

CAUSE NO. 75576-CV

Tyler Lee and Leigh Ann Lee, individually and as next friend of Sydney Rose Lee, minor	§ § § §	IN THE DISTRICT COURT OF
Plaintiff	§	
v.	§	BRAZORIA COUNTY, TEXAS
	§	
Berkel & Company, Contractors, Inc. Maxim Crane Works, L.P., Dixon Equipment Services, Inc., Floyd Dixon, Isaac Dolan, James Davidson, Andrew Bennett, and Link-Belt Construction Equipment Co.	§ § § § § § §	
Defendants	§	149 th JUDICIAL DISTRICT

Plaintiffs' Second Amended Petition

Plaintiffs Tyler Lee and Leigh Ann Lee, individually and as next friend of Sydney Rose Lee, a minor (collectively as "Plaintiffs"), complain of Berkel & Company, Contractors, Inc., Andrew Bennett, Maxim Crane Works, L.P., James Davidson, Dixon Equipment Services, Inc., Floyd Dixon, Isaac Dolan, and Link-Belt Construction Equipment Company, L.P., LLLP and will show the Court the following:

I.

Nature of Action

1. This is an action arising under the common law of the State of Texas.

II.

Discovery

2. Plaintiffs intend to conduct discovery under Discovery Level 2 pursuant to TEX. R. CIV. P. 190.3.

III.

Jurisdiction and Venue

3. The Court has jurisdiction over this case because Plaintiffs seek damages well within the jurisdictional limits of the Court. Dixon Equipment Services, Inc., Floyd Dixon, James Davidson, and Isaac Dolan are citizens of Texas and subject to jurisdiction in Texas. Berkel & Company, Contractors, Inc., Maxim Crane Works, L.P., and Link-Belt Construction Equipment Company, L.P., LLLP conduct substantial business in Texas, including the negligence which caused injury and damages to Plaintiffs, which would subject them jurisdiction.

4. Venue is proper in Brazoria County because Dixon Equipment Services, Inc. and Floyd Dixon reside in Brazoria County. TEX. CIV. PRAC. & REM. CODE 15.002(a)(2).

IV.

Parties

5. Plaintiffs are residents of Texas.

6. Defendant Berkel & Company, Contractors, Inc. (“Berkel”) is a Kansas company that does substantial business in Texas that would subject it to general jurisdiction. Moreover, Berkel’s negligence at the work site led to Plaintiffs’ injuries and damages, which gives rise to specific jurisdiction. Berkel has already made an appearance in this lawsuit.

7. Defendant Andrew Bennett was the crane operator at the time of the subject incident. Andrew Bennett has already made an appearance in this lawsuit.

8. Defendant Maxim Crane Works, L.P. (“Maxim”) is a Pennsylvania company that does substantial business in Texas that would subject it to general jurisdiction.

Moreover, Maxim's negligence in Texas led to Plaintiffs' injuries and damages, which gives rise to specific jurisdiction. Maxim has already made an appearance in this lawsuit.

9. Defendant James Davidson is an inspector with Maxim Crane Works, L.P. He is a resident of Texas. He inspected the subject equipment involved in this incident and certified it fit for use. James Davidson has already made an appearance in this lawsuit.

10. Defendant Dixon Equipment Services, Inc. ("Dixon") is a Texas company that provided inspection services with respect to the subject equipment involved in this incident. Dixon has already made an appearance in this lawsuit.

11. Defendant Floyd Dixon is a Texas resident that provided inspection services while employed by Dixon Equipment Services, Inc. for the subject equipment involved in this incident. Floyd Dixon has already made an appearance in this lawsuit.

12. Defendant Isaac Dolan is a Texas resident that provided inspection services while employed by Dixon Equipment Services, Inc. for the subject equipment involved in this incident. Isaac Dolan may be served by personal delivery to 6960 Cayton, Houston, Texas 77061.

13. Defendant Link-Belt Construction Equipment Company, L.P., LLLP ("Link-Belt") is a Kentucky company that does substantial business in Texas that would subject it to general jurisdiction. Moreover, the actions of Link-Belt in Texas led to Plaintiffs' injuries and damages, which gives rise to specific jurisdiction. Link-Belt has already made an appearance in this lawsuit.

V.

Facts

14. On September 30, 2013, Plaintiff Tyler Lee was employed by Skanska at a jobsite at 15375 Memorial Drive when he was struck by a piece of equipment that ultimately resulted in the amputation of his left leg. Mr. Lee is 31 years old. He is married to Leigh Ann Lee and has an infant daughter named Sydney Rose Lee.

15. At the time of the incident, Skanska had commissioned the construction of an office building. To that end, Berkel was hired to provide construction services. One area of Berkel's job included deep foundation drilling, which required use of an auger. The auger, which is like a giant drill bit, is held in place by a derrick attached to a crane. Ultimately a crane is used to place all of this equipment in the proper place. On the date in question, Berkel's Andrew Bennett was the crane operator. Chris Miller was the Berkel Superintendent on site and (1) had authority to employ, direct, and discharge Berkel's employees, (2) was engaged in the performance of Berkel's non-delegable or absolute duties, and (3) was the person to whom Berkel delegated the management of its business for this work site. Chris Miller is, therefore, a vice-principal of Berkel.

16. The crane in question was manufactured by Link-Belt. Maxim owned the crane and provided the crane to the work site. Maxim directed how to erect and assemble the crane and otherwise provided inspection services for the crane. Maxim's James Davidson assembled the crane, configured the crane computer, inspected the crane and certified it for use. Another Maxim employee, Stephen Slater, serviced the crane after it had been erected and put into service by Berkel. Additionally, Dixon, Floyd Dixon, and Isaac inspected the

crane and its set up to ensure that it was safe for use and would operate in a reasonably safe manner.

17. Notably, these pieces of equipment are large—i.e. they can be used to drill 120 foot holes for piles. On the date in question, Tyler Lee was standing approximately 90 feet away from the derrick and auger behind the safety fence that surrounds the work site. The crane collapsed during use and its equipment associated with the operation fell in various places. Ultimately one of these pieces of equipment collapsed on Tyler Lee and trapped him against the ground. The pieces of equipment had to be lifted off Tyler Lee by crane. Once Mr. Lee was freed from the fallen pieces, he was rushed to Ben Taub Hospital where his left leg was eventually amputated above the knee.

18. Berkel's conduct on the day in question was particularly egregious. Berkel's superintendent repeatedly violated known safety policies and procedures because in an effort to speed along the operations. Berkel's superintendent consciously overruled objections and concerns of other employees about the safe operations on site and otherwise carried on in a reckless manner indifferent to the safety of others. Berkel's superintendent flouted the warnings of the other Berkel employees and disregarded the visible proof that the crane was overloaded – a fact confirmed by the crane's electronic data recorder (or "black box"). The evidence was such that Berkel's employees knew that the crane's failure was imminent and that harm was substantially certain to occur. Berkel's actions, therefore, constitute knowing misconduct, not mere accidental injuries or wrongs.

19. At all times on the date in question, Tyler Lee was exercising reasonable care for his own safety.

VI.

Causes of Action

A. *Negligence and Gross Negligence Claims Against Berkel.*

20. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of Berkel's negligence and gross negligence evidenced by:

- Its failure to properly train the crane operator and its employees;
- Its failure to ensure sufficient grout was on site before pumping the piling in question;
- Its failure to properly supervise the crane operations;
- Its failure to safely operate the crane;
- Its failure to properly set up the equipment—i.e. auger, derrick, and crane, including but not limited to its deviations from the manufacturer-approved configuration of the crane ;
- Its failure to obtain manufacturer approval for deviations from the manufacturer-approved configuration of the crane;
- Its failure to properly inspect the equipment in question;
- Its failure to maintain a safe work area;
- Its entrustment of equipment to the crane operator;
- Its repeated failure to heed warnings by the stress put on the crane and its equipment;
- Its repeated failure to heed warnings by other employees that the job should be stopped;
- Knowingly taking actions that were substantially certain to result in the crane's failure and harm to bystanders; and

- Other acts deemed negligent and grossly negligent.

Berkel's "knowing" conduct for which harm was substantially certain to occur is not the type of "accidental injury or wrong" to which the Texas Workers' Compensation Act's exclusive remedy bar applies. Plaintiffs' claims for knowing misconduct are protected by the Texas Constitution.

B. Negligence and Gross Negligence Claims Against Andrew Bennett.

21. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of Bennett's negligence and gross negligence evidenced by:

- Bennett's failure to properly set up the equipment—i.e. auger, derrick, and crane, including but not limited to its deviations from the manufacturer-approved configuration of the crane ;
- Bennett's failure to obtain manufacturer approval for deviations from the manufacturer-approved configuration of the crane;
- Bennett's failure to safely operate the crane and appurtenant equipment;
- Bennett's failure to inspect the equipment in question prior to use;
- Bennett's failure to properly secure the area surrounding the subject equipment prior to its use;
- Knowingly taking actions that were substantially certain to result in the crane's failure and harm to bystanders; and
- Other acts deemed negligent and grossly negligent.

Bennett's "knowing" conduct for which harm was substantially certain to occur is not the type of "accidental injury or wrong" to which the Texas Workers' Compensation Act's exclusive remedy bar applies. Plaintiffs' claims for knowing misconduct are protected by the Texas Constitution.

C. *Negligence and Gross Negligence Claims Against Maxim.*

22. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of Maxim's negligence and gross negligence evidenced by:

- Providing an unsafe crane to Berkel;
- Its failure to properly inspect the equipment—i.e. auger, derrick, and crane, including but not limited to its failure to adequately test the crane's alarms and safety features and its failure to inspect the crane in its operational configuration;
- Its failure to properly set up the equipment—i.e. crane, crane computer, auger, derrick, and crane;
- Its failure to provide a crane that had adequate, functioning safety equipment, such as the crane computer, warnings, and other safety features;
- Its failure to properly supervise the setup of the equipment, including but not limited to its failure to properly set up the crane computer and inquire as to the use of the crane or deviations from the manufacturer-approved configuration of the crane;
- Its failure to obtain manufacturer approval for deviations from the manufacturer-approved configuration of the crane;
- Its failure to provide proper instruction, training, and safety policies for the use of the auger, derrick, and crane;
- Its failure to stop the crane operations once it noted that Berkel's equipment was set up in an unsafe manner;
- Its failure to ensure the adequacy of Berkel's training, certifications, and policies; and
- Other acts deemed negligent and grossly negligent.

D. *Negligence and Gross Negligence Claims Against James Davidson.*

23. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of James Davidson's negligence and gross negligence evidenced by:

- His failure to properly inspect the crane and appurtenant equipment prior to its use, including but not limited to his to adequately test the crane's alarms and safety features and his failure to inspect the crane in its operational configuration;
- His failure to properly supervise the setup of the equipment, including but not limited, to his failure to properly set up the crane computer and failure to inquire as to the use of the crane or deviations from the manufacturer-approved configuration of the crane;
- His failure to provide a crane that had adequate, functioning safety equipment, such as the crane computer, warnings, and other safety features;
- His failure to provide proper instruction, training, and safety policies for the use of the auger, derrick, and crane;
- His failure to stop the crane operations once it noted that Berkel's equipment was set up in an unsafe manner;
- His failure to ensure the adequacy of Berkel's training, certifications, and policies;
- His failure to properly evaluate the jobsite for safety hazards inherent with use of the subject equipment; and
- Other acts deemed negligent and grossly negligent.

E. Negligence and Gross Negligence Claims Against Dixon.

24. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of Dixon's negligence and gross negligence evidenced by:

- Failure to properly train its employees at the time of the incident;
- Failure to properly supervise its employees at the time of the incident;
- Its entrustment of inspection duties to Floyd Dixon and Isaac Dolan;
- Failure to detect that the equipment in question was inadequate and not fit for use;
- Failure to warn those individuals at the work site that the equipment in question was dangerous; and
- Other acts deemed negligent and grossly negligent.

F. Negligence and Gross Negligence Claims Against Floyd Dixon and Isaac Dolan.

25. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of Floyd Dixon and Isaac Dolan's negligence and gross negligence evidenced by:

- Their failure to properly and safely inspect the crane and appurtenant equipment on the date in question;
- Their failure to warn others of the crane's dangers;
- Their failure to ensure that the equipment—i.e. auger, derrick, and crane—was set up in the proper fashion; and
- Other acts deemed negligent and grossly negligent.

G. Claims against Link-Belt.

26. Plaintiffs repeat and reallege each allegation contained above. Plaintiffs sustained serious injuries because of Link-Belt's actions and inaction.

I. Negligence And Gross Negligence

27. Mr. Lee sustained serious injuries because of Link-Belt's actions/inaction when Defendants negligently and grossly negligently:

- Designed the subject crane;
- Designed the boom and hydraulic power unit on the subject crane;
- Manufactured the subject crane;
- Designed the crane to operate beyond its capacity;
- Designed the crane so that the safety features could be easily overridden;
- Designed the crane so that the warnings were ineffective in preventing unsafe operation of the crane;

- Designed the crane so that it could be operated at unsafe levels beyond its capacity;
- Failed to warn purchasers and all potential operators, including Plaintiff, about the possibility of severe bodily injury while operating the subject crane;
- Provided inadequate instruction on how to operate the subject crane;
- Installed the hydraulic power unit on the subject crane;
- Installed the boom on the subject crane;
- Other acts deemed negligent and grossly negligent.

II. Strict Liability, Manufacturing Defect and Failure to Warn

28. Link-Belt engaged in manufacturing, assembling, selling, marketing and distributing the subject crane. The subject crane was defectively designed, unreasonably dangerous to consumers, the defects existed at the time the crane left Link-Belt, the crane reached Plaintiff without substantial change, the machine could have been designed in a safer alternative manner, and the defect was the producing and proximate cause of Mr. Lee's injuries.

29. Link-Belt's crane was unreasonably dangerous to consumers, including Plaintiff. The crane was defective and unreasonably dangerous in that it was designed and manufactured. Specifically, the crane boom collapsed on the date in question causing Mr. Lee's injuries. Further, the crane's computer and the safety system was defective. Specifically, the crane computer was defective and failed to prevent a crane collapse. Moreover, the warnings failed to function and prevent the crane collapse.

30. A safer alternative design existed at the time the crane was manufactured. The safer alternative design would have prevented or significantly reduced the risk collapse and Plaintiff's injuries without substantially impairing the product's utility. Moreover, the safer alternative design was economically and technologically feasible at the time the product left Link-Belt's control by the application of existing and reasonably achievable scientific knowledge. A safer alternative design of the machine includes, but is not limited to: (1) a boom that would not have collapsed; (2) a sensor which would have alarmed and thereby alerted the operator to prevent collapse; (3) a safety feature that prevented the easy override of the crane's safety features; and (4) a safety function that shuts down the crane once it was overloaded to unsafe capacities.

31. At the time the Link-Belt manufactured and sold the crane, the same was defective in manufacture and unreasonably dangerous. The crane was dangerous to an extent beyond that which would have been contemplated by the ordinary user of the machine, with the common knowledge to the community as to the machine's characteristics, including Plaintiffs. This defect and unreasonably dangerous condition was the producing and proximate cause of Plaintiffs' injuries.

32. Prior to and following the sale of the crane, Link-Belt failed to give adequate and proper warnings and instructions regarding proper crane handling procedure, the limitations of the crane, and the dangers inherent within the crane. Link-Belt knew or should have known of the potential harm to a user, including Plaintiff. This failure rendered the crane defective and unreasonably dangerous, and was the producing and proximate cause of Plaintiffs' injuries.

III. Breach of Warranty

33. Link-Belt breached the implied warranty of merchantability because the subject crane was unfit for the ordinary purposes for which it is used. The subject crane's unfit condition proximately caused Plaintiffs' damages. Additionally, upon information and belief, Link-Belt breached the warranty of fitness for a particular purpose because Link-Belt warranted the subject crane would be safe for operation using the appurtenant equipment such as auger and derrick used in this incident.

H. Damages

34. Plaintiff Tyler Lee repeats and realleges each allegation contained above.

35. As a result of said occurrence, Tyler Lee suffered severe injury to his leg and other parts of his body. His earning capacity has been severely diminished. Further, he has incurred substantial medical and pharmaceutical costs.

36. Tyler lee sustained severe injuries to his body, which resulted in physical pain, mental anguish, and other medical problems. Plaintiff has sustained severe pain, physical impairment, disfigurement, discomfort, mental anguish, and distress. In all reasonable probability, Plaintiff's physical pain, disfigurement, physical impairment and mental anguish will continue indefinitely. Plaintiff has also suffered a loss of future earning capacity. Plaintiff has incurred and will incur pharmaceutical and medical expenses in connection with his injuries.

37. Tyler Lee is also entitled to punitive damages because the aforementioned actions of Defendants were grossly negligent. Defendants acted with flagrant and malicious disregard of Lee's health and safety. Defendants were subjectively aware of the extreme risk posed by the conditions which caused Lee's injuries, but did nothing to rectify them.

Defendants did so knowing that the conditions posed dangerous and grave safety concerns. Defendants' acts and omissions involved an extreme degree of risk considering the probability and magnitude of potential harm to Lee and others. Defendants had actual, subjective awareness of the risk, and consciously disregarded such risk by allowing Lee to work under such dangerous conditions.

38. Tyler Lee is also entitled to punitive damages because the aforementioned actions of Defendants Berkel and Bennett were knowing and, therefore, intentional. Defendants Berkel and Bennett acted with flagrant and malicious disregard of Lee's health and safety. Defendants Berkel and Bennett did so knowing that the conditions rendered harm substantially certain to occur. Defendants Berkel and Bennett's acts and omissions involved an extreme degree of risk considering the substantial certainty of potential harm to Lee and others. Defendants Berkel and Bennett had actual, subjective awareness that harm was substantially certain to occur, and consciously disregarded the likelihood of such harm by continuing to operate the crane in such an unsafe manner.

I. Loss of Consortium

39. Plaintiff Leigh Ann Lee repeats and realleges each allegation contained above.

40. Defendants caused extreme bodily injury and mental anguish to her husband Tyler Lee, resulting in a loss of consortium including comfort, assistance around the home, solace, moral support, and consortium damages. Plaintiffs seek all damages recoverable at law.

J. Loss of Parental Consortium

41. Sydney Rose Lee repeats and realleges each allegation contained above.

42. Defendants caused extreme bodily injury and mental anguish to her father Tyler Lee, resulting in a loss of parental consortium including their father's love, affection, protection, emotional support, services, companionship, care, and society.

43. Sydney Rose is a minor child who has lived with Leigh Ann Lee and Tyler Lee since her birth. Sydney Rose has fully depended upon her mother and father emotionally and financially since birth. Plaintiffs seek all damages recoverable at law in this regard.

VII.

Prayer

Plaintiff prays for relief and judgment as follows:

- a. Past and future medical damages for Tyler Lee;
- b. Future loss of earning capacity for Tyler Lee;
- c. Past and future pain and suffering for Tyler Lee
- d. Past and future mental anguish for Tyler Lee;
- e. Past and future impairment for Tyler Lee;
- f. Past and future disfigurement for Tyler Lee;
- g. Loss of Consortium for Leigh Ann Lee;
- h. Loss of support, love, and affection for Sydney Rose Lee;
- i. Exemplary damages;
- j. Interest on damages (pre- and post-judgment) in accordance with law;
- k. Such other and further relief as the Court may deem just and proper.

VIII.

Jury Trial Demanded

Plaintiffs hereby demand a trial by jury on all issues.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this instrument has been served upon all parties of record by electronic mail, on November 25, 2014, pursuant to the requirements of Rule 21a, Tex. R. Civ. P.

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