by CSNJ, with MT acting as "little more than a payroll company for Giamella." Therefore, the court held, MT could not be liable for Giamella's negligence under a respondeat superior theory.

Although the court's finding as to the first prong of the Galvao test resolved the issue to its satisfaction, for the sake of completeness, the court also addressed the second prong of the Galvao test, that is: "whether the special employee furthered the business of the general employer," meaning that the work done by the special employee was within the general contemplation of the general employer, and the general employer derived an economic benefit by loaning its employee. Galvao, 179 N.J. at 472-73. As to this issue, the court found:

> There is no evidence that MT derived an economic benefit by providing the services of Giamella to CSNJ. Any economic benefit derived from Giamella's services was CSNJ's alone. MT was not even reimbursed by CSNJ for the compensation it paid Giamella. It is of no moment that the two companies are owned by the same

> individual. Additionally, it is not relevant to this court's analysis under Galvao that MT or CSNJ may be in fact circumventing [u]nion rules. That is not an issue before this court and there is no morality escape hatch analysis in Galvao.

Finally, the court concluded that MT was not barred from asserting a borrowed servant defense under plaintiffs' unclean hands theory. The court found it irrelevant under Galvao that MT and CSNJ may have been conspiring to violate union rules, or that MT sought insurance coverage for this lawsuit. The court also found no evidence that MT and CSNJ organized their businesses to avoid respondeat superior liability for Philip's injuries. Thus, finding "no evidence that either MT or CSNJ was guilty of bad faith, fraud or unconscionable acts as against plaintiff," the court concluded "the doctrine of unclean hands is not applicable."

In sum, the trial court concluded Giamella was a borrowed servant; he had been loaned by MT to CSNJ; CSNJ exercised both general and on-the-spot control over him; and as such, MT could not be held liable under a respondeat superior theory for Giamella's negligence in operating the forklift. The court set aside the verdict and entered judgment in MT's favor as a matter of law.

In their points I and II, plaintiffs contend on appeal that the trial court order granting MT's motion for judgment under Rule 4:40-1 should be reversed

because: (1) the court erred by not finding that MT retained at least broad control over Giamella, and benefited from Giamella's work for CSNJ, thereby making MT responsible for Giamella's negligence under a respondeat superior theory; and (2) the court erred in not applying the doctrine of bad faith/unclean hands to preclude MT from pursuing the borrowed servant defense.

In point II of its cross-appeal, MT contends the court erred in denying its motion for summary judgment because: (1) plaintiffs' claims against it are barred by the two-year statute of limitations; and (2) at the time of the accident Giamella was a borrowed servant of CSNJ, so there can be no respondeat superior liability under Galvao, 179 N.J. at 462.

II.

A. Plaintiffs' appeal

This court's review of the May 15, 2020, order is de novo. Specifically, when reviewing an order entered pursuant to Rule 4:40-1, an appellate court must apply the same standard as the court below. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). A motion for judgment under Rule 4:40-1 should be denied if accepting as true all the evidence supporting the party defending against the motion, and according that party the benefit of all reasonable inferences to be deduced from the evidence, reasonable minds could differ.

Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); Verdicchio v. Ricca, 179 N.J. 1, 30 (2004). The same standard applies on appeal. Smith, 225 N.J. at 397; Frugis 177 N.J. at 269.

B. Borrowed Servant Doctrine

The Workers Compensation Act (Act) prohibits employees from pursuing tort claims against their employers and co-employees for on-the-job injuries. N.J.S.A. 34:15-8; Volb v. G.E. Cap. Corp., 139 N.J. 110, 117 (1995); Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 183 (1986); Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80, 99-100 (App. Div. 2015). However, the Act permits employees to sue third parties who caused their on-the-job injuries. N.J.S.A 34:15-40; Vitale v. Schering-Plough Corp., 231 N.J. 234, 250-52 (2017); Estate of D'Avila, 442 N.J. Super. at 100.

Third-party employers may be held liable in tort for the negligence of employees they loaned to a plaintiff's employer, even if the loaned employee is deemed a co-employee of the plaintiff. Volb, 139 N.J. at 118-21. As applied to this case, for example, even if Giamella were deemed a co-employee of Philip's, i.e., a "special employee" of CSNJ who was loaned to CSNJ by his "general employer," MT, Giamella's co-employee immunity for Philip's injuries would not inure to the benefit of MT.

In such circumstances, the question presented is whether the loaned employee's "general employer" (MT) may be held liable under a respondeat superior theory for the loaned employee's negligence. Volb, 139 N.J. at 127. The applicable analysis for that inquiry is set forth in Galvao, where the Court expressly considered "whether a general employer may be held vicariously liable under the doctrine of respondeat superior for injuries caused by the alleged negligence of a borrowed, or 'special' employee, engaged in the business of a special employer." 179 N.J. at 464.

In Galvao, George Harms Construction Company (George Harms), contracted with the Department of Transportation (DOT) to perform construction and related services. George Harms performed the contracted work through two of its wholly owned subsidiaries: George Harms Excavating Company (Excavating), and G.R. Robert Construction Company, Inc. (Robert), with each subsidiary employing individuals from separate unions. Id. at 464-65. Excavating employed members of the Laborers Union, whereas Robert employed members of the United Steelworkers Union. Id. at 465. George Harms reimbursed each subsidiary for their payroll expenses, which constituted the subsidiaries' sole income. Ibid.

Galvao, who was employed by one of the subsidiaries, Excavating, was injured on the job when a defective rebar cage failed, causing him to fall twenty feet onto another rebar cage. Id. at 464-65. The defective rebar cage had been constructed by employees of the sister-subsidiary, Robert. Id. at 464.

Galvao filed a workers' compensation claim against George Harms (the parent corporation) and received benefits on that claim. Id. at 466. In subsequent litigation, Galvao attempted to pursue claims against Robert, the sister-subsidiary responsible for constructing the defective rebar cage. Ibid. However, the trial court dismissed the complaint on a motion for summary judgment, the Appellate Division affirmed, and so did the Supreme Court. Id. at 466, 475.

In affirming, the Court set forth a two-part test for determining whether a general employer (in that case, the sister-subsidiary, Robert) may be held vicariously liable for the alleged negligence for its employee loaned to a special employer (the parent corporation, George Harms). Id. at 472-73. It stated:

> The threshold inquiry is whether the general employer controlled the special employee. By "control," we mean control in the fundamental respondeat superior sense, which was described recently as "the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done." [Wright v. State, 169 N.J. 422, 436-37 (2001).]

> In addition to evidence of direct or "on-spot" control "over the means by which the task is accomplished," we will infer an employer's control based on the "'method of payment[,] who furnishes the equipment, and [the] right of termination.'" Id. at 437 (first alteration in original) (quoting N.J. Prop.-Liab. Ins. Guar. Ass'n v. State, 195 N.J. Super. 4, 14 (App. Div.), certif. denied, 99 N.J. 188 (1984)). The retention of either on-spot, or broad, control by a general employer would satisfy this first prong.
>
> If a general employer is not found to exercise either on-spot, or broad, control over a special employee, then the general employer cannot be held vicariously liable for the alleged negligence of that employee. If the general employer did exercise such control, however, then it must be ascertained whether the special employee furthered the business of the general employer. A special employee is furthering the business of the general employer if "the work being done [by the special employee] is within the general contemplation of the [general employer,]" [Viggiano v. William C. Reppenhagen, Inc., 55 N.J. Super. 114, 119 (App. Div. 1959)], and the general employer derives an economic benefit by loaning its employee. Ibid. . . . . If the answer to the second question is in the affirmative, the general employer may be held vicariously liable for the alleged negligence of a special employee.
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> [Id. at 472-73.]

The Court found that Galvao could not satisfy the first prong of this test because Robert did not exercise general or on-spot control of the special employees loaned to George Harms. Id. at 473. Robert did not pay their salaries

(it was reimbursed by George Harms); it did not furnish construction materials or equipment for the project; and it did not retain the right to hire forepersons or assign employees to particular aspects of the project. Ibid. Moreover, it did not direct the on-site work, design the rebar cages, or have any responsibility for workplace safety. Ibid. Therefore, Galvao's claims against Robert failed because "Robert cannot be held vicariously liable under respondeat superior for plaintiff's injuries." Id. at 473-74.

For the sake of completeness, the Court also found that Galvao's claims against Robert failed because he could not satisfy the second prong of the test. Id. at 474. As to this issue, the Court found that Robert did not derive any economic benefit by providing special employees to George Harms because its only income was reimbursement from George Harms for its payroll expenses. Ibid. Rather, George Harms benefited from the work of the special employees, as it received compensation for the project from the DOT; and the special employees benefited through remuneration for their services. Ibid. "Therefore, as with the control prong, plaintiff failed to meet the business furtherance prong to demonstrate that Robert may be held vicariously liable for the alleged negligence of the special employees here." Ibid.

The Court, however, cautioned:

> As a final matter, although the facts do not support dual liability, we caution that nothing in this opinion should be construed as foreclosing the possibility of dual liability. We recognize that a situation can arise where general and special employers both retain some control over a project and both stand to reap an economic benefit from it. In those circumstances, allocating liability between the responsible parties might be appropriate as it would in any matter in which two or more parties are responsible for a plaintiff's injuries.
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> [Id. at 474-75.]

C. Applying the two-prong Galvao test

The "threshold inquiry is whether the general employer controlled the special employee." Id. at 472. In this case, there is no dispute that Giamella was the special employee and that his general employer, MT, had loaned him to CSNJ, his special employer. The trial court's finding, based on the trial record, was that CSNJ exercised both broad and on-the-spot control over Giamella. That is, at all times during Giamella's employment with MT, including the day of the accident, he performed services for CSNJ as a refrigeration mechanic. CSNJ provided Giamella with the tools and equipment he required to perform those services, with the exception of some tools Giamella might bring with him to the worksite. Moreover, Giamella was supervised exclusively by CSNJ employees, who had the authority to hire and fire him.

That being said, contrary to the trial court's rulings, the record reflects that MT also exercised some degree of general control over Giamella's employment. For example, unlike in Galvao, MT retained responsibility for paying the special employee, Giamella, without being reimbursed by the special employer, CSNJ. Also unlike in Galvao, MT retained some responsibility for workplace safety. In particular, MT retained responsibility for providing Giamella with forklift training, required by OSHA under 29 C.F.R. § 1910.178(l), and in fact provided that training to Giamella after the accident.

In its ruling on the question of control, the court failed to acknowledge that notwithstanding all other control MT ceded to CSNJ over Giamella's employment, MT retained some general control over Giamella's employment. This led the court to err in its conclusion as to the control element of the Galvao test.

As explained earlier, the standard applicable to hearing this motion in the first instance is how we examine the issue presented. Like the trial court, we must accept as true all the evidence which supports the position of the parties defending against the motion for judgment, in this case plaintiffs. Thus, if reasonable minds can differ, the motion should be denied.

> In reviewing a motion . . . for judgment under Rule 4:40-1, we apply the same standard that governs the trial courts.

> "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied[.]" The motion should only "be granted where no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action."
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> [Smith, 225 N.J. at 397 (third alteration in original) (emphasis added) (internal citations omitted).]

Our review of the record here satisfies us that we have far less room to veer than perceived by the trial court. For reasons that even the parties at oral argument were not capable of clearly explaining, they consciously chose to leave the jury out of deciding the question of whether Giamella was a borrowed servant. Facts central to the question, if not the very question itself, could have been determined by the jury. Indeed, precedent exists to support that a court may decline to address the matter and instead submit the question to the jury. See Yonkers v. Ocean Cnty., 130 N.J.L. 607, 610 (E. & A. 1943) (holding that the court correctly denied a motion for judgment and the submitted the borrowed-servant question to the jury where "there were conflicting inferences to be drawn from the evidence"); see also Devone v. Newark Tidewater Terminal, Inc., 14 N.J. Super 401, 404-406 (App. Div. 1951). Moreover, there is a model jury charge citing Galvao that is available for cases in which the jury

must determine whether there was an employer/employee relationship. See Model Jury Charges (Civil), 5.10I, "Agency" (rev. August 2011).

Nonetheless, the parties left resolution to the court on a motion under Rule 4:40-1. Yet those facts left unresolved that bore on the motion were not facts that could simply be decided by the court. Rather, the court was left to examine the evidence in a narrow and limited fashion and was required to give the benefit of every inference to the non-movant. The court could not weigh credibility in making this decision. Rena, Inc. v. Brien, 310 N.J. Super. 304, 311-312 (App. Div. 1998). The court was constrained to rule on the motion using scales that that are not balanced but are designed to tip in favor of, in this case, plaintiffs.

A motion for judgment is not a fact-finding exercise. In deciding a motion under Rule 4:40-1, a court "is not to consider 'the worth, nature or extent (beyond a scintilla) of the evidence,' but only review 'its existence, viewed most favorably to the party opposing the motion.'" Lechler, 452 N.J. Super. at 582 (quoting Dolson, 55 N.J. at 5-6). "[T]he judicial function here is quite a mechanical one." Dolson, 55 N.J. at 5-6.

Is there evidence that supports some control of MT over Giamella? There is. Is there enough evidence for a jury to have found MT retained sufficient control of Giamella "in the fundamental respondeat superior sense, [i.e.,] the

right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done[?]" Galvao, 179 N.J at 474-75. When viewing that evidence "most favorably to the party opposing the motion" we believe the answer is yes. Lechler, 452 N.J. Super. at 582.

MT's responsibility for Giamella's forklift training is particularly important because, under plaintiffs' theory of the case, it is MT's independent negligence in failing to provide Giamella with that legally required training that led to Giamella's negligent operation of the forklift on the day of the accident, for which MT could be held liable under a respondeat superior theory. Thus, contrary to the court's findings on the motion for judgment, plaintiffs were seeking to hold MT responsible both for its own negligence and Giamella's negligence, notwithstanding that the jury was not asked only to determine MT's negligence. The issues of MT's and Giamella's negligence were inextricably intertwined.

Moreover, Santomo's testimony regarding the limits of MT's authority over Giamella is itself suspect given that Santomo had an MT email address and is listed on the MT website as a point of contact for MT. Like Stoffer, he had an imprecise but existing working relationship with MT. To what degree was

Santomo acting as Giamella's shadow supervisor for MT as well as his direct supervisor for his employer CSNJ? That question was never asked nor answered. That said, the inference to be drawn in plaintiffs' favor, a task we are bound to perform, compels that we view his testimony with some skepticism considering the evidence. That necessary skepticism, while not a rejection of the testimony and other evidence, nevertheless shades it all in a way that clearly favors plaintiffs. Our review is limited to the record evidence only, giving the benefit of every inference to plaintiffs, and making no finding of facts. We thus conclude that the trial court committed error in finding that MT lacked control over Giamella.

Having concluded that there is sufficient evidence that would have allowed a fact finder to determine that MT exercised general control over Giamella, Galvao requires we address the second prong of its test: "whether the special employee furthered the business of the general employer." Galvao, 179 N.J. at 472. This prong involves two inquiries: whether the work being done by the special employee is within the general contemplation of the general employer; and whether the general employer derives an economic benefit by loaning its employee. Id. at 472-73.

The trial court did not address the first inquiry. Instead, it addressed only the question of whether MT derived an economic benefit by loaning Giamella to CSNJ. As for the first inquiry, the record supports a conclusion that MT was not solely a trucking business. As Santomo testified, part of MT's regular business operations was to serve as a quasi-employment agency for CSNJ—hiring mechanics and compensating them while they underwent a vetting period, to determine if they would be hired by CSNJ and sponsored for membership in the ILA. MT's loaning Giamella to CSNJ was part of that larger practice, and not a one-off instance of gratuitously loaning an employee to another affiliated business. Giamella's work for CSNJ clearly furthered that aspect of MT's business as doing so was its business, so his work was "within the general contemplation" of MT. Galvao, 179 N.J. at 472-73; Viggiano, 55 N.J. Super. at 119-20.

As for the next question, whether MT "derive[d] an economic benefit by loaning its employee," Galvao, 179 N.J. at 473, the record reflects that MT's vetting of future CSNJ mechanics was a cost center and did not directly generate revenue for MT. That is, MT was not directly compensated for the services its loaned employees performed on behalf of CSNJ, reimbursed for their

employment expenses. However, unlike the trial court, we do not believe that ends the inquiry.

MT obviously received financial benefit from the arrangement, or it would not have participated in it. It defies common sense to find otherwise. Cf. Volb, 139 N.J. at 126.

> Presumably, the decision to operate through interlocking corporations reflects the pragmatic determination that the specific advantages derived from the multi-corporate enterprise outweigh the risk of tort liability that that form of enterprise entails. Neither legislative history, precedent, nor public policy suggests that this [c]ourt should second-guess the reasonableness of such a business decision.
>
> [Ibid.]

To conclude that MT received no financial benefit for an arrangement where it paid all of its employees' wages for work done for others, without charging those others in some form or fashion for the employees' time would be to endorse an absurd and intentional fiction. It is not only inconceivable as a matter of fact, a finding we need not make, but incongruent with the indulgent standard afforded the plaintiffs when considering the evidence of record on a motion under Rule 4:40-1.

Indeed, in our view the record supports the conclusion that MT benefited from bearing these costs because the arrangement served the synergetic

relationship between MT and CSNJ, under which the companies were co-tenants on a triple net lease for 303 Doremus Avenue, thus sharing the costs of the property; jointly advertising their businesses as working in conjunction at the container depot location; and sharing employees without recognizing legal formalities resulting in cost savings because mechanics paid by MT were paid less than mechanics paid by CSNJ.

In considering what it had before it the trial court said:

> There is no evidence that by conducting business the way that MT and CSNJ do, in utilizing employees that are on the payroll of one company but work for another, that anyone had the idea that same would play any role in a respondeat superior analysis. It could just as easily been an individual who was injured, even perhaps an employee of MT, arguing that it should be the special employer (CSNJ), that controlled the negligent employee.

We disagree with this conclusion, not because the evidence might not have supported this finding under a different view but because the trial court was not presiding over a bench trial. The court was considering a motion under Rule 4:40-1, an entirely different task with a totally different objective. The court conducted its analysis as though it was answering the ultimate question. That is not a court's charge when tasked to decide a motion for a directed verdict. It is not to find facts by weighing all the evidence. It is, as we have said, to look at

the evidence, verify it exists, and draw inferences from it that favor the non-moving party. Lechler, 452 N.J. Super. at 582.

A reasonable inference from the record is that the arrangement under which Giamella and other mechanics were hired by MT and thereafter loaned to CSNJ was financially beneficial to both companies. MT benefited by having mechanics on the payroll who could perform services for MT at a lower rate than if MT had purchased such services from CSNJ. Moreover, by ensuring a sufficient number of qualified mechanics on-site, the arrangement assisted in drawing customers to the container depot, and this would generate revenue for MT as well as CSNJ, which both offered services at the location.

These facts differentiate this case from Galvao. At the very least, a question of fact, or inference, is presented as to whether MT derived an economic benefit from loaning Giamella to CSNJ. The parties' appellate briefs are indicative of that factual dispute, with plaintiffs emphasizing the financial savings MT obtained through the arrangement, as could be inferred from the record, and MT claiming those alleged financial savings were not supported by the record.

The judge was not free to rule on the motion based on what he believed the outcome should be based on the evidence. Instead, the judge was obliged to

consider the evidence and determine if the result sought by plaintiffs, the parties opposing the motion, could possibly be sustained. In considering the evidence, the judge was required to give every favorable inference to plaintiffs. This imbalance in favor of the non-moving party is a predominant feature of a Rule 4:40-1 motion. This analytical model is the very essence of how a court must consider the evidence when deciding if judgment should be entered on such a motion. We are satisfied that when applying this standard to the evidence of record in this case, the trial court's conclusion that Giamella did not further the business of MT is unsustainable.

III.

On cross-appeal, MT contends the court erred in denying its motion for summary judgment because: (1) plaintiffs' claims against it were barred by the two-year statute of limitations: and (2) at the time of the accident Giamella was a borrowed servant of CSNJ, so there can be no respondeat superior liability under Galvao. We have disposed of this second issue already, finding that the record does not support a borrowed servant defense and thus this motion was properly denied on a pre-trial basis and improperly granted after the jury's verdict was returned. As to the first issue, we find it to be of no merit.

We review a court's grant or denial of summary judgment de novo, applying the same legal standard as applied below. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). Summary judgment is appropriately 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." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires [the court] to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill, 142 N.J. at 540.]

The questions of whether a cause of action is barred by a statute of limitations, or whether an amended complaint relates back to an earlier complaint, are also questions of law that are reviewed de novo. Repko v. Our Lady of Lourdes Med. Ctr., Inc., 464 N.J. Super. 570, 574 (App. Div. 2020); Save Camden Pub. Schs. v. Camden City Bd. of Educ., 454 N.J. Super. 478,

487-88 (App. Div. 2018); Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div. 2016).

The procedural history of MT's summary judgment motion, its legal basis, the opposition, and a summary of the trial court's decision, is described in section I(D) of this opinion.

We affirm the court's denial of MT's summary judgment motion based upon its application of the relation-back rule, Rule 4:9-3, which states:

> Whenever the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment.
>
> [(Emphasis added).]

The rule should be liberally construed. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 499 (2006); Kernan v. One Washington Park Urb. Renewal Assocs., 154 N.J. 437, 458 (1998).

Here, plaintiffs added MT as a defendant to the complaint that already included CSNJ, rather than replacing CSNJ with MT (i.e., "changing the party against whom a claim is asserted"). However, Rule 4:9-3 still applies in that context. Otchy v. City of Elizabeth Bd. of Educ., 325 N.J. Super. 98, 105, 108 (App. Div. 1999) ("Relation-back depends upon whether the newly added party has demonstrated a sufficient identity of interest to justify treating it and the originally named party as a single legal entity.").

Moreover, since the other elements of Rule 4:9-3 were satisfied, the court correctly held that the third and fourth amended complaints related back to the original, timely-filed complaint. Kernan, 154 N.J. at 457-59; Otchy, 325 N.J. Super. at 105. That is, the third and fourth amended complaints clearly "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." Furthermore, because CSNJ was sued within the two-year statute of limitations, and because CSNJ and MT were both owned and operated by Castelo and maintained interconnected operations at the accident site, including with respect to their awareness of each other's employee rosters

and their joint employment of numerous employees, including Giamella, (a) MT had timely notice of the institution of the action and was not prejudiced in maintaining a defense on the merits, and (b) MT knew or should have known that, but for a mistake in the prior complaints concerning Giamella's name and the identity of his employer, the action would have been brought against MT as well as CSNJ. The court specifically noted the uniqueness of this situation when considering prejudice.

In addressing the relation-back rule, MT does not deny awareness of the litigation before it was added as a defendant. At most, it argues that "CSNJ and MT do not have the required identity of interest to impute notice of the claim from one company to the other." However, the evidence suggests otherwise. The record reflects that the companies jointly employed Giamella, with MT the general employer and CSNJ the special employer. At oral argument on the summary judgment motion, MT admitted to having notice of the litigation based upon CSNJ's involvement in it.

As for prejudice in allowing plaintiffs' claims to proceed, in the context of its discussion of Rule 4:26-4, MT cites the costs of litigation. However, the prejudice anticipated in Rule 4:9-3 is prejudice "in maintaining a defense on the merits," for example, through lost evidence, or lost witnesses, or lapsed

memories due to the passage of time. MT has cited no such prejudice, and the record contains no indication of such prejudice.

Under these circumstances, the court correctly applied Rule 4:9-3 and denied MT's motion for summary judgment on statute of limitations grounds. Kernan, 154 N.J. at 457-59; Otchy, 325 N.J. Super. at 105. Alternatively, upon this set of facts, the court reasonably relaxed strict application of Rule 4:9-3 and permitted the claims against MT to proceed in the interests of justice. R. 1:1-2; Viviano v. CBS, Inc., 101 N.J. 538, 551-53 (1986); Wimmer v. Coombs, 198 N.J. Super. 184, 188-89 (App. Div. 1985); Aruta v. Keller, 134 N.J. Super. 522, 529 (App. Div. 1975). The circumstances of this case align with the spirit of Rule 4:9-3 and the principles enunciated in those cases where its use has been affirmed. We see no reason to depart from the trial court's careful application of the rule in this case.

IV.

Because we reverse the trial court's order vacating the jury award and entering judgment in favor of MT on borrowed servant grounds, and remand for entry of judgment consistent with the jury verdict, we decline to address plaintiffs' unclean hands argument. Similarly, we need not reach MT's arguments as to Rule 4:26-4 or the discovery rule as we affirm the trial court's

order denying it summary judgment on statute of limitations grounds based on the court's reliance on Rule 4:9-3.

Affirmed in part, reversed in part, remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION