IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL DIGNAZIO and ALLISON EVANS, Husband and Wife, Plaintiffs,	)	
v.	)	C.A. No. 08C-11-208 PLA
RICKERMAN TREE SERVICES, INC. Defendant.	)	
v.	)	
RONALD and CHRISTINE SCHAFER Third-Party Defendants	)	

UPON DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS AND THIRD-PARTY DEFENDANTS
DENIED AND **DENIED**

Submitted: August 1, 2011
Decided: September 8, 2011

This 8th day of September, 2011, it appears to the Court that:

1. Plaintiff Dr. Michael Dignazio and his wife, Allison Evans ("Plaintiffs"), brought this negligence action against Defendant Rickerman Tree Services, Inc. ("Rickerman") after a tree allegedly inspected by Rickerman failed during high winds, fell to the ground, and crushed Plaintiff, rendering him paraplegic.[1] This tragic event occurred on December 1, 2006. Plaintiffs rented a home on property owned by Ronald and Christine Schafer ("the Schafers"), at 1201 Barley Mill Road in Wilmington, Delaware. Rickerman filed a third-party complaint against the Schafers, as owners of the property. Approximately eight months earlier, in April 2006, Mrs. Schafer had called Rickerman to inspect and evaluate the danger posed by a grove of trees near

[1] For the remainder of this opinion, the Court will use the name "Rickerman" to refer to Mr. Richard Rickerman, president of Rickerman Tree Services, Inc., and the certified arborist who conducted the evaluation of the tree in question.

the parking lot adjoining the home rented by Plaintiffs after a limb had fallen and damaged a car parked in the lot. Rickerman undertook a Visual Tree Assessment ("VTA") of the remaining trees in the grove and informed Mrs. Schafer that he "didn't see anything that caused [him] concern."[2] Eight months later, the tree that injured Plaintiff fell from the same grove inspected by Rickerman.

2. In preparation for trial, Plaintiffs employed an expert in the field of arboriculture, Mr. J. David Hucker, to render an opinion about the sufficiency of Rickerman's VTA, the standard of care owed by a certified arborist, and Rickerman's breach of that standard of care. Rickerman now moves for summary judgment against Plaintiffs on the basis of Mr. Hucker's report, arguing that he failed to express an opinion with regard to a violation of the applicable standard of care and the proximate cause of Plaintiff's injuries. By a separate motion, Rickerman also moves for summary judgment against the Schafers, arguing that, as landowners, they bear sole responsibility for Plaintiff's injuries.

3. When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[3] Initially, the burden is placed upon the moving party to demonstrate that his legal claims are supported by the undisputed facts.[4] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[5] Summary judgment will not be granted if, after viewing the evidence in the light most favorable

[2] Richard Rickerman Dep., Mar. 16, 2011, at 35:18–21.

[3] Super Ct. Civ. R. 56(c).

[4] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

[5] *Id.* at 880.

to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[6]

4. The elements of Plaintiffs' cause of action are those of a traditional negligence claim: duty, breach, causation, and harm.[7] Where one or more of the elements involve matters within the knowledge of experts only, and not within the ken of a lay person, expert testimony is needed to support a plaintiff's *prima facie* case.[8] However, "it is permissible for a plaintiff to make a *prima facie* case that a defendant's conduct was a proximate cause of the plaintiff's injuries based upon an inference from the plaintiff's competent evidence, if such a finding relates to a matter which is within a lay person's scope of knowledge."[9] Here, Plaintiffs' *prima facie* case requires the introduction of expert testimony with regard to the practices and principles of arboriculture, and the standard of care applicable to a certified arborist. However, for the reasons discussed below, a determination of causation does not require a consideration of information solely within the knowledge of experts.

5. In his report, Mr. Hucker opines, "within a reasonable degree of professional certainty," that Rickerman: (1) "failed to recognize, or report to his client, the significance of the prior failure within the grove of evergreen trees;" (2) "failed to recognize, or report to his client, the adverse site conditions and signs and symptoms expressed by the subject tree, which indicated the potential for subsequent failure;" and (3) "failed to advise his client of the limitations of a visual tree assessment following her request for assurance that no other trees in

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[6] *Id.* at 879–80.

[7] *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (Del. 2010).

[8] *Campbell v. Stonebridge Life Ins. Co.*, 966 A.2d 347, *3 (Del. 2009) (TABLE) (citing *Money v. Manville Corp. Asbestos Disease Comp. Tr. Fund*, 596 A.2d 1372, 1375 (Del. 1991).

[9] *Id.*

the grove would fall."[10] Rickerman submits that this opinion is not sufficient because Mr. Hucker "does not opine how the purported failures made any difference to the outcome."[11] Essentially, Rickerman argues that the expert evidence is deficient in the areas of breach and causation because Mr. Hucker's findings do not explicitly state that Plaintiff's injury would not have occurred but for Rickerman's inadequate VTA. Without this, Rickerman argues, "the only viable explanation for the incident was a violent wind storm constituting an act of God."[12]

6. Plaintiffs respond by arguing that, although the section of Mr. Hucker's report containing his opinions does not specifically state that Rickerman's VTA breached the applicable duty of care, the rest of Mr. Hucker's report, read as a whole, supports that conclusion by identifying a number of instances in which Rickerman's VTA was inadequate in relation to generally acceptable arboricultural practices.[13] Plaintiffs also argue that the available evidence supports a permissible inference of "but for" causation because Mrs. Schafer's deposition testimony indicates that, had she been fully and adequately informed of the danger posed by the tree, she would have asked for the tree to be removed. Logically then, if the tree had been removed, it could not have fallen on Plaintiff.[14] Finally, Plaintiffs argue that the incident cannot be called an "act of God," which Rickerman defines as "such inevitable accident as cannot be prevented by human care, skill or foresight."[15] Plaintiffs do not dispute that the tree was felled

[10] Def.'s Mot. for Summ. J., Ex. B, at 16.

[11] *Id.* at 3.

[12] *Id.*

[13] Pl.'s Resp. to Mot. for Summ. J. 2–3.

[14] *Id.* at 3.

[15] *Id.* at 4.

by a force of nature. However, it is Plaintiffs' argument that Mrs. Schafer hired Rickerman to "protect against such forces of nature" by the exercise of human care, skill, and foresight.[16]

7. Rickerman's argument that Mr. Hucker's report fails to establish a breach of the applicable standard of care does not merit serious consideration. Mr. Hucker's report details the elements of a standard VTA and explains what an adequate VTA of the grove of trees at the Schaefer property *should* have revealed about the subject tree. Mr. Hucker places this assessment in stark contrast to Rickerman's statement to Mrs. Schafer that he simply "saw no reason for concern."[17] The only logical conclusion that *any* person, lay or expert, can draw from this report is that Rickerman's VTA was inadequate.

8. Contrary to Rickerman's argument regarding causation, the conclusion that Mrs. Schafer would have removed the subject tree if Rickerman advised her that it posed a danger does not require "speculation," or an "assumption."[18] Mrs. Schafer's deposition testimony supports this conclusion quite clearly. In response to questioning about the reason Rickerman removed certain trees from her property after the first incident, in April 2006, Mrs. Schafer testified that, "[i]t must have been recommended, because I would have kept them up unless there were safety issues."[19] Mrs. Schafer also stated that she could not remember a time when she did not follow the advice of a tree specialist that a tree should be removed.[20] Furthermore, Rickerman admits candidly that Mrs. Schafer asked him to inspect the trees in the grove near the

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[16] *Id.*

[17] Def.'s Mot. for Summ. J., Ex. B, at 14–15.

[18] Def.'s Mot. for Summ. J. 3.

[19] Christine Schafer Dep., Mar. 14, 2011, at 54:21–55:8.

[20] *Id.* at 67:12–16.

driveway *for the express purpose of protecting against falling trees or branches*.[21] Mrs. Schafer's motivation in asking for the VTA, combined with her testimony, satisfies this Court that if Rickerman had warned Mrs. Schafer of the dangers posed by the subject tree, she would have asked Rickermen to remove it. The parties do not dispute that wind caused the tree to fall. Mrs. Schafer relied upon Rickerman's skill and experience for the very purpose of protecting against the effects of such high winds. It is certainly within the ken of the average lay person to understand that, if Rickerman had properly advised Mrs. Schafer of the dangers posed by the tree, she would have asked for the tree to be removed. Logically then, if the tree were removed, it could not have fallen upon and injured Plaintiff.

9. In the Court's judgment, Plaintiffs have propounded sufficient expert testimony on the issues of duty and breach, and further expert testimony is not required to assist the jury's determination of proximate cause. The substance of Rickerman's arguments for summary judgment amount to no more than an assertion that Mr. Hucker did not state his opinion in the proper terms, but this contention "exalts form over substance."[22] This Court has routinely held that such arguments are unavailing.[23] Summary judgment against Plaintiffs is, therefore, inappropriate.

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[21] *See* Richard Rickerman Dep., Mar. 16, 2011, at 18:7–12 ("She expressed concern for the condition or for—she asked whether or not the rest of the trees were in acceptable condition to paraphrase it. That's not exact words. Her concern was the condition of the trees in the grove."); *id.* at 18:21–23 ("She wanted me to look at the trees and let her know if there was any problems with the trees."); *id.* at 19:15–17 ("There was concern that—the tree had fallen and there was concern that another tree would fall."); *id.* at 20:2–4 ("It was her concern that—she wanted the trees looked at to make sure that there wouldn't be another issue with those trees."); *id.* at 20:7–10 ("She looked at—she said I'm worried that something else might happen.").

[22] *Drayton v. Price*, 2010 WL 154414, at *5 (Del. Super. Apr. 19, 2010).

[23] *See id.* ("The Supreme Court has previously held in a medical negligence case in which an expert did not express opinions in 'perfect legalese' that an expert need not utter 'magic words' and this Court must evaluate 'the substance of the proffered testimony as a whole . . . .'") (quoting *Barriocanal v. Gibbs*, 697 A.2d 1169, 1172–73 (Del. 1997)); *see also Pawtucket Mut. Ins. Co. v. J.B. Research, Inc.*, 2000 WL 1611079, at *2 (Del. Super. Aug. 25, 2000) ("Similarly, while experts must testify to within a reasonable degree of probability in their fields of expertise, [the argument that that particular language is necessary] is little more than a 'Gotcha!' . . . .").

10. Turning to Rickerman's second motion, Rickerman's primary argument for summary judgment against the Schafers is that they, as landowners of the property rented to Plaintiffs, owed a duty under Delaware law to keep their property in question in a safe condition for Plaintiffs' benefit.[24] This, Rickerman argues—without a citation to any legal authority—renders them "solely liable."[25] In response, Plaintiffs admit that they rented the property from the Schafers, but argue that Rickerman's argument "that this somehow renders the Schafers solely liable to the plaintiffs" is "twisted logic," and "is unfounded under the admitted factual circumstances of this case."[26] Plaintiffs argue that the Schafers undertook to discharge the duty they owed Plaintiffs by asking Rickerman to evaluate the trees in question, and they relied upon his skill and experience as a certified arborist in their determination of whether or not safety required the removal of additional trees from the grove.[27] Whether or not the Schafers owed Plaintiffs a duty does not automatically render them *solely* responsible for Plaintiff's injuries. Neither the law nor the facts support such a conclusion.

11. Furthermore, a review of the factual allegations in the parties' moving papers demonstrates disputed issues of material fact. For example, Rickerman's motion states that "there was no evidence of where the tree that fell in the spring of 06 had stood when Mr. Rickerman visually assessed the trees in the grove."[28] Plaintiffs' response points out that "while Mr. Rickerman may not have known the exact location of the tree that fell in the spring of 2006,

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[24] Def.'s Mot. for Summ. J. re: Third-Party Def. 3.

[25] *Id.*

[26] Pl.'s Resp. to Mot. for Summ. J. re: Third Party Def. 4.

[27] *See id.* ("Rickerman admits being asked to evaluate the subject grove of trees, a duty he undertook and, as explained by plaintiffs' expert, negligently performed. The Schafers relied upon Mr. Rickerman's evaluation that no other trees needed to be removed.").

[28] Def.'s Mot. for Summ. J. re: Third-Party Def. 2.

he was well aware it was in the grove of trees he had been asked to evaluate."[29] Mr. Rickerman's knowledge of a prior tree failure in the same grove as the tree that injured Plaintiff, and how that knowledge should have factored into his VTA, are central issues in this case that will have to be considered and weighed by the jury, rendering this case inappropriate for summary judgment.

12. For the foregoing reasons, Defendant Rickerman Tree Services, Inc.'s Motion for Summary Judgment, and Motion for Summary Judgment Re: Third-Party Defendants, are both **DENIED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve

[29] Pl.'s Resp. to Mot. for Summ. J. re: Third Party Def. 3 (citing Richard Rickerman Dep., March 16, 2011, at 17:17–20 ("Q. And what did she identify as the vicinity where the tree had fallen? A. The grove of trees next to the parking area next to the carriage house.")).