

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOSEPH BURLINGAME III,

Plaintiff-Appellant/Cross-Appellee,

v

NATIONSRENT, INC.,

Defendant/Cross-Plaintiff-  
Appellee/Cross-Appellant,

and

NANCY BROWN,

Defendant/Cross-Defendant-Cross-  
Appellee,

and

JASON BROWN,

Defendant.

UNPUBLISHED

January 25, 2011

No. 291312

Sanilac Circuit Court

LC No. 05-030686-NI

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Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing plaintiff's claim against defendant/cross-defendant, Nancy Brown. Plaintiff challenges an earlier order granting defendant/cross-plaintiff, NationsRent's motion for summary disposition and dismissing all of plaintiff's claims against NationsRent with prejudice. On cross-appeal, NationsRent challenges an order denying its motion for summary disposition of its cross-claim against Nancy. We affirm.

I.

Nancy rented a rough terrain forklift from NationsRent to move materials for a new barn from two flatbed trucks onto her property in Sanilac County. Nancy was not present at the time the forklift was delivered to the property and she did not sign or receive a copy of the invoice, which provided that NationsRent "makes available the opportunity for immediate operator

familiarization/training. Customer is cautioned to accept the Company's offer for familiarization/training and to avoid all opportunities where untrained persons may cause the equipment to be used or operated." Some time following the delivery, Nancy's son, defendant Jason Brown, operated the forklift with the assistance of plaintiff.

After the materials were successfully moved from the flatbed trucks, Jason continued to operate the forklift elsewhere on the property and plaintiff rode along by holding on to a handle on the outside of the cab. During this time, the forklift fell through ice and became stuck. Jason recalled telling plaintiff that he planned to move the forklift back and forth to free it, and if that plan failed, he would use the boom to push the forklift free. Jason further recalled telling plaintiff to get off the forklift, where he had been sitting. When Jason then attempted to free the forklift, his hand inadvertently hit the forklift's boom lever and the boom lowered onto plaintiff where he had remained sitting on the forklift. Plaintiff sustained severe injuries and was paralyzed.

Plaintiff filed a lawsuit against Nancy, Jason, and NationsRent.<sup>1</sup> Plaintiff asserted claims against NationsRent for negligence, alleging that NationsRent: 1) negligently entrusted the forklift with Nancy, 2) failed to provide adequate warnings about the forklift, 3) failed to investigate the experience or qualifications of Nancy and Jason, and 4) failed to instruct or train Nancy or Jason to use the forklift. NationsRent then filed a cross-complaint against Nancy, alleging that she was obligated to indemnify and hold harmless NationsRent and its agents, officers, and employees under an indemnity clause in her application for credit.

NationsRent filed a motion for summary disposition of plaintiff's claims under MCR 2.116(C)(8) and (10). With respect to plaintiff's negligent entrustment allegation, NationsRent argued that there was no genuine issue of material fact whether peculiarities regarding Nancy or Jason put NationsRent on notice that Nancy or Jason would use the forklift in a harmful manner. In addition, NationsRent argued that it had no duty to instruct or train Nancy or Jason to use the forklift and there were no facts to suggest that instruction or training would have prevented plaintiff's injuries. In response, plaintiff argued that, as a bailor, NationsRent had a duty to disclose dangerous qualities of the forklift to Nancy. The trial court granted NationsRent's motion for summary disposition. The trial court noted that plaintiff's bailment theory was not preserved in the complaint, but it nevertheless found that there were no facts demonstrating that either Nancy or Jason were unaware of the particularly dangerous qualities of the forklift. Noting the presence of safety warnings on the forklift and the invoice, the court declined to impose any duty on behalf NationsRent to provide training to operators of rental equipment. Plaintiff's appeal challenges this order.

NationsRent also filed a motion for summary disposition of its cross-claims against Nancy under MCR 2.116(C)(8) and (C)(10). The trial court denied this motion, reasoning that,

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<sup>1</sup> Plaintiff's claims against Nancy and Jason are not relevant to this appeal. However, we note that plaintiff ultimately obtained a default judgment for \$5,000,000 against Jason. Plaintiff's claim against Nancy was dismissed by stipulation, but plaintiff apparently filed a separate action against Nancy only and obtained a judgment for \$750,000.

in light of Nancy's failure to sign the rental contract containing an indemnification clause, there was a question of fact regarding whether Nancy's earlier signature on the application for credit containing a similar indemnification clause demonstrated her intent to indemnify NationsRent. NationsRent's cross-appeal challenges this order.

## II.

On appeal, plaintiff argues that the trial court erred in granting NationsRent's motion for summary disposition because NationsRent owed him a duty of care.<sup>2</sup> We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). NationsRent moved for summary disposition of plaintiff's claims under MCR 2.116(C)(8) and (C)(10), but the trial court did not articulate which subrule formed the basis of its decision. Because it appears that the court considered facts outside the pleadings, we treat NationsRent's motion as granted under MCR 2.116(C)(10). Consequently, we review all of the evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine question of material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Further, we review de novo whether the defendant owes a duty to the plaintiff. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Plaintiff first contends that NationsRent owed him a duty to ensure the safe use of the forklift under the theory of negligent entrustment. We note that the trial court did not consider NationsRent's duty under this theory when it granted summary disposition. Generally, an issue must be raised before and addressed by the trial court to be preserved for appellate review. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Nevertheless, we will review this argument because it involves a question of law, and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353, 362 (2008).

"The tort of negligent entrustment is comprised of two basic elements. *Perin v Peuler (On Rehearing)*, 373 Mich 531, 537-539; 130 NW2d 4 (1964). First, the entrustor is negligent in entrusting the instrumentality to the trustee. Second, the trustee must negligently or recklessly misuse the instrumentality." *Allstate Ins Co v Freeman*, 160 Mich. App. 349, 357; 408 NW2d 153 (1987). An entrustor is negligent in entrusting the instrumentality to the trustee if the entrustor "knew or should have known of the unreasonable risk propensities of the trustee . . . To prove an entrustor should have known an trustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the trustee sufficient to put the entrustor on notice of that likelihood must be demonstrated." *Fredericks v General Motors*, 411 Mich 712, 719; 311 NW2d 725 (1981).

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<sup>2</sup> To establish a prima facie case of negligence, a plaintiff must show (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff injuries, and (4) that the plaintiff suffered damages. *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006).

When Nancy called NationsRent, she explained that she needed to rent a piece of equipment that would off-load material of a certain weight from semi trailers. Nancy stated that she might have described the piece of equipment as a “hi-lo” and Kris Kryzanski, the salesperson at NationsRent who handled her call, stated that Nancy referred to it as a “reachable forklift.” From Nancy’s description, Nancy and Kryzanski determined that a rough terrain forklift was best-suited for the project. According to Kryzanski, Nancy informed him that she was renting the forklift on her own behalf and that Jason would be operating it. Plaintiff has not demonstrated that NationsRent knew of any unreasonable risk propensities of Nancy or Jason. Although plaintiff distinguishes Nancy, a private customer, from commercial construction companies that frequently rent from NationsRent, plaintiff has not demonstrated that this distinction constituted an unsafe peculiarity that put NationsRent on notice that Nancy or Jason would use the entrusted chattel in an unsafe manner. On the contrary, the record shows that Kryzanski had a “gut feeling” that both Nancy and Jason had construction equipment experience and, based on Nancy’s statements, Kryzanski believed that Jason had operated this type of forklift before. Absent sufficient notice of unsafe peculiarities, NationsRent had no further duty to inquire regarding Jason’s experience or training or to otherwise ensure the forklift’s safe use. *Buschlen v Ford Motor Co*, 121 Mich App 113, 118; 328 NW2d 592 (1982). Consequently, if the trial court had considered plaintiff’s negligent entrustment argument, it would not have been error to grant NationsRent’s motion for summary disposition.

Second, plaintiff relies on *Baker v Arbor Drugs*, 215 Mich App 198; 544 NW2d 727 (1996), in arguing that NationsRent voluntarily assumed various duties, including investigating an operator’s training and experience, offering to provide familiarization training in the invoice at delivery, and providing training by request, and was therefore required to exercise those duties with due care.<sup>3</sup> In *Baker*, a pharmacy “implemented, used, and advertised through the media” that it used a computer system to monitor its customers medication profiles and detect adverse drug interactions. *Id.* at 205. This Court concluded that by implementing and advertising this system, the pharmacy voluntarily assumed a duty to use the system with due care when filling prescriptions for a client who subsequently suffered a stroke as a result of ingesting incompatible drugs. Conversely, in *Estate of Qing Kong v AJ Marshall Co*, 233 Mich App 229-232; 590 NW2d 301 (1998), this Court found that the distributor of a food grinder that injured the plaintiff was not under a voluntarily assumed legal duty to assist the manufacturer’s recall of the grinder. The facts showed that the manufacturer did not request the distributor’s assistance with the recall and the distributor did not take any affirmative action to voluntarily assist or comply with the effort. *Id.* at 231-232.

Plaintiff’s reliance on *Baker* is misplaced. Despite NationsRent’s internal goal to create a corporate culture of safety, like the distributor in *Estate of Qing Kong*, NationsRent took no voluntary, affirmative action to either investigate and evaluate Jason’s training and experience, or to properly train Jason. Furthermore, even though NationsRent’s standard invoice gave

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<sup>3</sup> Again, plaintiff’s argument is not preserved, but, because the issue presented pertains to a question of law, we will, nevertheless, consider it. *Johnson Family Ltd Partnership*, 281 Mich App at 377.

customers the option to request familiarization training at the time of delivery, Nancy never received this invoice, and there are no facts demonstrating that NationsRent advertised, or otherwise notified Nancy, that this option would be provided in the invoice. In the absence of such affirmative action, plaintiff's claim that NationsRent voluntarily assumed any duty of care fails.

Third, plaintiff acknowledges that this Court has previously imposed a duty on a bailor for hire, with "actual knowledge of defects in, or dangerous qualities of, the subject of bailment that are not known to the bailee and may result in injury to him," to disclose such defects or dangerous qualities to the bailee. *Goldman v Phantom Freight, Inc*, 162 Mich App 472; 413 NW2d 433 (1987). Plaintiff urges this Court to extend a duty to any bailor of construction equipment to ensure that unprofessional or private renters, as opposed to commercial construction renters, are informed of the importance and availability of operator training.<sup>4</sup>

In common-law negligence cases, a duty "concerns whether a defendant is under any legal obligation to act for the benefit of the plaintiff." *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006), quoting *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004). Whether a duty exists depends on (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of the connection between the conduct and the injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Id.*

In the present case, there was no relationship between plaintiff and NationsRent. Plaintiff was only at the Sanilac County property because he was dating Nancy's daughter and had volunteered to accompany Jason to the property while on leave from work. It was arguably foreseeable that an operator's hand could inadvertently hit the forklift's boom lever causing the boom to lower contrary to the operator's intent. However, in light of the following warnings attached to the forklift, a reasonable person would not anticipate that this event would cause human injury: 1) "NO RIDERS PERMITTED ON HANDLER," 2) "KEEP OTHERS AWAY FROM MACHINE WHILE OPERATING. DO NOT STAND UNDER BOOM OR LOAD," and 3) "STAY CLEAR OF PINCH POINT AREA ANYTIME ENGINE IS RUNNING. BEING IN PINCH POINT AREA COULD CAUSE SERIOUS INJURY OR DEATH." Furthermore, the connection between NationsRent's alleged negligence and plaintiff's loss is tenuous. Even in hindsight, plaintiff does not establish that a warning by NationsRent to Nancy regarding the importance and availability of operator training would have caused Nancy to request training for Jason, who she believed had operated similarly equipment before. Plaintiff also fails to demonstrate that a warning would have caused Jason to ensure that plaintiff heeded warnings about remaining on the forklift, under the boom, while the engine ran. In addition, defendant's conduct was not morally blameworthy. For these reasons, although plaintiff argues that the

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<sup>4</sup> Apart from his negligent entrustment claim, plaintiff apparently does not argue on appeal that this Court should impose a common-law duty on a bailor of construction equipment to investigate every operator's experience and qualifications or to train the operator to properly use the forklift.

burden of imposing a duty on NationsRent to warn private renters of the importance and availability of operator training would be minimal because it would only require deliverers to point out that warning, which is listed on the company's standard invoice, plaintiff provides no basis for this Court to extend the duty of care upon defendant for plaintiff's benefit in this case.

Because we conclude that no duty existed, we need not address plaintiff's remaining arguments regarding proximate cause or NationsRent's argument on cross-appeal that Nancy agreed to indemnify and hold harmless NationsRent from all claims for personal injury in conjunction with the rental of this forklift.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Kurtis T. Wilder  
/s/ Elizabeth L. Gleicher