SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0689-21

JOHNNY MEDINA,

Plaintiff-Appellant,

v.

BARTLETT DAIRY, INC.,

Defendant-Respondent,

and

MDJTK HOLDINGS, LLC,
and TRACY COLD STORAGE
CONSTRUCTION, INC.,

Defendants,

and

BARTLETT DAIRY, INC.,

Defendant/Third-Party
Plaintiff-Respondent,

and

MDJTK HOLDINGS, LLC,

Defendant/Third-Party Plaintiff,

v.

TRACY COLD STORAGE
CONSTRUCTION, INC., and
COLI ELECTRICAL CONTRACTING,

Third-Party Defendants,

and

TRACY COLD STORAGE
CONSTRUCTION, INC.,

Third-Party Defendant/
Fourth-Party Plaintiff,

v.

SELECTIVE INSURANCE
CO. OF AMERICA,

Fourth-Party Defendant-
Respondent.

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Argued January 23, 2023 – Decided October 30, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9101-17.

Timothy Joseph Foley argued the cause for appellant (Birkhold & Maider, LLC, and Foley & Foley, attorneys; Kevin C. Decie, Sherry L. Foley, and Timothy Joseph Foley, of counsel and on the briefs).

Joseph G. Fuoco argued the cause for respondents Barlett Dairy, Inc. (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Michael J. Marone and Joseph G. Fuoco, on the brief).

The opinion of the court was delivered by

MITTERHOFF, J.A.D.

Plaintiff Johnny Medina appeals from an order granting summary judgment to defendant Bartlett Dairy, Inc. (Bartlett). This case concerns an injury to plaintiff that occurred when Kevin Skalko, a fellow employee of third-party defendant Coli Electrical Contracting (Coli), chased plaintiff in a forklift owned by Bartlett, veered too close and struck plaintiff's shoulder and ran over his foot. Plaintiff asserted that Bartlett negligently entrusted the forklift to an inexperienced driver. It was conceded for purposes of the motion that Bartlett entrusted the forklift to Skalko without inquiry whether he was certified by the Occupational Safety and Health Administration (OSHA) or otherwise qualified to operate a forklift.

On de novo review, we determine the trial court erred in finding that there was no duty of inquiry based on an analysis of the factors in Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999). In addition, we find the court erred in granting summary judgment when there were disputed issues of fact concerning Skalko's inexperience and proximate cause that must be resolved by a jury. We

therefore reverse and remand for trial.

The facts are largely undisputed for purposes of the summary judgment motion. Tracy Cold Storage Construction, Inc. (Tracy Cold Storage), is a construction company that builds refrigerated warehouses. In 2010, Bartlett, a dairy facility in Newark, contracted with Tracy Cold Storage to upgrade one of Bartlett's warehouses, a project which included increasing the amount of electrical service to the warehouse. Tracy Cold Storage subcontracted with Coli in September 2014 to increase the electrical service levels and install a backup generator for the Bartlett warehouse.

Plaintiff was working as an electrician's helper for Coli at the Bartlett facility in Newark from the middle of October 2015 until the date of his injury on January 13, 2016. His foreman was Kevin Skalko. On the day plaintiff was injured, Skalko was driving a forklift owned by Bartlett, which had been entrusted to him by a Bartlett employee. Prior to the entrustments, no Bartlett employee asked Skalko if he was OSHA-certified or otherwise experienced in the operation of a forklift.

At around 11:45 a.m. on January 13, Skalko sent plaintiff to get lunch for Coli's work crew. As plaintiff walked away, Skalko had some additional instructions for him and pursued plaintiff in the forklift. Skalko veered too close

to plaintiff and "brushed his shoulder, causing Plaintiff to spin and his left foot to get caught under a wheel."

OSHA, regulates the use and operation of forklifts pursuant to Regulation 1910.178, entitled "Powered industrial trucks." See 29 C.F.R. § 1910.178. The pertinent regulations in § 1910.178(*l*) include the following:

> (*l*) Operator training.
>
> (1) Safe operation.
>
> (i) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (*l*).
>
> (ii) Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (*l*), except as permitted by paragraph (*l*)(5). Training shall consist of a combination of formal instruction (e.g., lecture, discussion, interactive computer learning, video tape, written material), practical training (demonstrations performed by the trainer and practical exercises performed by the trainee), and evaluation of the operator's performance in the workplace.
>
> (2) Training Program Implementation

. . . .

(iii) All operator training and evaluation shall be conducted by persons who have the knowledge, training, and experience to train powered industrial truck operators and evaluate their competence.

(3) Training program content. Powered industrial truck operators shall receive initial training in the following topics, except in topics which the employer can demonstrate are not applicable to safe operation of the truck in the employer's workplace.

(i) Truck-related topics:

(A) Operating instructions, warnings, and precautions for the types of truck the operator will be authorized to operate;

(B) Differences between the truck and the automobile;

(C) Truck controls and instrumentation: where they are located, what they do, and how they work;

(D) Engine or motor operation;

(E) Steering and maneuvering;

(F) Visibility (including restrictions due to loading);

(G) Fork and attachment adaptation, operation, and use limitations;

> (H) Vehicle capacity;
>
> (I) Vehicle stability;
>
> (J) Any vehicle inspection and maintenance that the operator will be required to perform;
>
> (K) Refueling and/or charging and recharging of batteries;
>
> (L) Operating limitations;
>
> (M) Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate.
>
> (ii) Workplace-related topics:
>
> . . . .
>
> (D) Pedestrian traffic in areas where the vehicle will be operated;
>
> (E) Narrow aisles and other restricted places where the vehicle will be operated[.]

As required by § 1910.178(*l*)(1)(i), Bartlett requires any employee that operates its forklifts to be OSHA-certified to operate a forklift. OSHA training is mandatory for each Bartlett new hire before they are allowed to use one of defendant's machines.

At the time of the incident, Skalko was not OSHA-certified to operate a

forklift. His prior experience operating a forklift included: observing the use of powered vehicles to assist in pulling wire; some informal on-the-job training about the controls and handling of forklifts; and the use of forklifts or similar equipment "on average once or twice a year." Coli never owned or rented forklifts. Therefore, his experience was accumulated on equipment supplied by other contractors on the same job sites.

Plaintiff testified that he was transported to University Hospital of Newark by ambulance, x-rayed, and diagnosed with compartment syndrome. He was told by the surgeon that his left foot was "fractured and crushed." Plaintiff had his first surgery the same day as the accident and spent two months in the hospital before being discharged in March 2016. Plaintiff had two more surgeries during his hospitalization, and an additional four surgeries after his release. As a consequence of the accident, plaintiff lost sensation and mobility in his left pinky toe, deals with constant ankle pain, and cannot run, jump, hike, mount a ladder, or assume a "tippy-toe" position.

Plaintiff, in a second amended complaint, sued defendants Bartlett, MDJTK Holdings, LLC (MDJTK), and Tracy Cold Storage for negligent

entrustment of the forklift.[1] Bartlett moved for summary judgment of all claims on June 25, 2021. Third-party defendant Coli joined the motion, adopting Bartlett's arguments. On September 24, 2021, the trial court granted the motion.

The court, citing Mavrikidis v. Petullo, 153 N.J. 117 (1998), found that there was no common law duty for Bartlett to check the driving credentials of its contractor's or subcontractor's employees as such a duty "would impose a very onerous burden on the contractee." It also found Bartlett had no reason to foresee that Skalko would operate the forklift in a way to cause injury.

The court found persuasive a Texas negligent entrustment case, 4Front Engineered Solutions, Inc. v. Rosales, 505 S.W.3d 905 (Tex. 2016), due to its apparent legal and factual similarities to the case at bar:

> Here, our case is much more akin to the Texas case cited by the moving party, and while of course I am not bound in any way by an[] out-of-jurisdiction case, I do find that case persuasive because the language that the Court used in that case I find does line up very much with the state of the law in New Jersey.
>
> . . . .

[1] Tracy Cold Storage filed for summary judgment with respect to all claims and crossclaims against it, which the court granted on October 7, 2019. Subsequently, a stipulation of dismissal was entered which dismissed any and all crossclaims between Tracy Cold Storage, Coli, and Selective Insurance of America, Coli's insurance provider, with prejudice. On March 23, 2021, the remaining parties entered a stipulation of dismissal, dismissing all claims against MDJTK with prejudice.

> . . . [T]o sustain [] a claim based on a failure to screen in that case, negligent entrustment in our case, [plaintiff] had to prove that [t]he inquiries that [defendant] did not make would have revealed the risk that establishes liability for negligent entrustment.
>
> In other words, [plaintiff] had to show that [defendant] would have discovered facts through an inquiry that would have caused a reasonable employer to discover that [Skalko] was incompetent or reckless, not that he was not formally trained or certified.
>
> . . . [A] lack of formal training and certification does not establish that the operator was incompetent or reckless. . . .
>
> . . . .
>
> . . . I find that . . . the plaintiff cannot overcome the fact that there is not a genuine issue that can be submitted to the fact-finder that . . . would require submission of this issue to the trier of fact.

The trial court agreed with the central holding in Rosales, which was that, even if the forklift driver "was not formally trained and certified, and even if 4Front knew that he was not, a lack of formal training and certification does not establish that the operator was incompetent or reckless." Id. at 910-11. Rather, the plaintiff "was required to show that 4Front knew or should have known that [the driver] was incompetent or reckless, not that he was uncertified." Id. at 911. Accordingly, the court granted summary judgment to Bartlett and Coli. The judge surmised that "I believe that that finding [in Rosales] is exactly what

the courts in New Jersey would find applying the Alloway analysis employed by our own Supreme Court."

On appeal, plaintiff presents the following arguments for our review:

> POINT I
>
> THE ORDER GRANTING SUMMARY JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT MISAPPLIED THE LAW AND THERE ARE ISSUES OF FACT THAT SHOULD GO TO A JURY.
>
> POINT II
>
> THE TRIAL COURT ERRED BY APPLYING INCONSISTENT CASELAW TO THE DETERMINATION OF NEGLIGENT ENTRUSTMENT UNDER NEW JERSEY LAW.

We exercise de novo review of a trial court's grant of summary judgment, giving no deference to the trial court's legal rulings. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020); Townsend v. Pierre, 221 N.J. 36, 59 (2015)). The issues are reviewed de novo because "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In New Jersey, the "owner of a chain saw, a firearm, a boat, or a motor

vehicle, as well as any other device capable of causing injury when misused, has an obligation to avoid entrusting such a device to a person unfamiliar with its use." McKeown v. Am. Golf Corp., 462 N.J. Super. 339, 343-44 (App. Div. 2020) (citing Restatement (Second) of Torts § 390 (Am. L. Inst. 1965)).

The Restatement (Second) of Torts § 390 provides that a supplier is liable for physical harm resulting from supply of "chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others."

In order to sustain a claim of negligent entrustment a plaintiff must prove that:

> (1) the entrustee was incompetent, unfit, inexperienced, or reckless;
>
> (2) the entrustor knew . . . should have known, or had reason to know of the entrustee's condition or proclivities;
>
> (3) there was an entrustment of the dangerous instrumentality;
>
> (4) the entrustment created an appreciable or unreasonable risk of harm to others; and
>
> (5) the harm to the injury victim was "proximately" or "legally" caused by the negligence of the entrustor and the entrustee.

> [57A Am. Jur. 2d Negligence § 299 (2004) (footnotes omitted).]

The central issue here is whether Bartlett knew, should have known or had reason to know of Skalko's alleged inexperience. The resolution of that issue largely depends on our legal determination whether Bartlett had a duty to inquire about Skalko's qualifications prior to the entrustment. A secondary issue is, assuming the inquiry had been made, would the information learned be sufficient to raise a genuine issue of material fact whether Skalko was inexperienced as a forklift driver.

Whether a defendant owes a legal duty is a question of law subject to our de novo review. Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997) (citing Carvalho v. Toll Bros. & Devs., 143 N.J. 565, 572 (1996)). In undertaking this analysis, foreseeability of the risk of injury is a major consideration in deciding whether a duty of reasonable care exists under "general negligence principles." Alloway, 157 N.J. at 230 (citing Carey v. Lovett, 132 N.J. 44, 57 (1993); Weinberg v. Dinger, 106 N.J. 469, 485 (1987)). In addition, we consider "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439

(1993). A court's analysis whether to impose a duty of reasonable care is "'both fact-specific and principled,' and must satisfy 'an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'" Alloway, 157 N.J. at 230 (quoting Hopkins, 132 N.J. at 439).

Guided by these principles, we conclude the trial court erred in finding that Bartlett had no duty to ask Skalko whether he was OSHA-certified to operate Bartlett's equipment prior to entrusting him with the forklift. The court mistakenly found, relying on Alloway, that actual or constructive knowledge of Skalko's inexperience was required to sustain a claim for negligent entrustment.

Alloway, however, has limited relevance to this case because it was based on a legal theory of vicarious liability. The issue in Alloway was "whether a general or prime contractor has a duty to assure the safety of an employee of a subcontractor; and, more specifically, whether that duty encompasses the safety of equipment supplied by the subcontractor and used by its employee at the contractor's work site." Id. at 225 (emphasis added). Alloway did not involve the contractor's entrustment of a dangerous instrumentality that was solely owned and controlled by the contractor itself.

When asserting a negligent entrustment claim, we conclude that the central question is not whether it was foreseeable that Skalko would misuse the

forklift; rather, the question is whether it was generally foreseeable that providing a forklift to an inexperienced operator poses a risk of serious injury to others on the premises. Bartlett's strict enforcement of the OSHA-required certification for its own employees demonstrates its undeniable recognition of that risk.

The question here is if Bartlett can exercise a lower degree of caution in its entrustment of its forklift to employees of its subcontractors. In considering this question, we look to the nature of the relationship of the parties, and their opportunity and ability to exercise care. We must analyze these questions in the context of the specific facts of this case. Hopkins, 132 N.J. at 439. Based on the facts, we conclude the relationship Bartlett and Skalko was owner/entrustor and entrustee.

As the sole owner of the forklift, Bartlett had the absolute ability to control who used it. This is evidenced by the facts that Skalko did not initially request to use the forklift, because the machine was not necessary to perform Coli's job at the site. Rather, its use was initially offered to him by a Bartlett employee. Thereafter, on each occasion he used the forklift, he had to get permission from a Bartlett employee. Bartlett retained the absolute discretion to say no at any time.

We flatly reject the trial judge's conclusion that simply asking Skalko if he was OSHA-certified or otherwise experienced in operating a forklift "would impose a very onerous burden" on Bartlett. In reaching this conclusion, the court mistakenly relied on Mavrikidis, 153 N.J. at 117. As in Alloway, Mavrikidis involved the legal theory of a contractor's vicarious liability for its subcontractor's negligence. Id. at 124. There was no claim for negligent entrustment and there was in fact no entrustment because the subcontractor's employee was driving a dump truck owned by the subcontractor. Under those very different facts, the Court found that it would be a very onerous burden to require a contractor to check the driving credentials of each of its subcontractors' employees. Id. at 142. Here, in contrast, we conclude it would have been a minimal burden on Bartlett to ask Skalko if he was a qualified forklift operator prior to the entrustment of Bartlett's own equipment.

In short, based on our de novo analysis of the Alloway factors, we conclude that: Bartlett, as the sole owner of the forklift, had both the opportunity and ability to minimize the risk of serious injury by inquiring about the qualifications of persons to whom it entrusted its forklift; that the burden of inquiry would be minimal considering the risk of harm; and that the nature of the risk of entrusting a forklift to an inexperienced operator was foreseeable.

The imposition of this duty of inquiry is fair and in conformance with public policy requiring forklift operators to be OSHA certified. Because all of the Alloway factors tilt in favor of plaintiff, we reverse the trial court's determination that Bartlett had no duty to inquire about Skalko's qualifications.

We next consider whether the trial court erred in its decision that a reasonable inquiry, if conducted, would not have revealed information raising a jury question. We disagree. The court mistakenly relied on Rosales, 505 S.W.3d at 905, a Texas Supreme Court case. Despite superficial similarities between Rosales and this case, there is a critical substantive difference between New Jersey and Texas entrustment laws. The Texas Supreme Court held that, to establish the liability of 4Front on his negligent entrustment claim, Rosales had to prove:

> (1) 4Front entrusted the forklift to Reyes;
>
> (2) Reyes was an unlicensed, incompetent, or reckless forklift operator; [and]
>
> (3) at the time of the entrustment, 4Front knew or should have known that Reyes was an unlicensed, incompetent, or reckless operator[.]
>
> [Id. at 909.]

The court held that even reasonable inquiry would have been insufficient to show liability as "Rosales had to show that 4Front would have discovered facts

through its inquiry that would have caused a reasonable employer to discover that Reyes was incompetent or reckless, not that he was not formally trained or certified." Id. at 910.

Under Texas law, one must show that an entrustee is "unlicensed, incompetent, or reckless." Id. at 909. "[E]vidence that a driver is inexperienced, without more, does not permit an inference that the driver lacked judgment or perception or was otherwise an incompetent driver." Robson v. Gilbreath, 267 S.W.3d 401, 406 (Tex. App. 2008). See In re Acad., Ltd., 625 S.W.3d 19, 31 (Tex. 2021) (stating Texas Supreme Court has "not adopted this section [§ 390] of the Second Restatement").

Unlike Texas law, New Jersey imposes liability for entrustment to an inexperienced user. See McKeown, 462 N.J. Super. at 343-44, 347 (citing Restatement (Second) of Torts § 390). Reasonable inquiry would have revealed that Skalko was not OSHA-certified. That fact alone is sufficient to raise a question about Skalko's experience. Assuming Bartlett inexplicably decided to entrust the forklift to an uncertified operator, further inquiry would have revealed Skalko's arguably meager experience: he had never had any formal training; his prior experience operating a forklift included observing the use of powered vehicles to assist in pulling wire; some informal on-the-job training

about the controls and handling of forklifts; and the use of forklifts or similar equipment "on average once or twice a year." Coli never owned or rented forklifts. Therefore, Skalko's experience was accumulated on equipment supplied by other contractors on the same job sites.

Based on the forgoing, we conclude, contrary to the trial court's determination, that reasonable inquiry would have revealed information sufficient to raise a jury question concerning Skalko's experience. A reasonable jury could also infer that Skalko's lack of formal training contributed to his apparent disregard for safety in chasing after plaintiff in a dangerous instrumentality, veering towards him, and failing to maintain adequate distance and control to avoid hitting plaintiff and seriously injuring him. Therefore, summary judgment should not have been granted.

Reversed and remanded for trial. We do not retain jurisdiction.