IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CASE NO. 13-CA-001652

TIFFANY MANNING, as Personal Representative of the Estate of DUSTIN MANNING (Decedent),

Plaintiff,

v.

SUNBELT RENTALS, INC., a foreign Corporation, The Estate of JUAN BOCANEGRA, and SILVIA GARCIA, as Personal Representative of the Estate of JUAN BOCANEGRA,

Defendants.
_____/

SUNBELT RENTALS, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A NEW TRIAL

Defendant SUNBELT RENTALS, INC. (hereinafter "Sunbelt"), by and through the undersigned counsel hereby files its Response in Opposition to Plaintiff's Motion for a New Trial[1] and states as follows:

INTRODUCTION

This wrongful-death action was tried to a jury from November 4 – 18, 2014. The jury returned a verdict apportioning liability for Mr. Manning's death as follows: 85% to Baller Construction LLC (hereinafter "Baller"), 10% to the Estate of Juan Bocanegra, and 5% to Mr. Manning himself. No liability was attributed to Sunbelt. Plaintiff seeks a new trial, claiming that the verdict was contrary to the weight of the evidence, that the verdict was based on

[1] Plaintiff's motion also seeks additur in the amount of $1,226.00 for funeral expenses. Since the jury apportioned no liability to Sunbelt for any of Plaintiff's damages, Sunbelt does not oppose Plaintiff's request for additur in this amount.

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improper sympathy for Defendant Sylvia Garcia, and that the verdict was based on improper speculation that wasps may have played a role in the accident. Plaintiff also claims that the Court erred in determining that Sunbelt is not vicariously liable for the actions of Juan Bocanegra under the "dangerous instrumentality" doctrine and, further, that this purported error requires a new trial rather than a simple determination that Sunbelt is responsible for the 10% of liability that the jury apportioned to Mr. Bocanegra.

Plaintiff's motion for a new trial should be denied.

ARGUMENT

I. The Verdict was Not Contrary to the Manifest Weight of the Evidence

Plaintiff makes a three-pronged argument that the verdict was against the manifest weight of the evidence. First, Plaintiff claims that there was no basis for the jury's apportionment of 5% of the liability to Dustin Manning; second, Plaintiff claims the evidence did not support a determination that Baller was 85% responsible for the accident; and third, Plaintiff speculates that the jurors may have been confused about the standard comparative-fault instructions because they attributed 10% of the fault to the Estate of Juan Bocanegra and simultaneously awarded only 10% of the non-economic damages requested by Plaintiff's counsel during closing arguments. Plaintiff omits important facts in making these arguments, however, and cites no authority for the proposition that a new trial is required under these circumstances.

A. The apportionment of 5% liability to Dustin Manning was not contrary to the manifest weight of the evidence.

Plaintiff claims that "there was no evidence whatsoever of [Dustin Manning's] fault," *see* Pl. Motion at 13, and, hence, that the jury's determination that he bore 5% of the responsibility for the accident was baseless. In making this argument, Plaintiff overlooks the fact that Michael Keshishian testified that he and Dustin Manning received training as it "pertains to safety in the

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use of aerial lifts," *see* Tr. Trans., 11/11/14 (vol. 1), at 35:14-18, attached as Exhibit 1, and that, as part of that training, Mr. Manning was instructed to "watch [his] surroundings" and "use common sense" in order to avoid contact with power lines. *Id.* at 49:14-25.

The evidence was undisputed, furthermore, that the only thing that came into contact with the power line was Mr. Manning's head. It stands to reason, therefore, that Mr. Manning was in exclusive control of the only object that made contact with the power line and that, had he been aware of his surroundings, used "common sense," and followed his training, he could have avoided the accident by ducking, moving to another part of the aerial work platform, or simply warning Mr. Bocanegra that they were getting too close to the power line. Plainly, there was sufficient evidence for the jury to conclude that Dustin Manning bore 5% of the fault for causing the accident. *See Liggett Group., Inc. v. Davis*, 973 So. 2d 467, 474 (Fla. 4th DCA 2007) ("where there is any evidence from which the finder of fact may reasonably conclude that the non-moving party prevails, that verdict should stand.").

B. The jury's apportionment of 85% fault to Baller Construction LLC was not contrary to the manifest weight of the evidence

Plaintiff's next argument, that the apportionment of fault to Baller was contrary to the manifest weight of the evidence, is predicated on the assumption that the jury found Baller at fault only "for failing to train" Juan Bocanegra. *See* Pl. Motion at 13. Plaintiff complains that, if Baller was 85% responsible for failing to train Mr. Bocanegra, then Sunbelt should not have been let "completely off the hook" because it "provided no instruction to [Baller] despite industry safety regulations and internal policies that required it to provide such instruction." *Id.* Plaintiff, again, ignores some critical facts.

First, the evidence supporting Baller's fault was not limited to a failure on his part "to train" Juan Bocanegra. Indeed, there was undisputed evidence that Baller was required by

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federal law to either de-energize or insulate the power lines, and to implement a "safety plan," before permitting work to be conducted in the vicinity of the power lines. *See* Trial Trans., 11/11/14 (vol. 2), at 21:20 – 22:3, 22:9-15, 47:9-15, attached as Exhibit 2. In fact, Baller was cited by OSHA for violating these federal laws, *see id.*, and Baller's negligence in these respects cannot, in any way shape or form, be attributed to Sunbelt. Plainly, had Baller complied with this federal obligations, the accident would not have occurred. As such, the jury rightly found Baller to be almost wholly responsible for the accident.

Second, the evidence demonstrated that Baller had been trained, and re-trained, and certified in the operation of aerial work platforms and that he "didn't need" Sunbelt to show him how to operate the work platform in this case. *See Id.* at 24:25 – 29:3, 32:5-9, 38:7-9. The evidence likewise established that Mr. Bocanegra did not need to be shown how to operate the work platform in this case. *Id.* at 45:23 – 46:2, 52:13-16. Given this testimony, it is entirely likely that the jury's findings against Baller had nothing at all to do with his failure "to train" Mr. Bocanegra; and even if this "failure to train" liability theory did factor into the jury's apportionment of fault to Baller, moreover, it does not follow that Sunbelt contributed to Baller's "failure to train" Mr. Bocanegra. Again, there was no evidence that Baller needed the "familiarization" offered by Sunbelt in order to provide training to Mr. Bocanegra; his failure to train Mr. Bocanegra stemmed solely from his belief that Mr. Bocanegra already knew what he was doing, *see id.* at 37:10-16, 38:21-24, 45:9 – 46:2, 50:22-25, 52:9-12, and not from any conduct on the part of Sunbelt.

The jury's apportionment of fault to Baller was absolutely consistent with the evidence presented at trial.

C. Plaintiff's speculation that the jury misunderstood the standard comparative fault jury instructions is baseless

Plaintiff's next argument is that the jury's non-economic damages award, totaling $1,500,000.00, was "surprisingly low" and was "possibl[y]" attributable to a misunderstanding of the jury instructions. *See* Pl. Motion at 14. Plaintiff attempts to explain the non-economic damages award as follows:

> The jury awarded exactly 10 percent of the non-economic damages requested by the Plaintiff. This award was equal to the ten percent of fault attributed to the operator (the jury knew that the contractor was no longer a defendant in the case[2]). Thus, it appears that the jury erroneously did the math itself and reduced the award to equate to the operator's fault, contrary to the instructions to the jury.

Id. at 14-15.

Curiously, however, Plaintiff does not contend that the jury made a similar deduction for its award of economic damages. Indeed, Plaintiff's counsel asked the jury to award $94,083 in lost net accumulations during his closing argument, *see* Trial Trans., 11/14/14 (p.m.), at 104:24 – 105:2, attached as Exhibit 3, and the jury actually awarded $95,000.00 for these economic damages. The jury was not instructed to make deductions only for "noneconomic damages" and, as such, Plaintiff's speculation that the jury ignored the Court's instructions and "did the math," but only for the noneconomic damages portion of the award, is extremely unlikely.

Further, there was nothing ambiguous or unclear about the instructions given to the jury. The verdict form, for instance, stated:

> In determining the amount of damages**, do not make any reduction because of the negligence**, if any, **of Dustin Manning**

[2] What makes Plaintiff think that the Jury "knew that [Baller] was no longer a defendant in the case" is entirely unclear. The jury was never advised that Baller was, at any time, a party to the case.

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> or the negligence, if any, **of Juan Bocanegra**, Sunbelt Rentals, Inc., **or Jeffrey Baller and/or J. Baller Construction, LLC**.
>
> If you find that Dusting Manning, Juan Bocanegra, Sunbelt Rentals, Inc., or Jeffrey Baller and/or J. Baller Construction, LlC were negligent, **the court in entering judgment will make an appropriate reduction in the damages awarded**.

See Verdict Form, attached as Exhibit 4 (emphasis added). The same instruction was provided in the Court's instructions to the jury. *See* Exh. 3 at 51:16 – 52:3.

Plaintiff's argument hinges, furthermore, on the assumption that the Jury fully-accepted its counsel's suggestion as to the amount of non-economic damages to award to Tiffany, Liem, and Luke Manning. There was no evidentiary support for the number recommended by Plaintiff's counsel, however, and Plaintiff's counsel told the jury that there is "[n]o exact standard" for determining noneconomic damages. *See id.* at 106:5. Counsel's suggestion that the jury award a total of $15,000,000.00 in noneconomic damages was just that—a suggestion. Counsel for Sunbelt had a different suggestion; he told the jury that $15 million is not a "reasonable" award, *id.* at 144, 157 ("$15 million is not fair and just"), and the jury seems to have agreed.

While counsel for Plaintiff may have hoped for a higher noneconomic damages award, moreover, it cannot be said that the noneconomic-damage award of $500,000.00 each to Tiffany, Liem, and Luke Manning was unreasonable on its face, *c.f.* § 766.118(2)(a), Fla. Stat. (legislature capping noneconomic damages in wrongful death cases involving medical malpractice and stating: "With respect to a cause of action for … wrongful death arising from medical negligence, … noneconomic damages shall not exceed $500,000 per claimant"), much less that it was the product of misunderstood instructions.

II. The Verdict was not the Product of Improper Sympathy for Defendant Sylvia Garcia

Plaintiff's next argument is somewhat puzzling. Plaintiff chose to sue Sylvia Garcia, as the personal representative of the Estate of Juan Bocanegra, but now complains about Ms. Garcia's presence at the trial and about the fact that the jury necessarily understood her relationship with Juan Bocanegra. Plaintiff is the one that put her in the courtroom, however; not the defendants. Further, her extremely-limited testimony was in no way improper.

Plaintiff' nevertheless argues that Ms. Garcia's testimony was so compelling that it improperly influenced the jury's verdict. Ms. Garcia was not a feature of the trial in any way shape or form, however. Indeed, her testimony consisted only of twenty-three brief questions from the Estate's counsel, taking up less than four pages of the trial transcript. As Plaintiff concedes, moreover, her limited testimony was relevant to the issue of how Juan Bocanegra felt about, and typically reacted to the presence of, wasps. *See* Pl. Motion at 16. Tellingly, only one of the twenty-three innocuous questions posed to Ms. Garcia even drew an objection from Plaintiff's counsel. *See* at Tr. Trans., 11/13/14 (p.m.), at 59:14-16 ("Q: Would Johnnie do yardwork around the house?"), attached as Exhibit 5. There is simply no merit to Plaintiff's argument.

Plaintiff also complains that Sunbelt's counsel reminded the jury, during closing arguments, that "Ms. Garcia had her own compelling stories about her relationship with her late husband but the jury would not be able to hear them." Pl. Motion at 15. That comment was so insignificant, however, that Plaintiff's counsel did not even bother to make an objection thereto. *See* Exh. 3 at 144:14-25. Certainly, this brief comment did not constitute fundamental error so as to warrant a new trial without the necessity of an objection. *Metropolitan Dade County v. Dillon,* 305 So. 2d 36, 40 (Fla. 3d DCA 1974) ("Counsel are accorded a wide latitude in making

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arguments to the jury, and unless their remarks are highly prejudicial and inflammatory, counsel's statements made to the jury during closing arguments will not serve as a basis for reversing a judgment.").

The jury's verdict was supported by substantial competent evidence in all respects. There is no basis for concluding that it was improperly affected by sympathy for Sylvia Garcia.

III. The Verdict was not Based on Improper Speculation that Wasps May Have Played a Role in the Accident

Plaintiff's next argument confuses the burdens of proof in this case. Specifically, Plaintiff argues that it was improper for the jury to even hear about the existence of a wasps nest somewhere in the vicinity of the accident because the Defendants failed to prove that wasps "caused the accident." *See* Pl. Motion at 17. In Plaintiff's view, the jury could only "speculate" that wasps had anything to do with the accident based on the evidence presented.[3] The problem with Plaintiff's argument, of course, is that the Defendants did not have the burden to prove the cause of the accident; it was Plaintiff's burden to prove the cause of the accident and, in order to meet that burden, it needed to rule out alternate possibilities such as wasps.

In seeking a new trial on this ground, Plaintiff improperly attempts to shift the burden of proof to the defendants. Counsel for the Plaintiff attempted the same thing in *R.J. Reynolds Tobacco Co. v. Mack*, 92 So. 3d 244 (Fla. 1st DCA 2012), but the court there properly rejected counsel's effort, stating:

[3] It should be noted that Plaintiff did not object to the suggestion that wasps may have played a role in the accident when the issue first came up, *see* Tr. Trans., 11/7/14 (vol. 1) at 148:16 – 149:16 (first publication of the photo of the wasps nest to the jury and: "THE COURT: Any objection? … MR. UITERWYK: No, Your Honor."), attached as Exhibit 6, and Plaintiff's counsel subsequently raised the issue with Plaintiff's own expert, Elliot Stern, Ph.D. *See* Trial Trans, 11/10/14 (p.m.) at 72:18 – 73:22, 75:5 – 76:18, attached as Exhibit 7. Plaintiff's OSHA expert conceded, furthermore, that OSHA took the picture of the wasps nest because it was, "more likely than not," located in the vicinity of where the accident occurred, *see* Tr. Trans., 11/12/14 (p.m.) at 126:3-6, attached as Exhibit 8.

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> We do, however, agree with Appellant that the trial court erred in excluding its alternative causation evidence on the basis that its expert could not testify as to causation within a reasonable degree of probability… Appellee, as **the plaintiff** below, **had the burden of proof with regard to causation** … By excluding Appellant's alternative causation evidence on the basis that its experts could not testify to a reasonable degree of medical probability, **the trial court improperly shifted the burden of proof as to causation** to Appellant. Contrary to the trial court's reasoning, **Appellant was not attempting to prove that something else caused the decedent's laryngeal cancer. Instead, it was** attempting to diminish Appellee's expert testimony that smoking was the probable cause of the cancer by **introducing other possible causes** that were pertinent to the decedent's situation.

Id. at 245-46, 248 (emphasis added).

As in *Mack*, it was entirely appropriate for the jury to consider all possibilities in evaluating the accident in this case and for it to hold Plaintiff to its burden of establishing which of these possibilities was the actual cause of the accident. This is particularly true here since there were no witnesses to the accident and, as counsel for Plaintiff rightly conceded back in October, "we don't know what happened." *See* Hrg. Trans, 10/7/14, at 211, attached as Exhibit 9. Despite the fact that Plaintiff does not know what caused the accident, Plaintiff's experts, Dr. Stern and Mr. Gualardo, were allowed to state causation opinions at trial and, hence, it was entirely appropriate for Defendants to show that they were unable to rule out alternative possible causes of the accident, such as wasps, in reaching their causation opinions. *See* Exh. 7 at 142:13-15 (Dr. Stern admitting: "I did not rule that out."), 143:1-14, 22-24; Exh. 8 at 133:5-10 (Mr. Gualardo admitting: "I have no clue in terms of whether a wasp had anything to do with this accident.").

IV. The Court's Determination that Sunbelt is Not Vicariously Liable for Juan Bocanegra's Actions was Correct and a New Trial is Not Warranted

Plaintiff's final argument is that the Court should reconsider its pretrial determination that Sunbelt is not vicariously liable for the actions of Juan Bocanegra and order a "new trial" because the "failure to inform the jury of the dangerous nature of the lift deprived the jury of a full understanding of Florida law." *See* Pl. Motion at 3. Specifically, Plaintiff contends that the aerial work platform is a "motor vehicle" used to transport persons and, as such, it is comparable to an automobile which is a "dangerous instrumentality" under Florida law. Plaintiff also argues that, like automobiles, the aerial work platform is "heavily regulated" and, further, that it posed a danger to the public because it was operated in "proximity to the public." Finally, Plaintiff implies that the aerial work platform is potentially more dangerous than an automobile because of its ability to raise persons high in the air and cites statistics of worker injuries using aerial work platforms.

Plaintiff's arguments miss the mark. The dangerous instrumentality doctrine was never intended to protect workers engaged in the use of rented equipment. Vicarious liability under the doctrine applies only when members of the public are injured by negligent operation of a dangerous instrumentality. Further, the aerial work platform plainly is not a "motor vehicle," its use is not regulated by the Florida legislature, and it is not designed to be used as a "mode of transportation." The fact that it has a motor and wheels, an operator's manual, and can be driven temporarily for proper positioning at a worksite does not make the equipment a "motor vehicle." It is more analogous to a ladder or scaffold which are also used to elevate people and have never been deemed "dangerous instrumentalities." Finally, the statistics cited by Plaintiff are deceiving and only reflect injuries to workers using the machinery; Plaintiff presents no evidence of a risk of injury to members of the general public.

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A. Vicarious Liability, based on the Dangerous Instrumentality Doctrine, Only Applies when a Member of the Public is Injured by a Dangerous Instrument

The "dangerous instrumentality" doctrine was first applied by the Florida Supreme Court in *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920). There, the Court announced that:

> [O]ne who authorized and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on a public highway is liable for damages for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one so authorized by the owner.

Id. at 638 (emphasis added). *See also Rippy v. Shepard*, 80 So. 3d 305, 307 (Fla. 2012) (quoting *Anderson* and stating that the doctrine is intended to "preserve public safety.").

"[V]icarious liability founded on the doctrine[] of dangerous instrumentality … is primarily for the protection of **third party members of the public**, rather than the injuries sustained by fellow employees ..." *Smith v. Ryder Truck Rentals, Inc.*, 182 So. 2d 422, 424-25 (Fla. 1966) (emphasis added); *see also Smith & Jobalia Constr. Co., Inc.*, *v. Halifax Paving, Inc.*, 538 So. 2d 76, 81-82 (Fla. 5th DCA 1989) (dangerous instrumentality doctrine inapplicable in case involving worker who was injured by a crane because plaintiff was not a member of the public), *approved*, 565 So. 2d 1346 (Fla. 1990); *Jackson v. Marine Terminals, Inc.*, 422 So. 2d 882, 883 (Fla. 3d DCA 1982) (quoting *Smith*); *Zenchak v. Ryder Truck Rentals, Inc.*, 150 So. 2d 727 (Fla. 3d DCA 1963) ("Appellant's contention … that the owner of the truck is vicariously liable because of the dangerous instrumentality doctrine" fails "because the truck in question was leased by the defendant to plaintiff's employer, was being operated by the lessee's employee, and was being used as a part of the construction machinery."). The purpose of the doctrine is "to provide greater financial responsibility to pay for the carnage on our roads," *Rippy*, 80 So. 3d at 307 (quoting *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990))

(emphasis added); it is premised on the theory that "one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation." *Id.*

While it is true that the doctrine has been expanded to apply to products other than automobiles and, in some instances, to accidents taking place off of public highways, the purpose of protecting third party members of the public has never changed. Obviously, the policies of protecting "third party members of the public" and ensuring that "adequate resources" are available to pay for injuries caused by negligent operation of an instrumentality are inapplicable in the context of construction-site accidents where the injury is incurred by a worker through the his own use, or that of a co-worker, of construction equipment. *See Florida Power & Light Co. v. Price*, 170 So. 2d 293, 298 (Fla. 1964) ("We hold that liability flowing from operation of the doctrine of dangerous instrumentalities and inherently dangerous work is subject to the exception that where the defendant owner contracts with an independent contractor for the performance of inherently dangerous work and the latter's employee is injured by a dangerous instrumentality owned by the defendant which is negligently applied or operated by another employee of the independent contractor but wholly without any negligence on the part of the defendant owner, the latter will not be held liable."). Such injured workers are not "third persons" in need of protection, and the parties in the "best position" to ensure "adequate resources" are available to compensate them are, in fact, their employers on the worksite themselves—who, incidentally, are required by law to maintain workers compensation insurance specifically for such injuries. Simply stated, "leased equipment used on a job site in effect has become the working tool of the employer… Thus, the exclusivity principle of worker's compensation comes to bear." *Halifax Paving, Inc. v. Scott & Jobalia Constr. Co., Inc.*, 565 So. 2d 1346, 1347 (Fla. 1990).

Plaintiff nevertheless contends that these policies are achieved by applying the doctrine in this case because the aerial work platform was operated in "proximity to the public" and was, hypothetically, "capable" of causing "harm to the public." *See* Pl. Motion at 7. Plaintiff cites no authority for the proposition that the doctrine should be applied when no harm was *actually* caused to a member of the public, however. Indeed, the cases relied upon by Plaintiff, involving injured workers, refused to apply the doctrine because the plaintiffs were engaged in projects using the equipment and were not members of the public. *See e.g. Halifax Paving, Inc.*, 538 So. 2d at 81-82 (doctrine does not apply because crane injured a worker at a construction site rather than a member of the public); *Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991) (road grader operated by a co-worker on a construction site was not a dangerous instrumentality for purposes imposing vicarious liability on owner).

Under the Florida Supreme Court's *Smith* decision and its progeny, vicarious liability cannot be imposed in a case such as this, where the equipment was used a "working tool" on a jobsite. The workers in this case were using the aerial work platform in a common enterprise and, hence, were co-bailees for whom the dangerous instrumentality doctrine was never meant to apply. *See Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965) (co-bailee who used automobile for her benefit "was not a 'third party' in the sense ordinarily contemplated in application of the dangerous instrumentality doctrine" and, as such, the owner of the vehicle was not vicariously liable for the plaintiff's damages); *Ferrer v. FGC Enterprises, Inc.*, 805 So. 2d 967 (Fla. 3d DCA 2002) (person who allowed another to operate golf cart that he rented and was subsequently injured as a result of that person's driving could not sue owner on vicarious liability theory because plaintiff and negligent driver were "co-bailees or joint adventurers."); *State Farm Mut. Auto Ins. Co. v. Clausen*, 511 So. 2d 1085 (Fla. 3d DCA 1987) (rejecting the claim that the

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Medcalfe rule does not apply because the injured bailee secured the vehicle from an interveneing lessee/bailee rather than directly from the owner).

B. Plaintiff Cites No Statistics Demonstrating that the Aerial Work Platform Poses Any Risk of Harm to the Public at All

Even if it were sufficient to show that a piece of equipment was conceivably "capable" of causing "harm to the public," *which it is not*, Plaintiff has not demonstrated any risk of injury or death to members of the public posed by the aerial work platform in this case. Plaintiff attempts to demonstrate the hazards posed by the equipment by arguing that "statistics from the Center to Protect Workers establish[ed] that between the years 1992-99, aerial work platforms resulted in the deaths of 207 persons." *See* Pl. Motion at 8 (citing Trial Exhibit 94C). As a publication from an entity called the "Center to Protect Workers" would suggest, however, the statistics cited therein pertain to "worker" fatalities; not third-party member of the public fatalities. *See* Trial Exhibit 94C, attached hereto as Exhibit 10.

In addition, even these "worker" statistics are deceptively inflated. As a preliminary matter, the 207 fatalities mentioned in Trial Exhibit 94C involved all types of aerial work platforms, including scissor lifts. The aerial work platform in this case was a boom lift and Trial Exhibit 94C reports that there were 142 fatal accidents involving boom lifts during the 8 year period, resulting in an average of 17.75 fatalities per year. Trial Exhibit 94C further reveals that electrocutions comprised a large portion of these fatalities and "[h]alf of the boom lift electrocutions involved body contact with overhead power lines, **mostly involving electricians or electrical power installers and repairers**." *Id.* (emphasis added). In other words, the statistics relied upon by Plaintiff—*which are not even relevant because they do not demonstrate a risk to members of the general public*—are skewed by incidents involving workers who

intentionally used aerial work platforms to get in close proximity to, and to work on, energized power lines.

The facts of this case are not even close to those of *Meister* (which Plaintiff relies on at page 8 of its motion), moreover, wherein the record evidence demonstrated not just a substantial risk of harm to the public from golf carts, but also "that 'the types of accidents caused by the operation of the carts are due to the particular design features of the carts and are *identical to those involving other motor vehicle accidents.*'" *Meister*, 462 So. 2d at 1073 (emphasis in the original). There is no evidence in this record demonstrating that the "types of accidents" involving aerial work platforms are in any way similar to, much less "identical" to, those involving "motor vehicle accidents."

C. The Aerial Work Platform is Not a "Motor Vehicle," it is Not Used as a "Mode of Transportation," and it is Not "Heavily Regulated"

Having failed to show that the aerial work platform in this case harmed a member of the public, or even that it posed a risk of harm to members of the public, Plaintiff argues that the aerial work platform is a dangerous instrumentality because it is, in fact, a "motor vehicle" because it is "self-propelled" by "a motor," because it can be "used to transport persons or property," and because it is "heavily regulated" like a motor vehicle. *See* Pl. Motion at 8-11. In making these arguments, Plaintiff cites to broad definitions of the term "motor vehicle" found in the Webster's Dictionary and in Section 316.003(21) of the Florida Statutes. *Id.* at 10. Plaintiff cites no authority actually holding, or even implying, that an aerial work platform is, in fact, a "motor vehicle," however—presumably because Florida courts have rejected application of these broad definitions to products that are somewhat similar in nature to aerial work platforms.

In *Crane Rental of Orlando, Inc. v. Hausman*, 518 So. 2d 395 (Fla. 5th DCA 1987), *approved*, 532 So. 2d 1057 (Fla. 1988), for example, the Fifth District expressly held that "self-

propelled cranes" are not "motor vehicles" because, although they are propelled by motors and can be used to transport persons or property on a highway, they were "not used for the ***primary*** purpose of transporting persons or property" and "their use of the highways is solely for purposes of taking them to the construction site where they are used as cranes." *Id.* at 397 (emphasis added). "[A]ny use [of these self-propelled cranes] over the highways was incidental to the main purpose for which the cranes were designed, *i.e.*, for use in construction." *Id.* at 396.

In reaching its determination that self-propelled cranes are not "motor vehicles," the *Hausman* court rejected the notion that these "self-propelled cranes" fit the definition of a "motor vehicle" found in the statute relied upon by Plaintiff here, Section 316.003(21) of the Florida Statutes. *See* Pl. Motion at 10 (citing § 316.003(21), Fla. Stat.). Instead, the court found that these "vehicles" fit the definition of "Special Mobile Equipment" set forth in Section 316.003(49), stating:

> Our conclusion that the legislature did not intend these vehicles to be classified as motor vehicles, is further supported by the definition of special mobile equipment in Chapter 316, Florida Statutes:
>
> > (49) SPECIAL MOBILE EQUIPMENT.-Any vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway, including, but not limited to, ditchdigging apparatus, well-boring apparatus, and road construction and maintenance machinery, such as asphalt spreaders, bituminous mixers, bucket loaders, tractors other than truck tractors, ditchers, leveling graders, finishing machines, motor graders, road rollers, scarifiers, earth-moving equipment…
>
> § 316.003(49), Fla. Stat. (1985). We believe this expresses the legislature's intent to distinguish machinery that requires the use of public highways to transport itself from motor vehicles, which are used primarily to transport persons or property.

Hausman, 518 So. 2d at 398.

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Like the "self-propelled crane" in *Hausman*, the aerial work platform in this case is primarily used at construction sites and fits the legislature's definition of "special mobile equipment." The fact that it is "self propelled" by a "motor" and can transport persons or property at maximum speeds of 4.5 miles per hour on public roadways does not transform the special mobile equipment into a "motor vehicle." Plainly, the "primary purpose" of the aerial work platform is not to transport persons or property along public highways and any use of them along public roads is "solely for purposes of taking [them] to the construction site" where they can be used to elevate workers. *See Hausman*, 518 So. 2d at 397. Indeed, the evidence here is that the aerial work platform was, in fact, transported to the worksite on the back of a truck and it was only briefly operated on a roadway because the truck could not get any closer to the worksite than the golf course parking lot across the street. *See* Trial Trans., 11/13/14 (a.m.), at 69:6-12, attached as Exhibit 11. This minimal operation of the lift on a public roadway, in order to put it in a place where it could be used as intended, simply is not sufficient to transform the "special mobile equipment" into a "motor vehicle."

Plaintiff's argument that just about any instrument that propels itself by way of a motor, and is capable of transporting people, is a "motor vehicle" was also rejected in *Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542 (Fla. 4th DCA 2005). There, the Fourth District held that "go karts" are not dangerous instrumentalities despite the fact that they have engines and wheels, and are capable of transporting people at speeds of up to 18-20 miles per hour—*far faster than the aerial work platform at issue in this case*. In rejecting application of the doctrine, the Fourth District emphasized that go karts are not designed to be operated on public "roads of the state," *id.* at 545, and that they are not "extensively regulated by the Florida legislature," *id.* at 546. The court also relied on expert testimony, which provided that the go karts are not particularly fast,

that they specifically warn against the hazard that caused the injury in that case—*i.e.* "bumping," and that serious injuries are a "pretty rare occurrence." *Id.* at 543.

As in *Gooch*, the undisputed evidence here is that the aerial work platform operates at very slow speeds (max. 4.5 mph) and that it was covered in warnings about the hazards of operating the lift near power lines. *See* Photo and Depo. of Merrifield at 160:3, attached as Composite Exhibit 12. Also like go karts, the equipment here was not designed to be operated on public roads and it is not "extensively regulated" by the Florida legislature. Indeed, Plaintiff can point to no Florida statute requiring aerial work platforms to be "equipped with 'vehicular hazard warning lights,'" or requiring them to be equipped with "slow-moving vehicle emblems," or requiring them to be equipped with "lamps and reflectors" meeting legislatively-mandated specifications, or requiring them to have "adequate breaks," etc. *Compare Rippy*, 80 So. 3d at 308 (listing these as examples of how the legislature regulates tractors to provide for public safety); *Meister*, 462 So. 2d at 1072 (noting that the Florida legislature requires the "presence of adequate brakes, steering apparatus, safe tires, a rear view mirror and red reflectors on the front and rear" of golf carts). Further, Plaintiff cites no Florida statute requiring aerial work platforms to be "licensed with the Department of Motor Vehicles" or requiring them to carry "license plate[s]." *Compare Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991) (emphasizing that a road grader did not need to be licensed or carry a license plate in holding that it is not a "dangerous instrumentality").

Plaintiff's reliance on the manufacturer's "operating and safety instructions" and certain ANSI standards, *see* Pl. Motion at 8-9, as proof that the aerial work platform may be dangerous, moreover, does not mean that *the Florida legislature* deems it dangerous to the public. *Compare Meister*, 462 So. 2d at 1072 ("It is idle to say that the Legislature imposed all these restraints,

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regulations, and restrictions upon the use of automobiles, if they were not dangerous agencies which the Legislature felt it was its duty to regulate and restrain for the protection of the public."). Indeed, ANSI is a voluntary organization and its recommendations, along with those set forth in the manufacturer's operating instructions, do not constitute "regulations" at all. *See e.g.* Trial Exhibit 91 at 10 ("While ANSI standards are considered best practices, they are not laws or regulations. Complying with ANSI standards is voluntary."), attached as Exhibit 13. The OSHA regulations relied on by Plaintiff are also inapposite because "OSHA's role is to assure safe and healthful conditions for working men and women." *Id.* at 9 (emphasis added). Unlike the Florida legislature, OSHA does not regulate public safety.

Finally, even if the aerial work platform could somehow be construed as a "motor vehicle"—which it plainly cannot, the result would be that Plaintiff's vicarious liability claim would be barred by the federal Graves Amendment. *See* 49 U.S.C. § 30106(a) ("An owner of a motor vehicle that rents or leases the vehicle to a person … shall not be liable under the law of any State … by reason of being the owner of the vehicle … for harm to persons or property that results or arise out of the use, operation, or possession of the vehicle during the period of the rental or lease…); *see also Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp.2d 821, 826 (M.D. Fla. 2007) (noting that the Graves Amendment "preempts Florida's common law vicarious liability scheme"). Plaintiff fails to explain how it can avoid application of the Graves Amendment if the Court were to accept Plaintiff's position that the aerial work platform is a rented "motor vehicle."

Plaintiff simply has not established that the aerial work platform in this case is a "dangerous instrumentality" by virtue of it being a "motor vehicle," by virtue of it being used as a "mode of transportation," or by virtue of it being "heavily regulated." It is none of the above.

D. The Function of the Aerial Work Platform is Similar to that of a Scaffold or a Ladder, and the Fact that it Can Elevate Workers does Not Make it a Dangerous Instrumentality

Lastly, Plaintiff focuses on the "vertical nature" of the aerial work platform in this case, seeking to compare it to a "crane"[4] stating: "the aerial lift poses precisely the same danger" as a crane because "[p]ersons or objects falling from an aerial lift can cause grave injury or death, whether falling from a crane or a lift four stories in the air." *See* Pl. Motion at 11-12. This isn't a case where something fell from the aerial lift and injured an innocent bystander below, however; nor has Plaintiff submitted any evidence to demonstrate that aerial work platforms are designed to hoist heavy objects into the air like cranes. To the contrary, the manufacturer's operation manual describes the aerial work platform as a "hydraulic personnel lift," designed to lift people to elevated work areas, *see* Tr. Exhibit 23 at 4-1, attached as Exhibit 14, and it expressly warns: "**Never attempt to use the machine as a crane**," *see id.* at 1-7 (emphasis added). There is simply no basis for Plaintiff's conclusory contention that the risk posed by falling objects is the same for aerial work platforms as it is for cranes; they are fundamentally different pieces of equipment used for different functions in the construction industry.

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[4] Plaintiff no longer relies heavily on the Fifth District's *Litton v. Saf-T-Green of Orlando, Inc.*, 608 So. 2d 908 (Fla. 5th DCA 1992) decision. Unlike its position prior to trial, when Plaintiff argued that *Litton* is directly on point because it "ruled" that an aerial work platform was a dangerous instrumentality, Plaintiff now dedicates only one sentence to *Litton*, at page 5 of its motion, stating that the opinion merely "suggested" that an aerial work platform was a "dangerous instrumentality." The fact of the matter, however, is that the *Litton* court did not even go that far. Vicarious liability was not an issue in the *Litton* case*, see id.* at 908-09, and, consequently, neither was the dangerous instrumentality doctrine. In fact, the words "dangerous instrumentality" were not even mentioned in the opinion except in the course of a long quote taken from the Florida Supreme Court's *Halifax Paving, Inc. v. Schott & Jobalia Constr. Co., Inc.*, 565 So. 2d 1346 (Fla. 1990) opinion, where the language was used in reference to another device. The Fifth District never even described the aerial work platform as a "dangerous instrumentality," much less did it hold it to be such.

The aerial work platform in this case is far more analogous to a ladder or a scaffold, *see e.g.* Exh. 10 at 119:6-8 (aerial work platforms are used in lieu of scaffolds where it is not "cost-effective to erect scaffold."), which are used to elevate people at worksites rather than to lift heavy objects, and no Florida court has held a ladder or scaffold to be a "dangerous instrumentality." Courts in other jurisdictions, furthermore, have repeatedly held that these sorts of tools are not dangerous instrumentalities in reference to other legal doctrines. *See e.g. Alexander v. St. Paul Fire & Marine Ins. Co.*, 312 So. 2d 139, 143 (La. App. 1975) ("While the use of a ladder may involve personal risk, a ladder is not per se a dangerous instrumentality"); *Grogan v. U.S.*, 341 F.2d 39, 42 (6th Cir. 1965) ("scaffold assembly" was properly found not to be an inherently "dangerous instrumentality"); *Crawford v. Cox Planing Mill & Lumber Co.*, 383 S.W.2d 291, 292 (Ark. 1964) (scaffold not a "dangerous instrumentality"); *Wallach v. U.S.*, 184 F. Supp. 785, 789 (S.D.N.Y. 1960) (scaffold from which plaintiff fell is not a "dangerous instrumentality"); *Neal v. Home Builders, Inc.*, 111 N.E.2d 280, 288 (Ind. 1953) (ladder is not a "dangerous instrumentality."). In a similar vein, the First District, in *Seitz v. Zac Smith & Company, Inc.*, 500 So. 2d 706 (Fla. 1st DCA 1987), concluded that a floodlight tower with pegs designed for workmen to climb did not constitute a "dangerous instrumentality" so as to trigger an exception to the *Slavin* doctrine.

Regardless, even if an aerial work platform could be analogized to a crane in terms of the danger it poses to the public, cranes are not properly deemed "dangerous instrumentalities" for purposes of imposing vicarious liability. *See Northern Trust Bank of Florida, N.A. v. Constr. Equip. Int'l, Inc.*, 587 So. 2d 502 (Fla. 3d DCA 1991). In *Northern Trust*, the court held:

> The trial court correctly entered a directed verdict in favor of CEI on the issue of vicarious liability. The crane in *this* case does not fall within the dangerous instrumentality doctrine because the crane was in use for construction, did not pose a sufficient danger

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> to the public, was generally fenced and not exposed to the general public, and was not used as a motor vehicle found on the highways a the time of the accident.

Id. at 504 (emphasis added).

Plaintiff asks the Court to disregard *Northern Trust*, arguing that it is an "early case" and "contrary to the weight of authority" finding cranes to be "dangerous instrumentalities." *See* Pl. Motion at 6 (citing *Geffrey v. Langston Const. Co.*, 58 So. 2d 698, 699 (Fla. 1952); *Scott & Jobalia Constr. Co., Inc. v. Halifax Paving, Inc.*, 538 So. 2d 76 (Fla. 5th DCA 1989); *Larzelere v. Employers Ins. of Wausau*, 613 So. 2d 510, 511 (Fla. 2d DCA 1993)).[5] Ironically, two of the three decisions that Plaintiff cites as the "weight of authority" actually pre-date *Northern Trust.* Further, ***none*** of these decisions actually applied the dangerous instrumentality doctrine to impose vicarious liability for the negligent operation of a crane. *See Geffrey*, 58 So. 2d at 698 (involving claim that a crane "mounted on a truck" was "defective;" it was not a vicarious liability case); *Scott & Jobalia*, 538 So. 2d at 81-82 (refusing to apply the dangerous instrumentality doctrine because the plaintiff was an injured worker and not a member of the public); *Larzelere*, 613 So. 2d at 510 (same). The only case to directly address whether vicarious liability should be imposed under the dangerous instrumentality doctrine concerning operation of a crane was *Northern Trust*, and the court there determined that the doctrine is inapplicable.

E. A New Trial is Not the Appropriate Remedy

Even if Plaintiff could somehow demonstrate that the Court's determination that Sunbelt is not vicariously liable for the conduct of Juan Bocanegra was erroneous—*which it cannot demonstrate*—the remedy would not be a new trial. The jury has considered the evidence and

[5] Plaintiff also cites to *Lewis v. Sims Crane Serv., Inc.*, 498 So. 2d 573, 575 (Fla. 3d DCA 1986) and *Canull*, 584 So. 2d at 1096 in making this argument, but neither case involved a crane. *Lewis* involved a construction elevator and was not a vicarious liability case; *Canull* involved a road grater and the court determined that the vehicle was not a dangerous instrumentality.

apportioned only 10% of the fault for the accident to Juan Bocanegra. At most, therefore, Sunbelt would be vicariously responsible for this 10% of fault if the dangerous instrumentality doctrine were applied.

Nevertheless, Plaintiff contends that the Court should grant a new trial because "the failure to inform the jury of the dangerous nature of the lift deprived the jury of a full understanding of Florida law and the scope of [Sunbelt's] responsibility for ensuring its safe use." *See* Pl. Motion at 3. Plaintiff cites no authority for the proposition that the jury should have been instructed that the product at issue was a "dangerous instrumentality," however. Plaintiff also ignores that the notes to the standard jury instruction on vicarious liability specifically say the opposite. Note 2 to instruction 401.14a states:

> 2. *Dangerous instrumentality.* The committee recommends that the court ***not instruct the jury*** that an automobile is a "dangerous instrumentality," such an instruction being ***unnecessary and essentially argumentative***.

See Std. Instr. 401.14, attached as Exhibit 15 (emphasis added).

Plainly, the failure to instruct the jury on the "dangerous instrumentality" doctrine would not warrant a new trial even if the doctrine were applicable. Regardless, as shown above, the Court's pretrial determination that the dangerous instrumentality doctrine does not apply in this case was entirely correct and there is no basis for a new trial.

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CONCLUSION

For the reasons set forth above, Sunbelt respectfully request entry of an order denying Plaintiff's motion for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email this 23rd day of February, 2015 to: Joseph Sette, Esq., Conroy, Simberg, 4315 Metro Parkway, Suite 250, Ft. Myers, FL 33916 (jsette@conroysimberg.com; eserviceftm@conroysimberg.com); and Hendrik Uiterwyk, Abrahamson & Uiterwyk, 900 Platt St., Tampa, FL 33606 (service@uiterwyklaw.com).

/s/ *Todd L. Wallen*
Todd L. Wallen
Fla. Bar. No. 151203

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CASE NO. 13-CA-001652

TIFFANY MANNING, as Personal Representative of the Estate of DUSTIN MANNING (Decedent),

Plaintiff,

v.

SUNBELT RENTALS, INC., a foreign Corporation, JEFFREY BALLER, J. BALLER CONSTRUCTION, LLC, a Florida Corporation, The Estate of JUAN BOCANEGRA, SILVIA GARCIA, as Personal Representative of the Estate of JUAN BOCANEGRA, and BELLA LAGO CONDOMINIUM AT BAY BEACH CONDO. ASS'N., INC., a Florida Corporation,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL AND GRANTING PLAINTIFF'S MOTION FOR ADDITUR

THIS CAUSE came before the Court on Plaintiff's Motion for a New Trial or, in the Alternative, Motion for Additur on Feburary 27, 2015 and, having heard the arguments of the parties and being otherwise duly advised, it is hereby

ORDERED AND ADUDGED as follows:

1. Plaintiff's Motion for a New Trial is **DENIED.**

2. The jury's verdict was consistent with the manifest weight of the evidence and it has not been established that the verdict was improperly influenced by sympathy or speculation.

3. The Court further finds that Sunbelt Rentals, Inc. is not vicariously liable for Juan Bocanegra's operation of the aerial work platform under the dangerous instrumentality doctrine. The aerial lift is not a "motor vehicle" and its functionality is comparable to that of a motorized ladder or scaffold. Neither its speed nor its ability to elevate workers has been shown to pose a significant danger to the public and, as such, the aerial work platform is not a "dangerous instrumentality" for purposes of imposing vicarious liability under Florida law. *See e.g. Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542 (Fla. 4th DCA 2005) (go-kart is not a dangerous instrumentality for purposes of imposing vicarious liability); *Northern Trust Bank of Florida, N.A. v. Constr. Equip. Int'l, Inc.*, 587 So. 2d 502 (Fla. 3d DCA 1991) (crane is not a dangerous instrumentality for purposes of imposing vicarious liability); *Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991) (road grater is not a dangerous instrumentality for purposes of imposing vicarious liability); *see also Scott & Jobalia Const. Co., Inc. v. Halifax Paving, Inc.*, 538 So. 2d 76, 82 (Fla. 5th DCA 1989) (Cowart, J., concurring) (a crane "merely being used as a lifting tool, [] should not be held, as a matter of law, to be a dangerous instrumentality for which the owner is vicariously liable."); *Seitz v. Zac Smith & Co., Inc.*, 500 So. 2d 706 (Fla. 1st DCA 1987) (floodlight tower with pegs for climbing is not a "dangerous instrumentality"). In addition, the Court is not persuaded that the dangerous instrumentality doctrine even applies in this case because the decedent, Dustin Manning, was engaged in the use of the lift at the time of the accident; he was not a "third party member of the public." *See Smith v. Ryder Truck Rentals, Inc.*, 182 So. 2d 422, 424-25 (Fla. 1966).

4. Plaintiff's Motion for Additur is **GRANTED**. The amount of $1,226.00, representing funeral expenses, will be added to the Final Judgment against the Estate of Juan Bocanegra.

DONE AND ORDERED in Chambers at the Lee County Courthouse, this 11th day of March, 2015.

HON. MICHAEL T. MCHUGH
CIRCUIT COURT JUDGE

Copies furnished to:
All Counsel of Record