SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2783-21

CHRISTOPHER BARRY and
LORI BARRY, his wife,

Plaintiffs-Appellants,

v.

GRAYBAR ELECTRIC
COMPANY, INC.,

Defendant/Third-Party
Plaintiff-Respondent,

and

IMPULSE COURIER SERVICE,
INC.,

Defendant/Third-Party
Defendant.

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Argued August 29, 2023 – Decided September 14, 2023

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1342-18.

Matthew P. Pietrowski argued the cause for appellants (Levinson Axelrod, PA, attorneys; Brett R. Greiner, on the briefs).

Gerald T. Ford argued the cause for respondent (Landman Corsi Ballaine & Ford, PC, attorneys; Gerald T. Ford, Rachel S. Rubenstein, and Lorenz Gomez-Rivera, on the brief).

PER CURIAM

Plaintiff Christopher Barry injured his back at work while unloading a heavy reel of wire. He appeals from an order granting summary judgment to the supplier of the reel, defendant Graybar Electric Company, Inc. (Graybar).[1] The trial court held that Graybar had no duty of care to plaintiff. We agree and affirm.

I.

We discern the material facts from the summary-judgment record, viewing them in the light most favorable to plaintiff, the non-moving party. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Plaintiff worked as an electrician helper for Rogers Electric (Rogers). In August 2016, plaintiff was working on a project at a Babies-R-Us store in Totowa, New Jersey. In connection with that project, Rogers ordered a reel of

[1] Plaintiff and his wife are the named plaintiffs. We refer to Christopher Barry as plaintiff because he was the person physically injured.

500 feet of copper wire from Graybar. The reel weighed approximately 900 pounds.[2]

Employees at Rogers initially requested the reel to be delivered to the Babies-R-Us store on August 15, 2016. The Rogers employees did not specify how or in what type of vehicle the reel should be delivered. An employee of Graybar responded that Graybar would use a courier. Graybar then retained Impulse Courier Service, Inc. (Impulse) to make the delivery. Graybar had previously used Impulse as a courier and was aware that Impulse used vans that did not have a liftgate. The bill of lading for the delivery of the reel of wire listed the weight of the reel as 350 pounds.

On August 19, 2016, an Impulse employee, driving a van, delivered the reel of wire to the Babies-R-Us location in Totowa. The Impulse van did not have a liftgate or any other mechanical device to unload the reel. When the van arrived, plaintiff's supervisor asked him to help unload the reel without the aid of any mechanical device. While unloading the reel by hand, plaintiff injured his back.

[2] The record does not clearly establish the weight of the reel. All parties agree that the reel was a very heavy object weighing at least several hundred pounds. We accept and use the 900-pound weight alleged by plaintiff.

Plaintiff and his wife sued Graybar, alleging that it had been negligent in delivering the reel without a mechanical method to unload the reel. Graybar filed an answer and third-party complaint against Impulse. Thereafter, plaintiff amended his complaint to name Impulse as a defendant and Impulse asserted crossclaims and counterclaims against Graybar.

After conducting discovery, Graybar moved for summary judgment. It argued that it had no duty of care to plaintiff, it was not negligent in causing plaintiff's injuries, and its actions or inactions were not the proximate cause of plaintiff's injuries. Impulse also moved for summary judgment making the same arguments as Graybar.

The trial court heard arguments on those motions on July 17, 2020. On August 21, 2020, the trial court issued an order, containing a short statement of reasons, granting summary judgment to Graybar, and dismissing plaintiff's complaint and the crossclaims against Graybar with prejudice. The trial court held that Graybar had no duty of care to plaintiff because it did not have sufficient control or opportunity to avoid the risk of harm to plaintiff. In that regard, the trial court reasoned:

> Graybar conscripted [c]o-[d]efendant Impulse to deliver the subject reel. Once the reel left Graybar's possession, Graybar had no control over how the reel would be delivered to the jobsite. Graybar had a

> contract with [p]laintiff's employer to provide the subject reel. The record reflects that Graybar had utilized delivery vans without a lift-gate to make similar deliveries. The record also reflects the fact that [p]laintiff's employer did not request a vehicle with a lift-gate to deliver the subject reel. Plaintiff was directed to remove the reel by hand, in contradiction with [p]laintiff's employer's own policies and procedures. Graybar could not have anticipated that [p]laintiff or [p]laintiff's employer would remove the materials on site without mechanical assistance nor did Graybar have any opportunity to control or avoid the risk once [p]laintiff's employer directed [p]laintiff to remove the reel.

In a separate order, the trial court denied summary judgment to Impulse, reasoning that Impulse, in contrast to Graybar, had "some control over the delivery" of the reel. Impulse moved for reconsideration of that order. Plaintiff opposed Impulse's motion and cross-moved for reconsideration of the order granting summary judgment to Graybar.

On October 16, 2020, the trial court heard arguments on the motions for reconsideration. That same day, the court entered an order denying both motions. The court also entered an order dismissing Impulse's counterclaims against Graybar with prejudice.

Thereafter, at the request of Graybar, the trial court dismissed Graybar's third-party complaint against Impulse without prejudice. Plaintiff then settled his claims against Impulse and a stipulation of dismissal of those claims was

filed. Plaintiff now appeals from the August 21, 2020 order granting summary judgment to Graybar and the October 16, 2020 order denying his motion for reconsideration.

II.

On appeal, plaintiff argues that Graybar was not entitled to summary judgment because the inferences of fact support imposing a duty of care on Graybar. We reject that argument and hold that the material facts establish that Graybar had no duty of care to plaintiff for his work-related injury.

In reviewing summary judgment orders, appellate courts use a de novo standard of review and apply the same standard employed by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Accordingly, we determine whether the moving party has demonstrated there are no genuine disputes as to any material fact and, if so, whether the facts, viewed in the light most favorable to the non-moving party, entitled the moving party to a judgment as a matter of law. R. 4:46-2(c); see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"A dispute of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would

require submission of the issue to the trier of fact.'" Gayles by Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021) (quoting Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017)). "Rule 4:46-2(c)'s 'genuine issue [of] material fact' standard mandates that the opposing party do more than 'point[] to any fact in dispute' in order to defeat summary judgment." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (alterations in original) (quoting Brill, 142 N.J. at 529). Unsubstantiated arguments based on assumptions or speculation are not enough to overcome summary judgment. Brill, 142 N.J. at 529; see also Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 533 (App. Div. 2019) (explaining that "'conclusory and self-serving assertions by one of the parties are insufficient to overcome' summary judgment motions" (quoting Puder v. Buechel, 183 N.J. 428, 440-41 (2005))).

To establish negligence, a plaintiff must prove: "(1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Davis, 219 N.J. at 406 (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). "A 'plaintiff bears the burden of establishing those elements "by some competent proof."'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Davis, 219 N.J. at 406).

The question of whether a duty exists is a question of law. Robinson v. Vivirito, 217 N.J. 199, 208 (2014). Determining whether a duty exists "involves identifying, weighing, and balancing several factors" to determine whether, in light of the actual relationship of the parties under all the surrounding circumstances, imposing a duty to exercise reasonable care to prevent foreseeable harm is "fair and just." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 438-39 (1993). The foreseeability of an injury "is 'crucial' in determining whether a duty should be imposed." J.S. v. R.T.H., 155 N.J. 330, 338 (1998) (quoting Carter Lincoln-Mercury, Inc. v. EMAR Grp. Inc., 135 N.J. 182, 194 (1994)).

"Foreseeability requires a determination of whether the defendant was reasonably able to ascertain that his [or her] allegedly negligent conduct could injure the plaintiff in the manner it ultimately did." Robinson, 217 N.J. at 212. In determining the extent of a defendant's duty of care, courts consider the foreseeability of the risk of injury, and then weigh and balance (1) the relationship of the parties; (2) the nature of the attendant risk; (3) the opportunity and ability to exercise care; and (4) the public interest in the proposed solution. Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999) (citing Hopkins, 132 N.J. at 439). "Ultimately, all considerations must be balanced 'in a "principled"

fashion leading to a decision that both resolves the current case and allows the public to anticipate when liability will attach to certain conduct.'" Coleman v. Martinez, 247 N.J. 319, 338 (2021) (quoting G.A.-H. v. K.G.G., 238 N.J. 401, 414 (2019)).

Giving all reasonable inferences to plaintiff, Graybar could have reasonably foreseen that unloading a heavy reel of wire could cause injury to a worker. Nevertheless, the material facts establish that Graybar had no control over or responsibility for the manner of unloading the reel of wire. Graybar had no direct relationship with or control over plaintiff. Instead, plaintiff was an employee of Rogers and Rogers purchased the reel of wire from Graybar. The material undisputed facts establish that no one from Rogers requested that the reel be delivered on a truck with a liftgate or with a mechanical device for unloading the reel. Instead, the material facts establish that an employee of Graybar informed an employee of Rogers that Graybar would use an independent courier to make the delivery. Accordingly, when Graybar hired Impulse, which was an independent company, Impulse controlled how the delivery was made.

Just as importantly, when the reel arrived at the jobsite, it was plaintiff's supervisor, an employee of Rogers, who decided how the reel would be

unloaded. The supervisor or plaintiff could have arranged for mechanical assistance to unload the reel. Graybar had no control over the jobsite or how the reel was unloaded.

In short, Graybar had no direct relationship with plaintiff. Graybar had retained an independent contractor to make the delivery and, therefore, it had no control over the attendant risks of the delivery. Graybar also had no opportunity or ability to exercise care over Rogers' worksite or how the reel was unloaded. Finally, the public interests would not be advanced by imposing liability on Graybar under these circumstances. Consequently, none of the factors for imposing a duty of care support imposing a duty on Graybar for plaintiff's injuries.

Plaintiff relies on an accident report to argue that Graybar was requested to deliver the reel with a means of unloading it with mechanical assistance. The injury report was prepared by plaintiff's supervisor, a Rogers employee. The report states: "The supply house was asked to put this on a truck and did not. There should have been a liftgate. They were negligent & we needed it right then." The injury report and the statement within it are hearsay and do not establish a disputed fact that Graybar was asked to deliver the reel on a truck with a liftgate. See Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J.

369, 375 n.1 (2010); Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 457 (App. Div. 2009). The report does not identify who contacted Graybar with a request for a truck with a liftgate. Instead, the emails between employees of Rogers and Graybar establish that there was no request that the reel be delivered on a truck with a liftgate. The supervisor who prepared the accident report was not deposed and there is no evidence in the record that he contacted anyone at Graybar. In short, the statement in the accident report is inadmissible hearsay and does not create a genuine issue of disputed fact. See Hanges, 202 N.J. at 375 n.1; Ellis, 409 N.J. Super. at 457.

In summary, the material undisputed facts do not support imposing a duty of care on Graybar. Accordingly, summary judgment was appropriately granted and the motion for reconsideration was correctly denied.

Affirmed.