COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

BRADD M. MILLER,	:	**NO. 20-01214**
Plaintiff,	:	
	:	
vs.	:	
	:	**CIVIL ACTION**
DEBRA KINLEY and GERALD KINLEY,	:	
Defendants.	:	
* * * * * * * * * * * * *		
BRADD M. MILLER,	:	**NO. 22-00349**
Plaintiff,	:	
	:	
vs.	:	
	:	**CIVIL ACTION**
RONALD W. BANEY and JOHN J. ECKERT,	:	
Defendants.	:	**Motion for Summary Judgment**

OPINION AND ORDER

These two consolidated matters came before the Court on July 29, 2024, for oral argument on the Motion for Summary Judgement, filed by Defendant John J. Eckert (hereinafter "Eckert") on June 28, 2024. The Court hereby issues the following OPINION and ORDER on that Motion.

I. Background:

The matter docketed to 20-01214 was consolidated with the matter docketed to 22-00349, by the Order of September 7, 2022. The Complaint filed December 28, 2020, by Plaintiff, Bradd M. Miller (hereinafter "Miller"), against Defendants Gerald Kinley and Debra Kinley. Miller alleges Gerald Kinley and Debra Kinley permitted Miller to cut down trees located on property owned by Gerald Kinley and Debra Kinley. Miller alleges that, as he began cutting one large tree, the tree fell and struck him, causing serious injury. With regard to the allegations in the Complaint filed to docket 22-00349, Miller alleged at Paragraph 15 that Eckert "had negligently connected a rope or cable to the tree in an effort to control the way the tree fell, which process was negligent and caused the tree to fall in an unintended direction away from the notch."

At a deposition conducted on January 6, 2022, in response to the question "How

about John Eckert, was he responsible for your injury," Miller responded "**I would not believe so. He was in the dump truck."** Notes of testimony (hereinafter "N.T.") of January 6, 2022 at 61 (emphasis added). When further pressed for any basis for liability on the part of Eckert, Miller responded:

> **Well by denying me to go up and cut the limbs and kind of going with John's idea, the rope or steel cable, that was just—I knew from the beginning it was a wrong idea. The tree was just—it was too twisted to be able to—boy, how do I want to put this? I'm trying to put this in a very understandable term. The way the tree was twisted, it left a lot of weight towards the garage. And even with the steel cable or rope being in there, it wasn't a guaranteed thing.**

N.T. of January 6, 2022 at 61-62.

When Miller was asked if he felt that he had the most knowledge of any of the persons present during the tree cutting, he responded **"absolutely."** N.T. of January 6, 2022 at 34 (emphasis added).

At a deposition conducted on January 9th, 2024, Miller testified that Eckert attached cables to the tree which caused Miller's injuries. N.T. of January 9, 2024 at 123. When Miller was asked whether he had any issue with the way that Eckert attached the cable to the tree, Miller responded **"No. He double wrapped it around the trunk of the tree and above a branch. That way it couldn't slide down. It was in a guaranteed grab spot."** *Id*. (emphasis added). When asked if he would have wrapped the cable in the same manner, Miller responded **"More or less, yes. In the same manner."** *Id.* (emphasis added).

II. The Test for Summary Judgment:

In Pennsylvania, a party may move for summary judgement "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action…." Pa.R.C.P. Rule 1035.2(1). In response, the adverse party may not rest on denials but must respond to the motion. Pa.R.C.P. Rule 1035.3(a). The non-moving party can avoid an adverse ruling by identifying "one or more issues of fact arising from evidence in the record…." Pa.R.C.P. No. 1035.3(a)(1).

In considering a motion for summary judgment, it is not the Court's function to decide issues of fact. Rather, is it our function to decide whether an issue of fact exists. *Fine v. Checcio*, 870 A.2d 850, 862 (Pa. 2005). Moreover, our Superior Court noted the following:

> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

Hovis v. Sunoco, Inc., 64 A.3d 1078, 1081 (Pa. Super. Ct. 2013)(quoting *Cassel-Hess v. Hoffer*, 44 A.3d 80, 84-85 (Pa. Super. Ct. 2012)); *accord Khalil v. Williams*, 278 A.3d 859, 871 (Pa. 2022)(citing *Bourgeois v. Snow Time, Inc*., 242 A.3d 637, 649 (Pa. 2020)).

Our Superior Court described the test for a grant of summary judgment as follows:

> First, the pleadings, depositions, answers to interrogatories, admissions on file, together with any affidavits, must demonstrate that there exists no genuine issue of fact. Pa.R.C.P. 1035(b). Second, the moving party must be entitled to judgment as a matter of law. *Id.* The moving party has the burden of proving that no genuine issue of material fact exists. *Overly v. Kass,* 382 Pa.Super. 108, 111, 554 A.2d 970, 972 (1989). However, the non-moving party may not rest upon averments contained in its pleadings; the non-moving party must demonstrate that there is a genuine issue for trial. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. *Stidham v. Millvale Sportsmen's Club,* 421 Pa.Super. 548, 558, 618 A.2d 945, 950 (1992), *appeal denied,* 536 Pa. 630, 637 A.2d 290 (1993) (citing *Kerns v. Methodist Hosp.,* 393 Pa.Super. 533, 536–37, 574 A.2d 1068, 1069 (1990)). Finally, an entry of summary judgment is granted only in cases where the right is clear and free of doubt. *Ducko v. Chrysler Motors Corporation,* 433 Pa.Super. 47, 48, 639 A.2d 1204, 1205 (1993) (citing *Musser v. Vilsmeier Auction Co., Inc.,* 522 Pa. 367, 370, 562 A.2d 279, 280 (1989)). We reverse an entry of summary judgment when the trial court commits an error of

> law or abuses its discretion. *Kelly by Kelly v. Ickes,* 427 Pa.Super. 542, 547, 629 A.2d 1002, 1004 (1993) (citing *Carns v. Yingling,* 406 Pa.Super. 279, 594 A.2d 337 (1991)).

Accu-Weather, Inc. v. Prospect Commc'ns, Inc., 644 A.2d 1251, 1254 (Pa. Super. Ct. 1994).

III. Question Presented:

Whether Defendant John J. Eckert is entitled to summary judgment on the claims asserted against him to docket 22-00349.

IV. Response:

Defendant John J. Eckert is entitled to summary judgment, because there is no genuine issue of any material fact as to a necessary element—here, duty—of the cause of action.

V. Discussion:

Reviewing the record in the light most favorable to Miller, the Court finds that Defendant John J. Eckert is entitled to summary judgment, because there is no genuine issue of any material fact as to a necessary element of the cause of action—here, duty. Simply stated, no reasonable jury could find by a preponderance of the evidence that, by wrapping a cable on the tree in the same manner which Miller would have used, John J. Eckert (who was sitting in a dump truck at the time when Miller cut the tree and sustained his injuries) had assumed a duty to act to prevent Miller's injuries.

In the matter of *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000), our Supreme Court discussed the element of duty in a claim of negligence as follows:

> The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff. *See Gibbs v. Ernst*, 538 Pa. 193, 210, 647 A.2d 882, 890 (1994)("Any action in negligence is premised on the existence of a duty owed by one party to another").
>
> ….
>
> The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the

> consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution. *See generally Dumanski v. City of Erie*, 348 Pa. 505, 507, 34 A.2d 508, 509 (1943)(relationship between the parties), *Forster v. Manchester*, 410 Pa. 192, 197, 189 A.2d 147, 150 (1963)(social utility), *Clewell v. Pummer*, 384 Pa. 515, 520, 121 A.2d 459, 463 (1956)(nature of risk), *Witthoeft v. Kiskaddon*, 557 Pa. 340, 353, 733 A.2d 623, 630 (1999)(foreseeability of harm), *Cruet v. Certain-Teed Corp.*, 432 Pa.Super. 554, 558, 639 A.2d 478, 479 (1994)(relationship, nature of risk and public interest in the proposed solution). *See also Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Texas 1994)("In determining whether to impose a duty, this Court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor.").

Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166, 1168-1169 (Pa. 2000); *see Maxwell v. Keas*, 639 A.2d 1215, 1217 (Pa. Super. Ct. 1994)("The existence of a duty is predicated upon the relationship between the parties at a specific point in time"); *see also Seebold v. Prison Health Services, Inc.*, 57 A.3d 1232, 1242-1243 (Pa. 2012)(applying the *Althaus* factors, the Court opined that a physician for prison inmates did not have a duty to warn correctional officers who regularly interacted with inmates who had a contagious disease); *see, generally, Emerich v. Philadelphia Center for Human Development, Inc.*, 720 A.2d 1032, 1036 (Pa. 1998)("Under common law, as a general rule, there is no duty to control the conduct of a third party to protect another from harm. However, a judicial exception to the general rule has been recognized where a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives to the intended victim a right to protection. See, Restatement (Second) of Torts § 315 (1965).").

Miller filed a response to Eckert's Motion for Summary Judgment on July 18, 2024. That response admits some of the statements in Motion, and denies others. Regrettably, the response contains no affidavit illustrating any material issue of fact for trial, nor any references to the record. Rather, the response merely claims at Paragraph 23 that "expert testimony has been presented by Affidavit and will be followed up by deposition in this matter." Because the deadline for discovery and for expert reports in this matter has long passed, the Court must decide the Motion on the existing record.

At the oral argument conducted on Eckert's Motion for Summary Judgment, counsel

for Miller called the Court's attention to the final page of Miller's Pre-Trial Statement, filed June 6, 2024. That document, one page in length, is dated May 26, 2022. Although titled "Affidavit," the document is an unverified statement, signed by Glenn M. Neff, Sr.; Neff claims to be the "Director of Operations of Patriot Line Clearing, Mill Hall," and claims to have worked "in the tree removal trimming industry for a period of 36 years." Neff offers the opinion that "if someone is cutting down a tree and hears any sound that makes them think that the tree may be hollow, they should exit the area where the tree is falling as quickly as possible." In the view of the Court, that statement is simply an expression of common sense. Neff also opines that tree removal activities should include a safety officer, situated a safe distance away from the tree. While that opinion might be relevant at trial, it does not support Miller's claim that Eckert was negligent in his technique for attaching a cable to the tree.

The issue presented by Eckert's Motion is whether there are any material issues of fact to support Miller's claim that Eckert's conduct was a substantial factor in causing Miller's injury. Miller himself testified that he would have attached the cable to the tree in the same manner as that chosen by Eckert, and that Eckert was in a dump truck at the time of Miller's injury. Miller has produced no written report from any expert in support of his claim that Eckert was negligent. Further, there is no record evidence to support the existence of any agreement between Miller and Eckert—either prior to or on the date of the tree-cutting incident, that Eckert would assume responsibility for Miller's safety. On the contrary, Miller testified that he was the most experienced person present, that Eckert attached the safety cable in the same manner which Miller would have used, and that Eckert was sitting in a dump truck at the time of the injury. When asked "How about John Eckert, was he responsible for your injury," Miller bluntly responded "I would not believe so. He was in the dump truck." Under these facts it is difficult to imagine that the *Althaus* Court contemplated imposing a duty on an individual, such as Eckert, which he never agreed to assume. 756 A.2d at 1169.

Reviewing this record in the light most favorable to Miller, the record evidence does not present a genuine issue of material fact as to a necessary element of the cause of action—duty. Duty of care owed by a defendant to a plaintiff is "[t]he primary element

in any negligence cause of action." 756 A.2d at 1168.

ORDER

AND NOW, this 5th day of August 2024, the Court finds that the record in this matter does not reveal a genuine issue of any material fact as to a necessary element—here, duty—of the cause of action regarding John J. Eckert for trial. For that reason, Eckert's Motion for Summary Judgment is **GRANTED**.

By the Court,

_____
William P. Carlucci, Judge

WPC/aml

cc: Charles R. Rosamilia, Jr., Esquire
241 W. Main Street, Lock Haven, PA 17745
Joseph Musto, Esquire
Elizabeth A. Ontko, Esquire
3 Parkway, Suite 1210, 1601 Cherry Street, Philadelphia, PA 19102
Wade Manley, Esquire
301 Market Street, PO Box 109, Lemoyne, PA 17043-0109