IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
NEW CASTLE COUNTY

HARMON R. CAREY,	)	
	)	
Plaintiff Below/Appellant	)	
	)	
v.	)	**C.A. No: 2007-12-641**
	)	
GUY A. DISABATINO & ASSOCIATES, and GUY A. DISABATINO	)	
	)	
Defendant Below/Appellees	)	

Harmon R. Carey
2018 Silverside Rd.
Wilmington, DE 19810
Plaintiff Below/Appellant, Pro Se

Andrea C. Panico, Esquire
1010 North Bancroft Parkway, Suite 22
Wilmington, DE 19805
Attorney for Defendants Below/Appellees

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO DISMISS

Date Submitted: May 26, 2009
Date Decided: June 5, 2009

Trial in the above-captioned matter took place on May 26, 2009. The instant action is an *appeal de novo* debt/trial action brought pursuant to 10 *Del. C.* §9570 *et seq.* After Plaintiff rested his case, defense Moved to Dismiss (the "Motion") while reserving the right to present its case-in-chief should the Court deny the Motion.[1] Following oral argument on the Motion, the Court reserved decision. This is the Court's Final Decision and Order.

I. Facts

Following the trial and receipt of evidence,[2] the Court finds the relevant facts as follows:

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[1] *See, CCP Civ.R.* 41(b).
[2] At trial photographs of the property including trees and shrubs at 2018 Silverside Rd. produced by Carey were moved into evidence as Plaintiff's Exhibit No. 1.

In the spring of 2007, Defendant Below/Appellee Guy A. Disabatino & Associates ("DiSabatino & Associates") installed a driveway ("the driveway") on the lot of land owned by the residents at 2014 Silverside Rd., Wilmington, Delaware. The Court notes Guy A. DiSabatino ("Guy A. DiSabatino") is sued in his individual capacity. However, as will be noted below, no trial testimony or documentary evidence was presented to substantiate any claim against Guy A. DiSabatino individually and he is summarily dismissed as a party defendant for these reasons. One of the properties contiguous to that lot was 2018 Silverside Rd., Wilmington, DE ("2018 Silverside Rd."), was owned by the Plaintiff Below/Appellant Harmon R. Carey ("Carey"). Carey has resided at this address since 1975. Carey owned a number of trees and shrubs on his adjoining property, including a tulip tree, a holly tree, an elm tree and yews. Subsequent to the construction of the driveway, the tulip tree, the holly tree, and the yews died which Carey attributes to the work performed on the adjoining lot by co-defendants.[3]

Carey contended at trial that the construction of the driveway by co-defendants caused his trees and shrubs to die. Carey testified that during construction he was approached by DiSabatino & Associates regarding the possibility of using his property at 2018 Silverside Rd. as a "staging ground" for the work to be done on the adjoining lot. Carey claims that he granted permission to DiSabatino & Associates with the provision that his property not be damaged. Carey further testified at trial that DiSabatino & Associates drove heavy equipment onto his property to clear shrubbery from 2014 Silverside Rd., and that these actions damaged the root system of his trees, notably the tulip and holly trees, causing them to die. Further, Carey alleged at trial that DiSabatino

[3] As will be discussed below, the Court construes Carey's complaint as a negligence action.

& Associates used a backhoe[4] to clear top soil from an area where the driveway was to be installed, and in clearing the top soil damaged the root systems of Carey's trees and shrubs causing the soil to compress and water to accumulate at the base of the yews, killing them. Finally, after Carey noticed that his trees and shrubs were dying Carey contended DiSabatino & Associates regarding the damage, but that it denied any liability. Carey testified at trial that he estimated his actual damages for the trees was $20,000 but he requested only $10,000 at trial to be fair.

DiSabatino & Associates admitted in their pleadings that they constructed the driveway at 2014 Silverside Rd. However they deny that they approached Carey about the use of the adjoining lot as a staging ground, or that it was used in such manner. Further, DiSabatino & Associates deny any responsibility for causing the damage to the trees or shrubs on Carey's property during the construction of the driveway, or that they were contacted by Carey regarding any subsequent problems with his trees.

II. Procedural History

Carey originally filed a debt action in the Justice of Peace Court No. 13. Trial was scheduled for December 12, 2007. On December 11, 2007, Carey requested a continuance and delivered a copy of a continuance report to DiSabatino & Associates, alleging that his expert witness, Russell Carlson, an arborist who works for Tree Tech Consulting could not be present at the trial due to having to report to jury duty. Defense counsel opposed the request for continuance, so the trial was held on December 12, 2007 before Judge Rosalind Toulson. After Carey objected to the trial going forward and re-entered his request for continuance, Judge Toulson denied that request and held that

[4] A backhoe is a piece of excavating equipment typically consisting of a digging bucket on the end of a two-part articulated arm mounted on the front or back of a tractor.

Carey should have subpoenaed Mr. Carlson. Judge Toulson entered judgment in favor of DiSabatino & Associates in an Order following trial.

On December 28, 2007 Carey filed an appeal to this Court. Trial was set for November 25, 2008. On February 19, 2008 Carey filed a complaint *de novo* pursuant to 10 *Del.C.* §9570 *et* seq. in the Court of Common Pleas. On April 7, 2008 DiSabatino & Associates was served with a summons and Notice of Appeal. DiSabatino & Associates filed the Answer to the complaint on April 18, 2008. In his Pretrial Worksheet received by DiSabatino & Associates on November 5, 2008, Carey identified that he intended to have his expert witness, Russell Carlson again, testify at trial in his *de novo* appeal. DiSabatino & Associates objected to the second trail date in this Court pursuant to Court of Common Pleas Civil Rule 26,[5] as Carey failed to provide DiSabatino & Associates with an Expert Report by Mr. Carlson stating in pre-trial discovery.

Unable to contact Carey after receiving the Pretrial Worksheet, DiSabatino & Associates requested a Continuance of the trial date. The continuance was granted on November 20, 2008. Subsequently, trial was canceled, and the trial was referred to Mediation. Carey failed to appear at the mediation appointment set for January 28, 2009 and trial was set for a new date for May 26, 2009. According to co-defendants, as of May 19, 2009, Carey had again failed to produce any report from Mr. Carlson that set forth his opinions and the foundations of those opinions. DiSabatino & Associates subsequently filed a Motion in Limine to exclude Mr. Carlson's expert testimony pursuant to Court of Common Pleas Civil Rule 26. DiSabatino & Associates contended

[5] CCP Civ. R. 26(b)(4)(A), (2008) ("A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary on the grounds for each opinion.")

that they would be unable to adequately or properly prepare a defense and would be severely prejudiced at trial without being furnished such a report. A report was finally received by DiSabatino & Associates on the afternoon of May 22, 2009.

The morning of trial, this Court issued two oral bench rulings. First, this Court ruled that DiSabatino & Associates' Motion to Exclude the Expert's Report was denied because the issue was moot, as DiSabatino & Associates was now in possession of the report, albeit late. Second, Carey's Motion for Continuance was denied as it was noted that the Court had attempted to contact Carey for Mediation without avail; summons were issued on April 3, 2009 for the second trial date, and Carey had since November to timely subpoena or summon his expert witness and failed to formally retain that expert witness through either a financial agreement or formal contract.[6] Further, the Court noted that May 26, 2009 trial date was the mandatory and that the resources of the judicial system were twice committed for this particular trial, ruling that granting that Carey's Motion for Continuance would be an abuse of discretion. The matter then proceeded to trial.

After Plaintiff rested his case, defense counsel Moved to Dismiss while reserving the right to present its case should the Court deny its motion. The basis of defendant's Motion was that competent expert testimony was needed in the trail record to determine the applicable standard of care as to both the elements of causation and damages for Carey's complaint , and neither was set forth in the trial record.

[6] Care represented at trial that he did not know of his expert was dead or alive and has not discussed this trial date or properly served or subpoenaed his expert.

III. The Law

If a defendant wishes to effectuate a motion for dismissal then "[a]fter the plaintiff, in an action tried by the Court without a jury, has completed the presentation of plaintiff's evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."[7]

To recover on a claim of negligence in regards to the conduct of a professional, it is well established in Delaware law that "[a]s a general rule the standard of care applicable for a professional can only be established through expert testimony. An exception to the rule exists, however, when a professional's mistake is so apparent that a layman, exercising his common sense is perfectly competent to determine whether there was negligence."[8] As the Court noted more specifically in the *Abegglan* decision:

> "Delaware Rules of Evidence 702 provides that '[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.' However, there are some situations when expert testimony is required. In *Weaver v. Lukoff* the Superior Court stated that '[a]s a good rule the standard of care applicable to a professional can only be established through expert testimony. An exception to this rule exists, however when the mistake is so apparent that a layman exercising his common sense is perfectly competent to determine whether there is negligence.

[7] CCP Civ. R. 41(b), 2008.

[8] *Weaver v. Lukoff*, 1986 WL 17121 (Del. Supr.). See also, *Abegglan v. Berry Refrigeration, et. al.*, Del. Super., C.A. No. 03-08-061, Scott J. (Dec. 2, 2005) (Mem. Op.)(Expert testimony is necessary to establish negligence in regards to the proper procedures for repairing an ice machine), *Roberts v. Daystar Sills, Inc.*, Del. Super., C.A. No. 05C-04-189 CLS (Expert testimony is necessary to establish negligence in regards to a general contractor's routine practices observed on a closed construction site).

IV. Opinion and Order

The Court concludes that in the present case, a layman is not equipped with the expertise to determine what specific factors contributed to the death of wildlife such as trees and shrubs on plaintiff's property. Without an expert to testify as to the direct cause of death of the trees and shrubs the Court is left to speculate in determining whether DiSabatino & Associates exercised the proper standard of care in the construction of the driveway at 2014 Silverside Rd., or whether the defendant acted in a negligent manner and caused damage to Carey's property. Thus, as the purported mistake made by DiSabatino & Associates is not a mistake so apparent that a layman exercising his common sense would be able to determine if it defendant was negligent, in the absence of expert testimony as well as no causal connection can be established between the damages to Carey's property and DiSabatino & Associates conduct, finding of negligence by this Court would be mere speculation. As Carey has failed to produce an expert to offer such expertise, he has failed to establish a prima facie case of negligence. However, even if this Court were to conclude that expert testimony is not required in the instant record, or was not necessary and lay witness testimony was competent, this Court concludes plaintiff has failed to prove by a preponderance of the evidence both causation and damages.

If the expert testimony is required, which the Court so finds, the Court also finds that the trial testimony also did not consist of a *diminimus quantum* of evidence on the issue of damages, or causation.

For the foregoing reasons, the defendant's motion for dismissal is GRANTED. Each party shall bear their own costs.

IT IS SO ORDERED this 5th day of June, 2009

John K. Welch, Judge

Cc: Ms. LuAnn Smith, Civil Court Clerk