

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

MERLIN SMITH,	:	
	:	C.A. No: 09C-01-031 (RBY)
Plaintiff,	:	
	:	
v.	:	
	:	
FIRST STATE COMMUNITY	:	
ACTION AGENCY &	:	
LARRY JOHNSON,	:	
	:	
Defendants.	:	

Submitted: December 17, 2011

Decided: January 26, 2011

*Upon Consideration of Defendants’
Motion for Summary Judgment*

DENIED

OPINION AND ORDER

B. Brian Brittingham, Esq., and Douglas B. Catts, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiff.

Beth H. Christman, Esq., Casarino, Christman, Shalk, Ransom & Doss, P.A., Wilmington, Delaware for Defendants.

Young, J.

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SUMMARY

_____ This suit arises out of an August 22, 2007 incident in which a tree branch fell on Plaintiff Merlin Smith (“Smith”) while Smith was under the supervision of Defendant Larry Johnson, a volunteer for Defendant First State Community Action Agency (collectively, “First State”). First State has filed the instant Motion for Summary Judgment, arguing that Smith cannot establish negligence because First State either owed him no duty of care, or, if it did, did not breach it. Because genuine issues of material fact remain concerning whether the elements of negligence are satisfied, First State’s Motion for Summary Judgment is **DENIED**.

FACTS

_____ While incarcerated at Sussex Correctional Institute, Smith was selected to assist First State Community Action Agency in demolishing several motor homes on August 22, 2007.¹ Smith was among several prisoners chosen to perform work at the site that day.

Larry Johnson was a First State volunteer charged with overseeing the demolition of the motor homes. Shortly before the incident, Johnson instructed several prisoners, including Smith, to remove a tree branch that was lodged underneath a dumpster. After finding the prisoners unable to accomplish this task, Johnson ordered them to move away so that he could try to remove the branch with a backhoe.

¹ First State is a non-profit organization that assists in rebuilding local communities.

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Along with the other prisoners, Smith moved away from the branch. As Johnson operated the backhoe, the branch bent, slipped, and struck Smith. Smith then filed a claim of negligence against First State and Larry Johnson.

STANDARD OF REVIEW

In order to establish a negligence claim, a plaintiff must establish that “defendant owed plaintiff a duty of care; defendant breached that duty; and defendant’s breach was the proximate cause of plaintiff’s injury.”² The defendant is entitled to judgment as a matter of law if the plaintiff fails to establish a prima facie case of negligence, or under no reasonable view of the evidence could a jury find in favor the plaintiff.³ Disputed issues of foreseeability and proximate cause involve factual determinations that must be submitted to a jury.⁴

“To be held liable in negligence, a defendant must have been under a legal obligation—a duty—to protect the plaintiff from the risk of harm which caused his injuries.”⁵ The Delaware Supreme Court has recognized that “whether a duty exists is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined

² *New Haverford P’ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001).

³ *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983).

⁴ *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007).

⁵ *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002).

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by the court.”⁶ If no duty exists, “a trial court is authorized to grant judgment as a matter of law.”⁷

DISCUSSION

Typically of course, negligence issues will not evoke summary judgment conclusions, but will be submitted to the jury.⁸ It is only when the moving party establishes the absence of a genuine issue of any material fact respecting negligence that summary judgment may be entered.⁹ As the moving party, the burden rests with First State to produce evidence of necessary certitude negating Smith’s claim.¹⁰ The Court will not grant summary judgment, when, from the evidence produced, there is a reasonable indication that a material fact is in dispute.¹¹

First State claims that Smith cannot establish that Johnson owed a duty to Smith, because the danger was not foreseeable. First State asserts that this is so, because after the accident Smith stated that he did not anticipate the danger, and also indicated that no one expected the tree branch to fall in his direction. In the event that the Court were to find the existence of a legal duty, First State argues that it did not

⁶ *Id.* (internal quotations omitted).

⁷ *Id.* (citing Del. Super. Ct. Civ. R. 50).

⁸ *Jones v. Crawford*, 1 A.3d 299, 303 (Del. 2010).

⁹ *Lightburn v. Delaware Power & Light Co.*, 167 A.2d 64 (Del. Super., Dec. 22, 1960).

¹⁰ *Ebersole v. Lowengrub*, 4 Storey 463, 469 (Del. 1962).

¹¹ *Id.* at 469.

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breach that duty. First State's argument on this point is based entirely on Smith's testimony that "no one expected the danger" posed by the tree branch.

In deciding the question of whether a duty of care exists, the Court must determine whether "such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other. Otherwise put, was the interest of the plaintiff which has suffered invasion entitled to the legal protection at the hands of the defendant."¹² With respect to the establishment of a legal duty, Delaware follows the Restatement (Second) of Torts.¹³ Section 4 of the Restatement defines duty as follows:

The word "duty" ...denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause."¹⁴

The Restatement thus provides useful guidance by both "describing the requirement that action shall be taken for the protection of the interests of others" and "describ[ing] the requirement that the actor, if he acts at all, must exercise reasonable care to make his acts safe for others."¹⁵ The Restatement also notes that anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable

¹² *Shepard v. Reinoehl*, 830 A.2d 1235 (Del. Super. Ct., Sept. 6, 2002).

¹³ *Reidel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

¹⁴ Restatement (Second) of Torts Comment (b) to § 4.

¹⁵ Restatement (Second) of Torts § 302 cmt. b.

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person to protect those others against an unreasonable risk of harm arising out of the act.¹⁶

There is no merit in First State's argument that the facts and inferences compel the conclusion that no legal duty existed or that Smith's injury was not a reasonably foreseeable event. Smith has presented uncontradicted evidence that First State controlled the work site in question. A duty on First State may exist to ensure that the work site was reasonably safe and free of hazardous and unsafe conditions. Smith has also alleged that Johnson owed a duty to Smith and the other workers under his direction to exercise reasonable care while operating the backhoe. On these facts, Johnson acquires a duty of reasonable care, as well.

First State's argument that the accident was not foreseeable is similarly persuasive. "An event is foreseeable if a *defendant* should have recognized the risk of injury under the circumstances."¹⁷ Thus, First State's focus on Smith's testimony is misplaced. The true question is whether a reasonable person in Johnson's position should have recognized the risk, not whether Smith actually did recognize it. This is a question that only a jury can resolve.¹⁸

¹⁶ Restatement (Second) of Torts § 302 cmt. a.

¹⁷ *Delaware Electric Cooperative, Inc. v. Pitts*, 1993 WL 445474, at *4 (Del. 1993) (emphasis added).

¹⁸ *Rogers v. Delaware State University*, 905 A.2d 747 (Del. 2006).

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CONCLUSION

_____ The issues of both Defendants' alleged breach of this duty involve material, disputed facts which must be presented to a jury. Therefore, the Defendants' Motion for Summary Judgment is **DENIED**.

SO ORDERED this 26th day of January, 2011.

/s/ Robert B. Young

J.

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