

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

BRIAN BURGE, as Guardian)
and Next Friend of)
EMILY A. BURGE, a minor child of)
MICHELLE SMITH, deceased.)

Plaintiffs,)

v.)

EDWARD ALLEN REISS, Jr.,)
)
Defendant.)

C.A. No.: 10C-03-152 FSS
E-FIELD

Submitted: July 26, 2010
Decided: October 29, 2010

Upon Defendant's Motion for Judgment on the Pleadings - *DENIED*

This negligence claim arises out of a tragic collision that set-off a string of events ending with Michelle Smith's death. Smith, a paramedic, was providing first aid to Edward Reiss, Jr., a drunk driver, as he lay on Route 13 after he negligently crashed his motorcycle. Another driver, Joseph Taye, Jr., an unlicensed, paraplegic who was using a stick to work the pedals, lost control of his car and killed Smith. The question here is whether the court can find as a matter of law that Taye's intervening negligence was unforeseeable so that it superseded Reiss's, thus breaking

the causal chain between Reiss's negligence and Smith's death. The court cannot hold as a matter of law that Taye's negligence relieved Reiss of liability.

I.

Based on the pleadings, it is taken that on December 20, 2008, around 9:50 p.m., Reiss was driving with a blood alcohol level of 0.14 on Route 13, a four lane, high-speed, divided highway, when he lost control of his motorcycle and crashed. Accordingly, Reiss was negligent *per se*.¹ Smith, a volunteer paramedic with the Delaware City Fire Company, arrived to help Reiss. An ambulance at the scene turned on its emergency lights, and a police car with its lights on, blocked part of the roadway at the scene. It is unknown if Smith responded with the ambulance, or whether she happened on the scene. But it appears from the pleadings that Smith was providing first aid to Reiss when Taye hit and killed her.

Taye was driving a car that was not properly equipped. Instead, he was using a wooden stick to manipulate the car's gas and brake pedals. He lost control. First, he crashed into the police car. Next, he hit Smith. The impact threw her into the air. Then, Taye fled. Two days later, Smith died. She is survived by her daughter, Burge, who brings this claim against Reiss. (It makes no difference here, but the court takes notice that Taye is in prison.)

¹ 21 Del. C. § 4177(a)(4) sets a person's blood alcohol content at 0.08.

II.

Reiss now asks the court to dismiss “for lack of proximate cause under [R]ule 12(c).” A Superior Court Civil Rule 12(c) motion for judgment on the pleadings is like a motion to dismiss “in that it admits, for the purpose of the motion, the allegations of the opposing party’s pleadings but contends that they are insufficient at law.”² It “presents a question of law and cannot be granted where the pleading raises any material issue of fact.”³

The issue is whether Taye’s intervening act of negligence was “entirely unforeseeable and extraordinarily negligent” as a matter of law. The foreseeability of an intervening act of negligence is usually reserved for the trier of fact. It is “[o]nly where there can be no reasonable difference of opinion as to the conclusion to be reached on such questions, should they be determined . . . as a matter of law.”⁴

III.

Reiss claims his negligence was a “prior and remote incident” that “cannot be the basis of an action pursuant to Smith’s damages.” Under the Rescue Doctrine, a person “who is injured in reasonably undertaking a necessary rescue, may

² *Fagnani v. Integrity Finance Corp.*, 167 A.2d 67, 77 (Del. Super. Nov. 30, 1960)

³ *Id.* at 75.

⁴ *Vadala v. Henkels & McCoy, Inc.*, 397 A.2d 1381, 1382 (Del. Super. 1979).

recover from the person whose negligence created the situation.”⁵ Then-judge Cardozo summed it up as, “Danger invites rescue.”⁶ As long as danger exists, it is foreseeable someone will try a rescue. Therefore, as long as Reiss lay on Route 13, he was potentially liable to whomever was injured trying to rescue him.

Reiss does not raise the Fireman’s Rule, which precludes paid first responders from recovering for injuries suffered while responding to emergencies created by someone’s negligence.⁷ Instead, Reiss argued it was “impossible for [him] to foresee the negligent acts of [Taye]” and “it was impossible to foresee the potential risk of injury that Smith ultimately faced when struck by [Taye’s] vehicle.”

Duphily v. Del. Elec. Coop., Inc., explains when a third party’s negligence relieves the original tortfeasor of liability.

An intervening cause is one which comes into active operation in producing the injury *subsequent* to the negligence of the defendant. The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct. This Court has long recognized that there may be more than one proximate cause of an injury. In order to break the causal chain, the intervening cause must also be

⁵ *Schwartzmann v. Del. Coach Co.*, 264 A.2d 519, 520 (Del. Super. 1970).

⁶ *Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921).

⁷ *Carpenter v. O’Day*, 562 A.2d 595 (Del. Super. 1988), *aff’d*, 553 A.2d 638 (Del. 1988) (TABLE).

a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor.⁸

In short, a tortfeasor's liability, despite another person's subsequent negligence, depends on whether the subsequent negligence was reasonably foreseeable.

"A foreseeable event is one where the defendant should have recognized the *risk* under the circumstances."⁹ As the Supreme Court of Delaware has explained, "[i]t is irrelevant whether the particular circumstances were foreseeable."¹⁰ Reiss conflates the particular circumstances of Taye's negligence – driving a car with a wooden stick at highway speed – with the risk that a first responder would be struck by an out-of-control car.

The question is not, as Reiss asks, whether "[i]t would be unreasonable to maintain that [he] should have foreseen a non-licensed paraplegic operating a vehicle with a wooden stick, passing a fire truck with its emergency lights flashing and slamming into a police car." The question is: Was it reasonably foreseeable that,

⁸ *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995) (citations omitted) (emphasis in original) (*Duphily I*).

⁹ *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1209 (Del. 1997) (emphasis added) (*Duphily II*); see also *McKeon v. Goldstein*, 164 A.2d 260 (Del. 1960) (stating "*The test is whether or not the negligence . . . under the circumstances was something which should have been reasonably foreseeable or reasonably anticipated . . .*").

¹⁰ *Del. Elec. Coop., Inc. v. Pitts*, 1993 WL 445474, at *2 (Del. 1993) (TABLE).

under the circumstances, another driver, for whatever reason, would not safely steer by the collision?

The court cannot conclude that the event that caused Smith's fatal injuries was unforeseeable so that, as a matter of law, Reiss is not liable. In *Duphily*, a case involving unusual circumstances, plaintiff was shocked when he grabbed a power line while standing on top of a moving "double-wide."¹¹ The Court approved jury instructions providing "it is not necessary . . . to foresee . . . anybody would be standing on top of a mobile home . . . [I]t's merely enough that injury from shock was foreseeable."¹² The Court concluded the defendant power company could not "reasonably argue . . . that backing a mobile home into a mobile home park is unforeseeable."¹³

It can be said that the particular circumstances of Taye's negligence, like the circumstances in *Duphily*, were bizarre and unusual. But, that does not mean the event, Taye's inability to safely steer by a collision, was unforeseeable. Smith was fatally injured when Taye hit her with his car while she was helping Reiss, who was lying on a four-lane, divided highway, after he crashed his motorcycle.

¹¹ *Duphily II*, 703 A.2d 1202.

¹² *Id.* at 703 A.2d at 1210, FN 10.

¹³ *Id.*

It is important to note the court is not saying Reiss is liable because Taye's negligence was reasonably foreseeable. Rather, the court is saying the occurrence of Taye's negligence was not unforeseeable as a matter of law so that it broke the causal chain and relieved Reiss of liability. The jury will have to decide whether Taye's negligence was reasonably foreseeable.

IV.

For the foregoing reasons, Defendant's motion for judgment on the pleadings is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary (Civil)
Nicholas E. Skiles, Esquire
Timothy E. Lengkeek, Esquire