FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-39

TUONG VI LE,

Appellant/Cross-Appellee,

v.

COLONIAL FREIGHT SYSTEMS, INC., a foreign corporation, RODRIGUEZ FAMILY EXPRESS, a foreign corporation, ATANASIO RODRIGUEZ, RICHARD LLAMAS, T.A. OPERATING, LLC, a foreign corporation, JOHN DOE, and LILY NGUYEN,

Appellees/Cross-Appellants.

On appeal from the Circuit Court for Columbia County.
Wesley R. Douglas, Judge.

December 4, 2019

LEWIS, J.

Appellant, Tuong Vi Le, appeals the Second Amended Final Judgment in which the trial court ordered that she recover $115,541.12 from Appellee, Colonial Freight Systems, Inc. Appellant argues that the trial court erred in determining that Appellee did not have a nondelegable duty to ensure that its trailer was properly maintained and operated in a safe condition and in

not ordering that Appellee pay her the total amount of damages as found by the jury in her negligence case. For the following reasons, we reject Appellant's arguments and affirm. We affirm as to the issues raised on cross-appeal without comment.

FACTUAL BACKGROUND

In February 2012, Appellant filed a Complaint against Appellee wherein she alleged that on June 2, 2010, a tire from one of Appellee's trailers detached and collided with the vehicle in which she was a passenger. In her Second Amended Complaint, Appellant added several defendants, including TA Operating, LLC ("TA"), and alleged that TA negligently installed the wheels on the trailer prior to the accident. In 2016, Appellant dropped all defendants except for Appellee.

Appellee subsequently moved for summary judgment, representing that TA performed repairs on the trailer at issue in May 2010 in South Carolina after a fire broke out at the right rear axle of the trailer. In her response, Appellant argued that Appellee "owed [her] a non-delegable duty to inspect, maintain, repair, and operate trailer #5427 in a safe condition under the common law and various trucking regulations." She further argued that Appellee knew or should have known that TA did not do a proper inspection and repair of the damaged parts of the trailer after the brake malfunction and fire. The trial court denied Appellee's motion.

During trial, Appellee denied Appellant's negligence claim and argued that TA, among others, was negligent. One of the stipulated facts read to the jury was that a TA mechanic failed to properly inspect and repair the damages caused by the May 2010 fire, which resulted in damage to the trailer's right rear axle bearings.

Thereafter, Appellant presented the deposition of Ray Floyd, Appellee's vice-president of maintenance. Floyd testified that Appellee had approximately 500 trailers and that he was responsible for taking care of "all of our company equipment." According to Floyd, Appellee "absolutely" worked with TA on a routine basis. It was "not necessarily" any of Appellee's employees' job to review the TA invoices "because the program that is set up

with TA is any kind of repairs that need to be done they have authorization to do or to go to whatever extent they feel like is necessary to make that repair." Appellee paid TA approximately $300,000 per year to work on its equipment. With respect to the invoice for the TA repair work at issue, Floyd testified, "I don't think I reviewed this invoice . . . until the second instance with the truck or with the trailer where the wheel came off. Then I went back and I reviewed it at that time." Floyd described the invoice as being "sketchy" and "kind of hard to understand," testifying, "It says took drum and hub oiler off to see if any damage was done to the hub and bearings. You can't inspect the bearings without pulling the hub." Floyd further testified that Appellee's inspector who conducted the periodic inspection on the trailer a couple of weeks after the repair was not told about the fire. He explained, "There was not anything to draw attention to this particular trailer because after the repair at TA, you see, I thought everything was good." Floyd later testified of TA, "The way the invoice reads, it looks like they did not do as much as they could have done."

The deposition of Scott Simmons, Appellee's safety director in 2010, was later presented. When asked if anything could have been done to avoid the accident, he replied, "Well, I believe that if the bearings within the hub had been properly inspected and replaced, this incident wouldn't have happened." When asked whether he believed that an inspection as done by a driver, "done exactly the way he's supposed to do it," would have revealed the problems with the wheels prior to the incident involving Appellant, Simmons replied, "In order to inspect the parts that we're talking about here, they are inside of a hub. And the only way to inspect them is to completely take the hub apart, which we would never ask of our drivers on the road. They're not qualified or trained to do that type of work." When asked if he blamed TA for the incident at issue, he replied, "They had the primary opportunity, the technician did, to take this hub apart and thoroughly inspect it after a fire to ensure that there was no damage done to these bearings within the hub."

After the parties rested their cases, Appellant moved for a directed verdict on the basis that "there is a non-delegable duty." The trial court denied the motion. Appellee's counsel argued

during his closing argument that TA was "the one that should carry the brunt of the responsibility."

In its verdict, the jury affirmatively answered the question of whether there was "negligence on the part of [Appellee] that was a legal cause of loss, injury or damage" to Appellant. The jury also found that TA's negligence was a legal cause of Appellant's loss, injury, or damage. The jury assigned twenty-three percent of fault to Appellee and seventy-seven percent of fault to TA. The jury determined that Appellant's damages totaled $521,984.39.

In response to the verdict, Appellant filed a Motion for Judgment as a Matter of Law on Apportionment of Fault. Appellant asserted that the trial court "should now hold that [Appellee] is liable for the fault assigned to its retained independent contractor" based on the nondelegable duty of care owed to her by Appellee. Appellant also filed a Motion for Entry of Judgment against Appellee, asserting that the damages award should not be reduced based upon the apportionment of fault.

Although the trial court initially determined post-trial that Appellee was responsible for the actions committed by TA and entered a final judgment in Appellant's favor in the amount of $502,352.70, it subsequently granted Appellee's motion to amend the final judgment. The trial court found that the law did not support a finding of a nondelegable duty on Appellee's part. In support of its ruling, the trial court noted that the driver of the tractor trailer had complied with the pertinent federal trucking regulations relative to his daily trip inspections and that Appellee had performed its required periodic inspection in 2010. The trial court also recognized that the regulations allow motor carriers like Appellee to utilize qualified mechanics and inspectors, that nothing requires a carrier to disassemble a wheel or hub during an inspection to verify that a qualified mechanic performed appropriate repairs, and that it was apparent that a repair facility not only owes a duty to the one who paid for the repairs, but also to third parties who might be endangered by negligent repairs. The Second Amended Final Judgment ordered Appellee to pay $115,541.12 to Appellant. This appeal and cross-appeal followed.

ANALYSIS

Appellant argues on appeal that the trial court erred in determining that Appellee did not have a nondelegable duty to ensure that its trailer was properly maintained and operated in a safe condition. The issue of whether a duty exists is a question of law. *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). Questions of law are reviewable de novo. *White v. Wal-Mart Stores, Inc.*, 918 So. 2d 357, 358 (Fla. 1st DCA 2005).

As we have explained, "Under the *Restatement (Second) of Torts*, as well as under Florida case law, a party who hires an independent contractor may still be liable where a nondelegable duty is involved." *Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. 1st DCA 1995). A nondelegable duty may be imposed by statute, contract, or the common law. *Id.* "Unfortunately, there are no specific criteria for determining whether or not a duty is nondelegable except for the rather ambiguous defining characteristic that the responsibility is so important to the community that the employer should not be allowed to transfer it to a third party." *Id.*; *see also Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 875 (Fla. 2d DCA 2010) (noting that the liability for a nondelegable duty that is imposed directly on an employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury will likely result in the absence of precautions).

It has been held that a property owner's duty of care towards invitees is a nondelegable duty. *U.S. Sec. Servs. Corp. v. Ramada Inn, Inc.*, 665 So. 2d 268, 270 (Fla. 3d DCA 1995). In other words, a landowner may contract out the performance of his or her nondelegable duty to an independent contractor, but he or she cannot contract out of his or her ultimate legal responsibility for the proper performance of his or her duty by the independent contractor. *Id.* A nursing home operator has also been held to have a nondelegable duty as to the responsibility for caring for its patients. *NME Props., Inc. v. Rudich*, 840 So. 2d 309, 312 (Fla. 4th DCA 2003). In *Wax v. Tenet Health System Hospitals, Inc.*, 955 So. 2d 1, 9 (Fla. 4th DCA 2006), the Fourth District held that because the pertinent statute and regulation imposed a duty for non-

negligent anesthesia services upon all surgical hospitals, it was important enough "that as between the hospital and its patient it should be deemed non-delegable without the patient's express consent." In contrast, in *Jones v. Tallahassee Memorial Regional Healthcare, Inc.*, 923 So. 2d 1245, 1246-47 (Fla. 1st DCA 2006), we affirmed a summary judgment on the "appellant's nondelegable duty claim because we . . . determined that the nondelegable duty doctrine should not apply in circumstances like these where the active tortfeasors were an independent contractor physician and his employee who was at all times acting only under the physician's supervision." More recently, in *Tabraue v. Doctors Hospital, Inc.*, 272 So. 3d 468, 469 (Fla. 3d DCA 2019), *rev. granted in Tabraue v. Doctor's Hospital, Inc.*, Case No. SC19-685, 2019 WL 3322517 (Fla. July 24, 2019), the Third District held that the appellee hospital owed no nondelegable duty to the appellant for the treatment provided to the appellant in the appellee's emergency room.

Appellant acknowledges that no court, either in Florida or elsewhere, has recognized the nondelegable duty she seeks to impose upon Appellee. Appellant contends that the duty arises under the Federal Motor Carrier Safety Regulations, one of which is section 396.17 of Title 49 of the Code of Federal Regulations, which is entitled "Periodic inspection" and provides in part:

> (a) Every commercial motor vehicle must be inspected as required by this section. The inspection must include, at a minimum, the parts and accessories set forth in appendix G of this subchapter. . . .
>
> (b) Except as provided in § 396.23 and this paragraph, **motor carriers must inspect or cause to be inspected all motor vehicles subject to their control**. . . .
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> . . . .
>
> (e) In lieu of the self-inspection provided for in paragraph(d) of this section, **a motor carrier or intermodal equipment provider responsible for the inspection may choose to have a commercial**

> **garage, fleet leasing company, truck stop, or other similar commercial business perform the inspection as its agent**, provided that business operates and maintains facilities appropriate for commercial vehicle inspections and it employs qualified inspectors, as required by § 396.19.
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> . . . .
>
> (g) **It is the responsibility of the motor carrier or intermodal equipment provider to ensure that all parts and accessories on commercial motor vehicles intended for use in interstate commerce for which they are responsible are maintained at, or promptly repaired to, the minimum standards** set forth in appendix G to this subchapter.
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> (h) Failure to perform properly the annual inspection required by this section shall cause the motor carrier or intermodal equipment provider to be subject to the penalty provisions of 49 U.S.C. 521(b).

(Emphasis added).

Although Appellant relies upon the emphasized portion of subsection (g) in support of her argument, section 396.17 addresses periodic inspections. There was no claim made in this case that Appellee failed to perform the required inspections on its trailer. Instead, there was evidence presented that Appellee performed additional inspections on the trailer that were not required under section 396.17. Moreover, it is undisputed that Appellee sought prompt repair work from TA when a fire occurred in May 2010. We read nothing in section 396.17 to support the contention that Appellee or any other motor carrier who seeks prompt repair work should then be held liable for any negligence on the part of an outside repair facility.

Appellant also relies upon section 396.5 of Title 49, which is entitled "Lubrication" and provides:

> Every motor carrier shall ensure that each motor vehicle subject to its control is—
> (a) Properly lubricated; and
> (b) Free of oil and grease leaks.

Appellant claims that the "properly lubricated" requirement supports her nondelegable duty argument but fails to explain how it does so. Simply because a motor carrier must ensure that a vehicle is properly lubricated does not equate to that carrier having a nondelegable duty when repairs done to a vehicle by an outside entity are negligently performed.

The three other federal regulations relied upon by Appellant include section 396.25 of Title 49, which is entitled "Qualifications of brake inspectors" and which provides in part:

> (a) Motor carriers and intermodal equipment providers must ensure that all inspections, maintenance, repairs or service to the brakes of its commercial motor vehicles, are performed in compliance with the requirements of this section.

Section 396.3 is entitled "Inspection, repair, and maintenance" and provides in part:

> (a) General. Every motor carrier and intermodal equipment provider must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control.
> (1) Parts and accessories shall be in safe and proper operating condition at all times. . . .

Section 396.7, entitled "Unsafe operations forbidden," provides:

> (a) General. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.
> (b) Exemption. Any motor vehicle discovered to be in an unsafe condition while being operated on the highway

> may be continued in operation only to the nearest place where repairs can safely be effected. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway.

As was the case with the first two federal regulations we mentioned, we find nothing in the three latter provisions that imposes the nondelegable duty upon motor carriers that Appellant advocates for. To read the provisions as Appellant does would create blanket liability for motor carriers whenever an accident occurs because of a faulty repair. As Appellee points out and as Appellant's counsel conceded at oral argument, if Appellant's argument is accepted, then motor carriers could be liable for faulty repairs that cause an accident or injury to a third party just minutes after leaving a repair center. Admittedly, the situation at hand is different because Appellee could have possibly avoided the accident by checking TA's invoice and the repairs that were made to ensure they were made correctly. However, as Appellee argues, its failure to do those things is presumably the reason why the jury found it partly at fault.

In support of her argument concerning what the federal trucking regulations require, Appellant relies upon a Regulatory Guidance for the Federal Motor Carrier Safety Regulations from the Federal Highway Administration. *See* 62 FR 16370-01 (1997). The Guidance sets forth in part, "This document presents interpretive guidance material for the Federal Motor Carrier Safety Regulations . . . now contained in the FHWA's Motor Carrier Regulation Information System . . . . These questions and answers are generally applicable to drivers, commercial motor vehicles, and motor carrier operations on a national basis." *Id.* at 16370. Question 3 under "section 396.3" asks "[w]ho has the responsibility of inspecting and maintaining leased vehicles and their maintenance records," to which the Guidance sets forth:

> The motor carrier must either inspect, repair, maintain, and keep suitable records for all vehicles subject to its control for 30 consecutive days or more, or cause another party to perform such activities. **The motor carrier is solely responsible for ensuring that the vehicles**

> **under its control are in safe operating condition and that defects have been corrected**.

Id. at 16427 (Emphasis added).

Contrary to Appellant's interpretation, we do not construe the Guidance as supporting the position that motor carriers should be held liable for faulty repairs done by outside repair facilities. We find it significant that Question 3 asked about "maintaining leased vehicles." That focus makes it likely that the response's "solely responsible" language was used to make clear that lessors will not be responsible for vehicles that are under a lessee's control. Indeed, it has been held that a lessor of trucks is not a motor carrier subject to the statutory and regulatory duties of inspection, maintenance, and repair. *See Hernandez v. Grando's LLC*, 429 P.3d 1259, 1264 (N.M. Ct. App. 2018). In this case, it is undisputed that Appellee owned the trailer at issue. Thus, the Guidance has no application to the situation at hand.

Appellant argues that our opinion in *Dixon* is distinguishable from this case. That case dealt with a school board contracting with an outside entity to transport public school students and a lawsuit brought on behalf of a student who was struck and killed when he tried to cross a street after getting off a public school bus. 654 So. 2d at 1231. After rejecting the appellants' argument that the trial court erred in finding them to be independent contractors, we noted their alternative argument that they, as agents of the school board, were performing a nondelegable duty – the transportation of public school students. *Id.* at 1232. In rejecting the argument, we set forth in part:

> Appellants' reliance on various articles of the Florida Constitution and several statutory provisions as demonstrating the Board has a nondelegable duty to transport public school children with safety is misplaced. The Florida Constitution does provide, in general terms, that "the school board shall operate, control, and supervise all free public schools within the school district." . . . Review of the cited statutes reflects the School Board also has a statutory duty to "make provision" or "provide" for the transportation of public

> school children where such is deemed necessary. . . . In providing such transportation, the School Board must have maximum regard for safety in routing buses, appointing drivers, and providing and operating equipment. . . . Nevertheless, the fact the school board is required by law to provide transportation for its students and is required by law to have maximum regard for safety in so doing, does not translate into a nondelegable duty. School boards owe their pupils a duty of reasonable care in providing them with safe transportation, but they are "not insurers of students' safety." *Harrison v. Escambia County Sch. Bd.,* 434 So.2d 316, 319 (Fla.1983). While appellants argue the Board should not be allowed to avoid liability by choosing to contract for buses from outside sources, the statutes themselves, as well as the regulations promulgated pursuant to chapter 234, clearly allow the School Board to do so, provided the contractors have the necessary insurance coverage and the buses are properly inspected and maintained. . . .
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> In short, the parties cite no controlling Florida authority, and we could find none in our own research, for the proposition that the safe transportation of public school students is a nondelegable duty. At least one sister state has held as we hold today. . . . Accordingly, we reject appellants' arguments in this regard and affirm.

Id. at 1232-33.

While *Dixon* is factually distinguishable from this case, the federal trucking regulations permit motor carriers to use outside repair facilities just as the school boards were permitted to use buses from outside sources in *Dixon*. As we reasoned in that case, the fact that a school board is required to provide transportation to its students does not translate into a nondelegable duty on the board's part. Here, neither party has cited, nor has our independent research revealed, any authority standing for the proposition that the necessity of having repair work done on equipment translates into a nondelegable duty on a motor carrier's part with respect to the repair work.

Appellant also relies upon *Vargas v. FMI, Inc.*, 233 Cal. App. 4th 638, 657 (Cal. Ct. App. 2015), where a California appellate court explained that the federal trucking regulations regarding drivers arose in response to motor carriers attempting to immunize themselves from liability for negligent drivers by leasing trucks and nominally classifying the drivers who operated the trucks as independent contractors. The appellate court, after analyzing several statutory and regulatory provisions, found it clear that "although a motor carrier may act through an independent contractor driving a leased vehicle, the motor carrier retains ultimate responsibility for the vehicle's safe operation." *Id.* at 664.

As Appellee contends, *Vargas* is distinguishable from this case in that it addressed drivers, not repair shops – two very different entities for purposes of liability. Appellant's reliance upon *Lynden Transport, Inc. v. Haragan*, 623 P.2d 789 (Alaska 1981), and *Indian Trucking v. Harber*, 752 N.E.2d 168, 171-72 (Ind. Ct. App. 2001), is similarly misplaced. In *Lynden Transport, Inc.*, the Alaska Supreme Court found no error in the use of a negligence per se jury instruction in a trial where the appellant was found liable to the appellee for personal injuries after the collapse of a flatbed trailer. 623 P.2d at 797. The court set forth, "We agree that the command that operators of motor vehicles shall 'systematically inspect and maintain' their vehicles is not a general duty, but a specific one. It requires operators to inspect their vehicles with some regularity and indicates that if they do not, the regulation is violated." *Id.* In *Indian Trucking*, an Indiana appellate court similarly set forth that a motor carrier was "ultimately responsible" for the inspection and maintenance of the motor vehicles in its possession and control. 752 N.E.2d at 174. However, neither case addressed the issue before us.

Appellant also contends that motor carriers will have no incentive to perform inspections, maintenance, and repairs if a nondelegable duty is not found and that such a duty is necessary to protect the general public. These arguments wholly ignore not only motor carriers' desire to stay in business, but also their obligation under the federal regulations to conduct inspections on their equipment and their potential liability for their own negligence or that of their drivers. Appellant's arguments also

disregard the fact that outside repair facilities may be sued for negligence, just as TA was sued by Appellant in this case. *See Craft v. Graebel-Oklahoma Movers, Inc.*, 178 P.3d 170, 178 (Okla. 2007) ("One who undertakes to repair a motor vehicle owes a duty not only to the party requesting the repair but also to any person who 'might reasonably be expected to be endangered by probable use of the chattel after repair.'" (citation omitted)).

The jury in this case was properly given the choice as to whom to assign fault. It chose to assign the majority of fault to TA, the entity who actually performed the faulty work. To accept Appellant's argument that Appellee should be held liable for TA's negligence would essentially impose a theory of strict liability upon Appellee and other motor carriers. This we decline to do.

Based upon the foregoing, we affirm the Second Amended Final Judgment.

AFFIRMED.

MAKAR and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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