NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1897-15T1

JOSEPH LASSANDRO,

Plaintiff-Respondent,

v.

THE PEP BOYS – MANNY MOE & JACK, a/k/a PEP BOYS EATONTOWN, a/k/a PEP BOYS HQ,

Defendant-Appellant,

and

ROTARY LIFT VEHICLE SERVICES GROUP, INC., and STEPHEN GRAGA CONSTRUCTION, INC.,

Defendants-Respondents,

and

CHALLENGER LIFTS, INC. and SERVALL,

Defendants.

Argued June 1, 2016 – Decided June 10, 2016

Before Judges Fisher and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1369-13.

Neal A. Thakkar argued the cause for appellant (Sweeney & Sheehan, P.C.,

attorneys; Christopher J. O'Connell, of counsel; Joseph M. Hauschildt, Jr., on the briefs).

Merric J. Polloway argued the cause for respondent Joseph Lassandro (Polloway & Polloway, LLP, attorneys; Mr. Polloway, on the brief).

PER CURIAM

Plaintiff Joseph Lassandro was employed as a technician by defendant The Pep Boys — Manny Moe & Jack,[1] when he was seriously injured in a workplace accident. He filed this personal injury lawsuit against defendant and others. Following discovery, all defendants filed motions for summary judgment. The court denied the motion as to this defendant and granted the motions of all other defendants. We granted leave to defendant to appeal from the order denying its summary judgment motion and now reverse.

I.

In reviewing a summary judgment decision, we apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Viewing the evidence "in [the] light most favorable to the non-moving party," we determine "if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 38, 41 (2012) (citing Brill v.

[1] Defendant states it was improperly pled as Pep Boys Eatontown and Pep Boys HQ.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). We review questions of law de novo, State v. Gandhi, 201 N.J. 161, 176 (2010), and need not accept the trial court's conclusions of law. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).

The Workers' Compensation Act, N.J.S.A. 34:15-1 to -128, represents "a historic 'trade off' whereby employees relinquish their right to pursue common-law remedies in exchange for automatic entitlement to benefits for work-related injuries." Mabee v. Borden, Inc., 316 N.J. Super. 218, 226 (App. Div. 1998). To implement this trade-off, N.J.S.A. 34:15-8 provides:

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.
>
> [(Emphasis added).]

This case presents a purely legal issue — whether plaintiff showed that his employer's conduct met the intentional wrong standard for overcoming the exclusive remedy provision of N.J.S.A. 34:15-8. Pursuant to Rule 4:46-2(c), we summarize the facts, drawing all legitimate inferences therefrom in favor of plaintiff.

In the May 2011 accident, plaintiff suffered tears of both the ACL and the medial meniscus of his right knee, requiring

surgery. He received an award of permanency in Workers' Compensation Court for the injuries in the amount of "37.5% of the right leg" (which provided 118.125 weeks of disability at $226.67 per week for a total of $26,775.00).

In plaintiff's answer to Form A Interrogatory #2, he described the accident as follows:

> I was working on a car in Bay 1 in the rear of the Pep Boys store located in Eatontown. I was called over by the manager — Mike Skully [sic] — to help set up a lift on a car that was being backed in on a flat bed at a different bay, Bay #4. The lift was in the air above the tow truck so the arms can be adjusted to lift off the car. I went to adjust the arm on the right rear of the car when after extending the arm, the lift itself dropped without warning (about 16 inches) and hit the tow truck and threw me forward to the floor. I injured my right knee as a result of this fall. It is very important to note that I had never worked with this exact lift previously at the store and that the lift itself had a portion of its safety mechanisms "disabled" by weights that were attached to it. The lift had nothing to support the arm in the locked position.

At his deposition, plaintiff testified that the lift was designed with safety mechanisms on either side that would lock in place once a vehicle is raised. Thereafter, the safety mechanisms would need to be manually disengaged by a mechanic in order to lower the lift. After the accident, plaintiff learned the safety mechanisms were weighted by a pair of five-pound free

weights because the lifts were old and the floor of the service bay was uneven, which made it difficult for a mechanic to disengage the safety mechanisms once the lift was raised. Rather than being able to disengage the safety mechanism by hand, a mechanic would need to manually jack the vehicle up to relieve pressure on the safety latch before disengaging it. He believed that the weights would prevent the safety mechanisms from engaging in the first place.

According to both plaintiff and William Dombrowski, one of his co-workers, lift #4 was the only lift with weights. Dombrowski stated he and plaintiff were both attempting to place the tow car on lift #4 when the accident occurred because lift #4 was the only one the tow truck driver could access.

Dombrowski testified a former employee, Cliff Dobson, placed the weights on lift #4, and that not every lift in the service bay had been modified. He testified that to his knowledge, Dobson was the only employee who regularly worked at lift #4, and that plaintiff had his own separate lift where he regularly worked and kept his tools. Dobson told Dombrowski he put the weights on the lift for his convenience so he would "not have to walk around the car while it's up in the air."

Michael Robinson, a certified lift technician with Stephen Graga Construction, Inc., testified he personally serviced the

lifts in the Pep Boys in Eatontown, including the subject lift. On multiple occasions, he observed the presence of the five-pound weights to "defeat" the safety mechanism. The first time Robinson made this observation, he personally removed the weights and told both a store manager and an automotive technician not to use the weights. He testified that the weights were off the lift when he left the store that day. However, on subsequent visits, he saw that the weights were again on the lift; he reiterated to someone at the store that they should not be using the weights in this manner.

Michael Skelly, the store manager at the time of plaintiff's accident, testified it was part of his job to make routine inspections of the lifts and the shop. Sometime in 2010, when he started his job as the store manager, he was given on-the-job training regarding in-store inspections by the Pep Boys Area Director, Brian Boyce. The five-pound weights were on the lift when Boyce gave him training on the operation of the lifts. He received no other "outside" training or certifications regarding the lifts or automotive safety. Skelly admitted that the weights were on the subject lift at the time of plaintiff's accident. Skelly testified he did not know who put the weights on the lift or what purpose they served. He was unaware that they afforded defendant any profit advantage.

Skelly could not recall any other accidents similar to the one that injured plaintiff while he was manager.

Plaintiff's liability expert, George H. Meinschein, P.E., did not examine the lift at issue because it had been removed and scrapped. His review of pertinent materials led him to conclude defendant's "failures to properly train their management staff, inspect their shop equipment, and maintain their shop equipment in a safe operating condition evidence[d] a reckless disregard for the safety of their employees," and "[b]y allowing an unsafe equipment modification and the intentional defeat of a safety feature to go unchecked, Pep Boys created a substantial certainty of serious injury to Mr. Lassandro given that he and/or other workers would use the unsafe lift to repair vehicles on any given day."

II.

The standard for proving the "intentional wrong" exception is "formidable." Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 451 (2012). It is interpreted very narrowly "to further these underlying quid pro quo goals, so that as many work-related disability claims as possible be processed exclusively within the workers' compensation system." Mabee, supra, 316 N.J. Super. at 226-27 (citing Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161, 177 (1985)).

Two conditions must be satisfied for the intentional wrong exception to apply. The first condition calls for an evaluation of the conduct of the employer, requiring that "the employer must know that his actions are substantially certain to result in injury or death to the employee." Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 617 (2002). The second condition calls for an evaluation of the context of the employer's conduct, and requires proof that "the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the [Act] to immunize." Ibid.; see also Millison, supra, 101 N.J. at 177-80.

Plaintiff argues the first prong was satisfied because, as shown through Skelly's admission and Dombrowski's testimony, the weights were in place on Dobson's lift from as early as 2010. Robinson's testimony revealed that he had warned a service manager and a technician that it was unsafe to use the weights and that they should not be used. Despite his warnings, Robinson observed the weights in place on subsequent visits. Plaintiff also cites the opinion of his expert as supporting the conclusion that defendant created a substantial certainty of injury to an employee by allowing this condition to persist.

It may be inferred from such evidence a risk of injury to its employees was created by defendant's failures to prohibit such modifications of the lift and to rigorously inspect the lift so that one of its employees could not add weights for his convenience. Creating a risk of injury is consistent with imposing liability based upon negligence. That is not the applicable standard here. To satisfy Millison's conduct prong, the employer must have knowledge that its conduct poses a far higher danger, both in terms of likelihood of injury and the nature of that injury. The employer must know that its conduct was "substantially certain to result in injury or death to the employee." Laidlow, supra, 170 N.J. at 617. The evidence fails to meet that standard.

The second Millison factor also presents a "high threshold" for the employee who seeks to escape the exclusivity of the Workers' Compensation Act. Van Dunk, supra, 210 N.J. at 474. It

> reinforce[s] the strong legislative preference for the workers' compensation remedy[, which] is overcome only when it separately can be shown to the court, as the gatekeeper policing the Act's exclusivity requirement, that as a matter of law an employee's injury and the circumstances in which the injury is inflicted are "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act."
>
> [Id. at 473 (emphasis omitted) (quoting Millison, supra, 101 N.J. at 179.)]

Plaintiff's argument on this point is focused on his disagreement with the weight defendant contends should be accorded to the absence of prior accidents regarding the subject lift; that the actual modification was made by a service technician for his convenience rather than at the direction of management; and that there was no stated profit motive for the modification. We agree with defendant that each of these is a factor to be considered in evaluating the context of the employer's conduct.

But what is fatal to plaintiff's cause is the absence of any evidence that would support the conclusion, "as a matter of law" that plaintiff's injury under the circumstances here is "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act." Ibid. (citation omitted). As Robinson testified, the lift here could fall without any intervention. The workplace here was one in which various employees used heavy equipment. The nature of the employment exposed plaintiff to the risk of injury due to the negligence of co-workers and management, which is what occurred here.

Because the evidence here clearly failed to support a finding that defendant committed an intentional wrong under the Workers' Compensation Act, the exclusivity provision of the Act

barred plaintiff's claim against his employer. We therefore conclude the trial court erred in denying summary judgment to defendant.

Reversed and remanded for entry of an order granting summary judgment to defendant.