IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEVE HALLMON, Plaintiff, v. C. RAYMOND DAVIS & SONS, INC. Defendant.	)	C.A. No. 02C-05-317 MJB
MARY ELLEN PAYLOR, Individually and As Personal Representative of Daniel Paylor Plaintiff, v. SUMMIT EQUIPMENT RENTALS, INC., SHELLY'S BUILDING SUPPLY, and C. RAYMOND DAVIS & SONS, INC., Defendants. And SUMMIT EQUIPMENT RENTALS, INC., Third Party Plaintiff, v. BRESCIA CONSTRUCTION, INC., Third Party Defendant.	)	

Submitted: March 17, 2006
Decided: March 30, 2006

On Motion for Summary Judgment by
Defendant Summit Equipment Rentals, Inc., **DENIED**.

OPINION AND ORDER

Daniel P. Bennett, Esquire, Heckler & Frabizzio., Wilmington, Delaware, Attorney for Defendant Summit Equipment Rentals, Inc.

Beverly L. Bove, Esquire, Vincent J. X. Hendrick, II, Esquire, Beverly Bove, Attorney at Law, Wilmington, Delaware, Attorneys for Plaintiff Mary Ellen Paylor.

BRADY, J.

Procedural History

This is a Motion for Summary Judgment filed by Defendant Summit Equipment Rentals, Inc. ("Summit") against Plaintiff Mary Ellen Paylor, Individually and as Personal Representative of Daniel Paylor. Two actions arising from the incident in this case were filed. Both were consolidated into the current action before the Court.

Facts

The instant dispute arises from a construction incident occurring at what is now known as the Brandywine Baptist Church on Mount Lebanon Road in Wilmington, Delaware on August 29, 2000. At the time of the incident, Brescia Construction, Inc. ("Brescia") was working as a subcontractor to C. Raymond Davis & Sons ("C. Raymond"). Brescia rented a crane and an operator (Robert Wyatt) from Summit to lift roof trusses to their proper position before being secured by Brescia employees to the truss bracing.

Following the bracing of nearly all the roof trusses, Brescia determined that one of the roof trusses was in the wrong position and had to be moved. The crane was hooked to one of the trusses and the bracing on the truss was removed. At this point many of the trusses collapsed, injuring

Daniel Paylor and Steve Hallmon. Daniel Paylor sustained severe injuries as a result. Mr. Paylor died days later in the hospital. Steve Hallmon was also injured in the incident and the cases have been consolidated for that reason.

Defendant Summit has filed the instant Motion for Summary Judgment against Plaintiff Mary Ellen Paylor alleging it may not be held vicariously liable for the acts of the crane operator ("Wyatt") because he was under the control and direction of Brescia at the time of the incident.

Standard of Review

The standard for granting summary judgment is high.[1] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[2] "In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party."[3] When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.[4]

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[1] *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).
[2] Super.Ct.Civ.R. 56(c).
[3] *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).
[4] *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).

Applicable Law

The Borrowed Servant Doctrine

There is a presumption in Delaware that, when an owner of heavy equipment supplies the equipment and an operator, the owner is presumed to retain actual control over the equipment to protect the ownership interest in the equipment.[5] Summit must overcome this presumption and prove no material issue of fact remains for jury determination.

Summit's first argument is based on the borrowed servant doctrine. Summit alleges there is no issue of fact regarding under whose direction Wyatt was acting when the incident causing Mr. Paylor's death occurred because the contract to rent the crane included the "rental" of the operator as well. Therefore, Summit argues, Wyatt was acting under the sole direction of Brescia, and his actions were not controlled by anyone but Brescia.

Plaintiff Paylor argues that Wyatt testified at his deposition that he took instructions and directions from his boss, Jerry Tompkins, president of Summit,[6] and that in a recorded statement Wyatt stated that he was the

[5] *Brittingham v. American Dredgin Co*., 262 A.2d 255, 266 (Del. 1970).
[6] *Plaintiff's Opposition to Defendant Summit Equipment Rental, Inc.'s Motion for Summary Judgment at* 2; exhibit 2 *Robert Wyatt Deposition* at 8.

person responsible for setting up the crane.[7] Wyatt further stated he did not speak to any other employees of the general or subcontractors, and that he was at the jobsite to represent his company (Summit). Additionally, on the date in question, Wyatt called Summit to tell his boss that he was concerned the weather was too windy to set the trusses and his boss told him to use his own judgment as to whether it was prudent to set the trusses in the wind.[8] Wyatt proceeded with the lift. Finally, Wyatt acknowledges that he went into the gymnasium to look at the truss bracing and did not feel it was sufficient,[9] but proceeded with the crane operation anyway. Plaintiff presented a report from an expert who opines that Summit, through Wyatt, was negligent because a crane operator has a duty not to continue with the job if they feel it will be unsafe.[10]

The borrowed servant doctrine is recognized in Delaware[11] and was outlined in *Richardson v. John T. Hardy & Sons, Inc.*:[12]

> **Whether or not a loaned employee becomes the employee of the one whose immediate purpose he serves is always a question of fact**, and depends upon whether or not his relationship to the specific employer has the usual elements of

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[7] *Plaintiff's Opposition to Defendant Summit Equipment Rental, Inc.'s Motion for Summary Judgment at* 2; exhibit 3 *Robert Wyatt Recorded Statement* at 8.
[8] *Plaintiff's Opposition to Defendant Summit Equipment Rental, Inc.'s Motion for Summary Judgment at* 2; exhibit 3 *Robert Wyatt Recorded Statement* at 10.
[9] *Plaintiff's Opposition to Defendant Summit Equipment Rental, Inc.'s Motion for Summary Judgment at* 2; exhibit 2 *Robert Wyatt Deposition* at 29-30.
[10] *Plaintiff's Opposition to Defendant Summit Equipment Rental, Inc.'s Motion for Summary Judgment at* 2; exhibit 4.
[11] *Richardson v. John T. Hardy & Sons, Inc.*, 182 A.2d 901 (Del. 1962).
[12] *Id*.

> the employer-employee status. Fundamentally, it is not important whether or not he remains the employee of the general employer as to matters generally. What is important to determine is, with respect to the alleged negligent act in question, whether or not he was acting in the business of and under the direction of the general or the specific employer. This is almost always determined by which employer has the right to control and direct his activities in the performance of the act allegedly causing the injury, and whose work is being performed. (Emphasis added.)

Delaware caselaw indicates that this State does not favor summary judgment in the borrowed servant context, holding that the question of who controlled the worker in question is an issue of fact for jury determination.

In *Paoli v. Dave Hall, Inc.*[13] the Court denied a motion for summary judgment based on the borrowed servant doctrine because the Defendant's alleged negligence in the actual operation of the crane was an issue "ripe for jury determination."[14]

In *Mumford & Miller Concrete, Inc. v. Burns*,[15] the Delaware Supreme Court affirmed the denial of cross motions for summary judgment regarding the borrowed servant doctrine because there was a

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[13] 462 A.2d 1094 (Del. Super. Ct. 1983).
[14] *Id* at 1098.
[15] 682 A.2d 627 (Del. 1996)

question of fact for the jury regarding under whose control a pump truck operator was acting when an injury took place.[16]

In *Volair Contractors, Inc. v. Amquip Corp.*,[17] the Delaware Supreme Court affirmed the Superior Court holding that there was an issue of fact for jury determination precluding summary judgment regarding the applicability of the borrowed servant doctrine.[18]

Summit seeks to distinguish *Volair*, because it is undisputed that Brescia controlled the jobsite. Even accepting that as true for purposes of this analysis, the fact that Brescia controlled the jobsite is not determinative here. As Plaintiff alleges, Wyatt could have still operated the crane in a negligent manner. Wyatt called Summit the same day the incident occurred and was told to use his judgment regarding whether it was prudent to proceed. When these facts are added to the presumption that Summit retained control over the crane operator, it is clear a material issue of fact is present.

Taking all the facts in the light most favorable to the nonmoving party, in this case Paylor, there are sufficient factual disputes regarding under whose control the crane operator was acting

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[16] *Id* at 628.
[17] 829 A.2d 130 (Del. 2003).
[18] *Id* at 136.

when the incident took place to preclude summary judgment. This determination lies with the jury.

Negligence of the Crane Operator

Summit next alleges that even if the Court finds the issue of whether Wyatt was a borrowed servant of Brescia an issue of fact for the jury, it should still grant summary judgment because the undisputed evidence is that Wyatt (and thus, Summit) was not negligent. Summit bases this argument on the fact that Wyatt testified in his deposition that he understood Brescia was taking care of any bracing concerns, that he was not an expert on roof truss bracing, and that he relied on the representations of Brescia.

Paylor counters that Wyatt operated the crane negligently and exercised his discretion in a negligent manner, partially causing the incident that resulted in David Paylor's death.

Based on the record, there are sufficient facts to preclude summary judgment regarding the negligence of Wyatt. Issues of negligence are ordinarily decided by the jury[19] and summary judgment should only be granted in negligence actions when the undisputed

[19] *Faircloth v. Rash*, 317 A.2d 871 (Del. 1974).

facts compel one conclusion.[20] The Court cannot conclude the facts in the instant case compel only one conclusion.

Taking the facts in the light most favorable to Paylor, the Motion for Summary Judgment cannot be granted in favor of Summit.

Conclusion

For the reasons stated herein, the Motion for Summary Judgment of Defendant Summit Equipment Rentals, Inc. is hereby **DENIED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[20] *Id*.