13 Fla. L. Weekly Supp. 45a

Torts -- Construction accident -- Action against lessor of forklift for injuries incurred when forklift collided with port-o-let occupied by plaintiff -- Vicarious liability -- Dangerous instrumentality -- Forklift may be dangerous instrument even when not operated on public roadway and even if not engaged in lifting operation at time of accident -- Negligence -- Lessor did not owe plaintiff a duty to train or supervise lessee's employees in operation of forklift where there is no legislation, administrative rule or judicial precedent holding otherwise, only the lessee's conduct may have contributed to foreseeable zone of risk, and lease provided that lessee was responsible for ensuring that qualified and trained individual operated forklift and disclaimed any liability on part of lessor for operation of forklift -- Summary judgment granted in favor of lessor on negligence claim and in favor of plaintiff on dangerous instrumentality claim

TERRY J. HIGGINS, Plaintiff, v. MCDONALD & SONS MASONRY, INC., et al., Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2002-CA-5951-O. November 1, 2005. Donald E. Grincewicz, Judge. Counsel: Louis B. Vocelle, Jr., Clem, Polackwich, Vocelle & Berg, LLP, Vero Beach. Robert W. Elton, Revis, Elton & Blackburn, P.A., Daytona Beach. Thomas R. Ray, Holbrook, Akel, Cold, Stiefel & Ray, P.A., Jacksonville.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART RINGHAVER EQUIPMENT COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on October 6, 2005, for consideration of the "Motion for Final Summary Judgment" filed by Ringhaver Equipment Company, a Florida Corporation d/b/a Ring Rent ("Ringhaver"). The Court, having considered the motion, arguments of counsel, the court file, and being otherwise fully advised herein, finds as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Ringhaver leased a Caterpillar TH103 Telehandler (hereinafter "Telehandler" or "forklift") to McDonald & Sons Masonry, Inc. ("McDonald") for use on the construction of a Lowes Home Improvement store. The Telehandler is a large telescopic forklift unit that weighs over 27,000 pounds and is able to lift 10,000 pounds up to forty-four feet in the air. McDonald used the forklift to carry and move mortar and concrete blocks. Pursuant to the terms of the McDonald/Ringhaver written rental agreement, McDonald was required to provide a competent and skilled operator to use the forklift.

Plaintiff was working at the construction site as a superintendent for Quinco Electric, the electrical subcontractor on the Lowes project. On June 26, 2001, while working at the construction site, Plaintiff took a bathroom break in a port-o-let. While Plaintiff was

using the bathroom, the forklift McDonald rented from Ringhaver collided with the port-o-let. The forks of the forklift pierced the plastic wall of the port-o-let and contacted Plaintiff's back. The collision further knocked the port-o-let over, throwing Plaintiff out of the port-o-let and allegedly injuring his back.

Geraldo "Primo" Lazo ("Lazo"), an employee of Javier Aguilar ("Aguilar"), was operating the forklift. McDonald hired Aguilar to lay block on the Lowes project. McDonald provided the forklift to Aguilar's employees to use at the construction site.

The construction site was located on private property. The forklift was only used on the construction job site.

As a result of the accident, Plaintiff filed a complaint asserting two claims against Ringhaver. In Count III, Plaintiff asserts that the forklift owned and leased by Ringhaver constituted a dangerous instrumentality, and as such, Plaintiff is vicariously liable for Plaintiff's injuries. In Count IV, Plaintiff maintains that Ringhaver was negligent because it 1) failed to ensure that a qualified and trained driver was permitted to operate the forklift and 2) failed to supervise all persons operating the forklift.

On July 1, 2005, Ringhaver filed a motion for final summary judgment as to Counts III and IV. On September 13, 2005, Plaintiff likewise filed a motion for summary judgment as to these counts. On October 6, 2005, the Court held a hearing on Ringhaver's motion for summary judgment.

II. LEGAL STANDARD

"Summary judgment should not be granted unless two conditions exist: (1) There is no genuine issue as to any material fact and (2) The moving party is entitled to judgment as a matter of law." *Clark v. City of Atl. Beach,* 124 So. 2d 305, 306 (Fla. 1st DCA 1960). "If the evidence is conflicting as to an issue of fact, or if there are conflicting inferences that may be reasonably drawn from uncontradicted evidence, the issue as to that fact must be submitted to the jury . . . ." *Prof'l Archers Ass'n v. Cmty. Promotions, Inc.,* 214 So. 2d 21, 23 (Fla. 1st DCA 1968). The movant has the burden to conclusively prove that there is no genuine issue of material fact. *Marinaro v. Redding,* 762 So. 2d 1048, 1049 (Fla. 5th DCA 2000). "[T]he proof must be such as to overcome all reasonable inferences which could be drawn in favor of the opposing party." *Aagaard-Juergensen, Inc. v. Lettelier,* 540 So. 2d 224, 225 (Fla. 5th DCA 1989). "All doubts regarding the existence of an issue in a motion for summary judgment are resolved against the moving party, and all evidence before the court plus favorable inferences reasonably justified thereby are to be liberally construed in favor of the opponent." *Id.*

III. ANALYSIS

A. Vicarious Liability Claim

Ringhaver maintains that it is entitled to summary judgment of Plaintiff's claim that Ringhaver is vicariously liable for Plaintiff's injuries based on the dangerous instrumentality doctrine. In support of its position, Ringhaver asserts that the forklift is not a dangerous instrumentality because it 1) is not a crane, 2) was not in the operation of lifting at the time of the accident, and 3) was not operating on a public road. Plaintiff maintains, however, that Florida law has recognized that a forklift can be a dangerous instrumentality regardless of whether it was in the process of lifting or was on a public road.

In *Harding v. Allen-Loux, Inc.,* 559 So. 2d 107, 108 (Fla. 2d Cir. 1990), the court determined that a forklift used on a public road is a dangerous instrument. The court reasoned:

If an owner of a golf cart is liable under Florida's dangerous instrumentality doctrine for the golf cart's operation on a golf course by a lessee, *Meister v. Fisher,* 462 So.2d 1071 (Fla.1984), surely the owner of this larger, four-wheel vehicle with protruding steel tusks is liable under this doctrine for its operation on a public highway by a lessee. The courts of Florida have applied this doctrine to other types of heavy equipment on job sites. *Scott & Jobalia Constr. Co. v. Halifax Paving, Inc.,* 538 So.2d 76 (Fla. 5th DCA), *jurisdiction accepted,* 544 So.2d 199 (FIa.1989) (crane); *Eagle Stevedores, Inc. v. Thomas,* 145 So.2d 551 (Fla. 3d DCA 1962) (tow motor).

Harding, 559 So. 2d at 108. The court further noted that whether a vehicle is a "motor vehicle" is not dispositive of whether it is a dangerous instrument. *Id.* The court explained, "The [dangerous instrumentality] doctrine is not necessarily invoked by any statutory definition of motor vehicle. Instead, it is invoked by a judicial decision that 'an instrumentality of known qualities is so peculiarly dangerous in its operation as to' justify the doctrine." *Id. (Quoting Southern Cotton Oil Co. v. Anderson,* 80 Fla. 441, 450, 86 So. 629, 638 (1920)).

In *Grove Manufacturing Co. v. Storey,* 489 So.2d 780, 782 (Fla. 5th DCA 1986), the court noted that a crane in operation is inherently dangerous. In *Storey,* the plaintiff was injured when a crane struck an overhead electrical line. 489 So. 2d at 781. Although the court was not deciding the issue of whether the crane was a dangerous instrument, the court's ruling recognized that a crane may be a dangerous instrument even if the injury does not result from lifting. *Id.*

Furthermore, in *Meister v. Fisher,* 462 So.2d 1071, 1073 (Fla.1984), the court ruled:

That the vehicle is being operated on the public highways of this state is likewise not required before the dangerous instrumentality doctrine can come into play. It is true that most of the Florida decisions applying this doctrine have made reference to the fact that the vehicle was being operated on the public highways.

. . .

We see neither reason nor logic in the view that a motor vehicle in operation, which is a dangerous instrumentality while being operated upon the public highway, somehow ceases to be a dangerous instrumentality the instant the driver causes it to turn off the public street or highway and onto a private drive or other private property.

Applying the holdings of *Harding, Storey, and Meister* to the instant action, the Court finds that Ringhaver's arguments in favor of summary judgment are not meritorious. First, a forklift has explicitly been deemed to be a dangerous instrumentality. Second, there appears to be no case law that would require the forklift to be in the act of lifting when the injury occurred in order for it to be deemed a dangerous instrumentality. Moreover, the forklift is not a crane, but a forklift that was being used on the construction site. Finally, the Florida Supreme Court has clearly ruled that whether a vehicle is operated on a public highway is not determinative of whether the vehicle is a dangerous instrumentality. For these reasons, Ringhaver's motion for summary judgment as to Plaintiff's claim based on the vicarious liability of Ringhaver as a lessor of a dangerous instrument is denied, and Plaintiff's motion for summary judgment is granted.

B. Negligence Claim

Ringhaver maintains that it did not owe Plaintiff a duty, and therefore, Plaintiff cannot maintain a negligence claim against it for failure to train or supervise. Plaintiff contends that Ringhaver owed him a duty of care.

Legal "[d]uty is a question of law." *Gross v. Sand & Sea Homeowners Ass'n,* 756 So. 2d 1073, 1075 (Fla. 4th DCA 2000) (internal citation omitted). "It 'may be derive[d] from several sources including: (1) legislative enactment and administrative regulation; (2) judicial precedent; and, (3) the specific facts of a given case.' " *Veliz v. Rental Serv. Corp. USA, Inc.,* 313 F. Supp. 2d 1317, 1332 n.39 (M.D. Fla. 2003) (*quoting Gross,* 756 So. 2d at 1075). " 'The general facts of a case may indicate a legal duty where a defendant's conduct creates a foreseeable zone of risk.' " *Veliz*, 313 F. Supp. 2d at 1332 n.39 (*quoting Gross,* 756 So. 2d at 1075).

In *Veliz,* the court considered whether the plaintiff could maintain a negligence action against the lessor of a forklift based on the lessor's failure to train or instruct the operator. *Veliz,* 313 F. Supp. 2d at 1331-32. The court determined that based on workers' compensation immunity, the plaintiff could not maintain such an action against the lessor. *Id.* at 1332. The court continued, however, to note that the plaintiff "failed to establish a duty on the part of a lessor to ensure that the employees of its lessees are properly trained, licensed, and/or certified to operate leased equipment." *Id.* at 1332 n.39. In so ruling, the court determined:

no legislative enactment, administrative regulation, or judicial precedent [exists] imposing a duty on a lessor to ensure the training and/or certification of the employees of its lessees. Nor do the general facts of this case indicate a legal duty in that regard. Because all of the circumstances -- the workplace, the lift, the lift's operator, and the decedent -- surrounding the tip over of the [forklift] . . . were controlled solely by [the

employer], only [the employer's] conduct logically contributed to a foreseeable zone of risk.

Id.

Likewise, in *Padilla v. Gulf Power Co.,* 401 So. 2d 1375, 1382 (Fla. 1st DCA 1981), the court noted that the owner of chattel has no duty to supervise the use of the chattel when it is in another's possession or to insure the safety of those using it unless the owner undertook to do so. The court reasoned:

The duty of the owner is not that of a manufacturer and clearly can be no greater than that of one who leases a chattel for use in the business of another or one who leaves his automobile with an independent contractor for repair. In both cases, the lessor/bailor, even of a dangerous instrumentality, is not liable to the employee of the lessee/bailee due to the negligent use of the chattel by a co-employee. *Fry v. Robinson Printers, Inc.,* 155 So. 2d 645 (Fla. 2d DCA 1963); *Pettite v. Welch,* 167 So.2d 20 (Fla. 3d DCA 1964); *Iglesia v. Floran,* 394 So.2d 994 (Fla. 1981); *Zenchack v. Ryder Truck Rentals,* 150 So.2d 727, 728 (Fla. 3d DCA 1963), *cert. discharged,* 164 So. 2d 200 (Fla. 1964). A chattel which is leased to one for use in his business or is turned over to a repairman is under the control of the lessee or repairman. Under those circumstances and in the instant case, there is no liability on the part of the owner to the employees of the independent contractor who are injured due to the negligence of the contractor.

Id.

Based on *Veliz and Padilla,* the Court finds that Ringhaver did not owe Plaintiff a duty to train or supervise McDonald's employees in the operation of the forklift as evidenced by the lack of legislative enactment, administrative regulation, or judicial precedent holding otherwise. Moreover, like the facts in *Veliz,* all of the circumstances surrounding the accident, including the workplace, the forklift, and the lift's operator, were controlled by McDonald or its agents. As such, only McDonald's conduct may have contributed to a foreseeable zone of risk. Furthermore, based on the lease agreement, Ringhaver did not undertake a duty to Plaintiff. The lease agreement provided that McDonald was responsible for ensuring that a qualified and trained individual operated the forklift. Moreover, the lease agreement indicated that Ringhaver disclaimed any liability resulting from the use of the forklift by the lessor. Accordingly, Plaintiff cannot maintain a negligence claim against Ringhaver.

IV. CONCLUSION

Based on the foregoing, the Court finds that Ringhaver may be held vicariously liable for Plaintiff's injuries because a forklift is a dangerous instrumentality. Plaintiff, however, cannot maintain a negligence action against Ringhaver based on Ringhaver's failure to train or supervise. Accordingly, it is hereby ORDERED AND ADJUDGED that Ringhaver's motion for final summary judgment is GRANTED as to Count IV and

DENIED as to Count III and Plaintiff's motion for final summary judgment is GRANTED as to Count III and DENIED as to Count IV.

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