NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOAN STURGILL,

Appellant,

v.

JOSE LUCAS and MARIA GARCIA MORALES, individually and d/b/a LUCAS TIKI, CANDIDA LUCAS GARCIA, LUTHER TIGER, and HERMALINDO LUCAS,

Appellees.

Case No. 2D18-2227

Opinion filed February 5, 2020.

Appeal from the Circuit Court for Collier County; James R. Shenko, Judge

Alexander Brockmeyer of Boyle & Leonard, P.A, Fort Myers; and Marcus W. Viles of Viles & Beckman, L.L.C, Fort Myers, for Appellant.

Steven B. Sundook of Vernis & Bowling of Southwest Florida, P.A., Fort Myers, for Appellee Hermalindo Lucas.

No appearance for remaining Appellees.

MORRIS, Judge.

Joan Sturgill appeals a final summary judgment entered in favor of Hermalindo Lucas in Sturgill's underlying negligence action. Because we conclude that the trial court improperly restricted its analysis of whether Lucas owed a duty of care to Sturgill, we reverse.

## I. Background

In early November 2014, Sturgill was hit by a truck being driven by Lucas's daughter, Candida Lucas Garcia. The truck was owned by Lucas's wife, Maria Morales. At the time, the truck was towing a twenty-foot, dual axle commercial trailer that Lucas had loaded with palm fronds. The trailer was registered to another party, Luther Tiger.[1] Lucas had intended to tow the palm fronds back to Tiger, but on the day of the accident, he was not feeling well so he asked Garcia to return the trailer with the palm fronds back to Tiger. As Garcia drove the truck, towing the trailer carrying the palm fronds, another vehicle stopped abruptly in front of her. Garcia attempted to brake but realized she could not stop in time so she swerved off the road to avoid hitting the vehicles in front of her. It was at that point that the truck struck Sturgill, who had been standing along the edge of the road waiting with her grandchildren for a school bus. There is no dispute that at the time of the accident, the trailer was not equipped with brakes. The police officer who responded to the accident identified the lack of brakes on the trailer as a cause of the accident.

Sturgill filed suit against Lucas, Tiger, and other parties who are not relevant for purposes of this appeal. The claim was predicated on negligence. Lucas

[1]There was conflicting deposition testimony as to who owned the trailer at the time of the accident, but it matters not to the resolution of this case.

filed a motion for summary judgment wherein he asserted in relevant part that he did not owe Sturgill a duty of care because there was no law, statute, or rule that required that the trailer be equipped with brakes. In response, Sturgill argued that Lucas did, in fact, owe her a duty of care because he exercised dominion and control over the truck and trailer, chose to use the truck and trailer to haul the palm fronds, loaded the palm fronds onto the trailer, and thereafter entrusted the truck and palm frond-laden trailer to Garcia to deliver to Tiger.

With regard to a breach of any duty, Lucas argued that since the trial court had already determined that Tiger was not negligent in its final summary judgment entered in favor of Tiger,[2] he [Lucas] was likewise not negligent. However, Sturgill responded that the evidence reflected that the trailer was overloaded with palm fronds. She pointed to the fact that Garcia was unable to stop the truck and trailer despite applying the brakes on the truck, the fact that Tiger had testified that the load was dangerous and required a person to be careful, and the fact that the responding police officer reported that lack of brakes on the trailer was a cause of the accident.

The trial court ultimately entered final summary judgment in favor of Lucas, adopting the findings it made in the order granting summary judgment in favor of Tiger. Specifically, the trial court determined that there was no legal duty to equip the trailer with brakes, noting that Sturgill had failed to cite to any law, statute, rule, or regulation requiring such. The trial court made no separate findings regarding any

[2]That final summary judgment was separately appealed to this court, and this court affirmed on November 1, 2019. See Sturgill v. Tiger, 2D17-5055, 2019 WL 5681103 (Fla. 2d DCA Nov. 1, 2019).

breach of a purported duty, presumably because it had already concluded that there was no duty from Lucas to Sturgill.[3]

## II. Analysis

We conduct a de novo review of a trial court's ruling on a motion for summary judgment posing a pure question of law. Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001). Summary judgment should be granted with caution in negligence actions. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). In such actions, where a party moves for summary judgment, the movant must demonstrate either that there is no negligence or that the plaintiff's negligence was the sole proximate cause of his own injury. Bryant v. Lucky Stores, Inc., 577 So. 2d 1347, 1349 (Fla. 2d DCA 1990). "To establish that there was no negligence, the movant must demonstrate that there is no duty owed to the plaintiff or that it did not breach a duty which is owed." Id. (citing Cutler v. St. John's United Methodist Church, 489 So. 2d 123 (Fla. 1st DCA 1986)).

Because the trial court's order rested on a determination that Lucas owed no duty to Sturgill and did not address the issue of a breach of any duty, we confine our analysis to the issue of duty as well. "Florida law recognizes the following four sources of duty: (1) statutes or regulations; (2) common law interpretations of those statutes or

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[3]Our review of the order granting final summary judgment to Tiger, which is contained within the record for this appeal, indicates that the trial court's decision as to Tiger was also based on a lack of duty. Because the trial court's order granting final summary judgment in this case adopted the findings in the order granting final summary judgment to Tiger, we have substituted Lucas's name when referring to the trial court's findings.

regulations; (3) other sources in the common law; and (4) the general facts of the case." Limones v. Sch. Dist. of Lee Cty., 161 So. 3d 384, 389 (Fla. 2015) (citing McCain v. Fla. Power Corp., 593 So. 2d 500, 503 n.2 (Fla. 1992)). When the duty is based on the fourth prong, the "factual inquiry into the existence of a duty is limited to whether the 'defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others.' " Id. at 389 n.4 (quoting McCain, 593 So. 2d at 502).[4] "Where a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." McCain, 593 So. 2d at 503 (quoting Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989)). "[A]s the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken." Id. (citing J.G. Christopher Co. v. Russell, 58 So. 45 (Fla. 1912)).

Notably, "[t]he statute books and case law . . . are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care." Id. "Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result." Id. Thus, "trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant." Id. And a party's failure to safely secure cargo has been found to have created a "McCain-type 'zone of risk' wherein a highway mishap of some description might well take place." Kowkabany v. Home Depot, Inc., 606 So. 2d 716,

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[4]See also Williams v. Davis, 974 So. 2d 1052, 1056 (Fla. 2007) ("[T]he determination of the existence of a common law duty flowing from the general facts of the case under our negligence law depends upon an evaluation of the concept of foreseeability of harm." (citing McCain, 593 So. 2d at 503)).

721 (Fla. 1st DCA 1992) (concluding that Home Depot's failure to safely load and secure timbers into customer's car created a "zone of risk" that was sufficient to establish duty element of negligence as it related to bicyclist who was struck by timbers protruding from customer's car and also noting that because bicyclist was within the McCain "zone," it was unnecessary for bicyclist to rely on any statutorily imposed duties in establishing negligence claim); cf. Bujnoch v. Nat'l Oilwell Varco, L.P., 542 S.W.3d 2, 10-11 (Tex. App. 2017) (holding that company that loaded mud into open-top dump trailer "was required to use reasonable care in doing so to prevent an unreasonable risk of harm to other motorists who would be affected if the load was inadequately secured"); Reed v. Ace Doran Hauling & Rigging Co., No. 95 C 4082, 1997 WL 177840, at *4 (N.D. Ill. 1997) (holding that hauling company owed plaintiff a common law duty to check load and ensure it was properly and safely secured); DeBonis v. Orange Quarry Co., 558 A.2d 474, 479 (N.J. Super. Ct. App. Div. 1989) (holding that quarry had a duty to load trucks so that they were not overloaded and so that load was secure). By logical extension then, a party's loading of heavy cargo onto a trailer that lacks brakes can also give rise to a "McCain-type zone of risk."

Here, the trial court initially explained that Lucas owed no duty to Sturgill because Sturgill "failed to file an affidavit or deposition testimony of a qualified expert to state within a reasonable degree or probability that it was dangerous to drive the trailer at the time of the accident with the subject load of palm fronds without brakes, or that doing so otherwise violated an existing statute, rule, or ordinance." The trial court then repeatedly referred to the fact that Sturgill failed to cite any law, statute, rule, or regulation to establish that Lucas owed a legal duty to her. The trial court also referred

to section 316.261, Florida Statutes (2017), explaining that the trailer was not subject to the requirements for brakes for vehicles as set forth in that statute. The trial court reasoned that "in the absence of a violation of any mandatory applicable legal standard, any argument to the contrary establishes no duty or has no evidentiary value" and that "[s]imply because something 'might be a good idea' does not give rise to an actionable legal duty in negligence if the idea is not employed." Ultimately, the trial court concluded that "there is no competent evidence to support a legal duty that the trailer required a braking device, either automatically by operation of law or because of the load."

We interpret the trial court's findings to mean that in deciding the issue of duty, it was primarily focused on whether there were applicable statutes or regulations or common law interpretations of those statutes or regulations related to braking systems on trailers. The trial court's fleeting reference to lack of an affidavit or deposition testimony relating to the dangerous nature of the trailer does not convince us that the trial court considered the fourth source of duty: the general facts of a case. There is nothing in the order suggesting that the trial court analyzed whether Lucas's act of loading a trailer with palm fronds where that trailer lacks brakes created a foreseeable zone of risk posing a general threat of harm to others. By improperly restricting its analysis on the issue of duty and failing to analyze the fourth source of duty, the trial court erred as a matter of law, and the final summary judgment entered in favor of Lucas must be reversed.

Because the trial court determined there was no legal duty flowing from Lucas to Sturgill, it never decided the issue of whether there were disputed issues of

material fact as to whether Lucas breached a duty. Thus although the parties ask us to decide that issue, we decline to do so in the first instance.

Reversed and remanded for proceedings in conformance with this opinion.

KHOUZAM, C.J., and BADALAMENTI, J., Concur.