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 June 12, 2024, for oral argument on the Motion for Summary Judgement, filed by Defendant Ronald W. Baney (hereinafter "Baney") on April 5, 2024, and the Second Motion for Summary Judgment filed by Defendant Gerald Kinley on April 19, 2024. The Court hereby issues the following OPINION and ORDER on those Motions.

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 alleges that Baney transported Miller to the property owned by Gerald Kinley and Debra Kinley, and that Baney agreed to assist in the removal of trees from that property. Miller claims that he requested Baney to act as the safety coordinator and spotter for Miller, and that Baney had failed to

advise Miller on how to safely avoid the falling tree. Miller further alleges that Baney failed to warn Miller the quality of the tree in question and the additional danger posed to Miller due to that quality.

At the January 9th, 2024, Defendants took the deposition of Miller (hereinafter the "Miller Deposition"). Generally speaking, Miller's testimony on certain key points varies from the claims alleged in the Complaints. Miller's deposition testimony reveals that 1) on page 33, Baney was present on the day of the tree-cutting incident, and Baney gave Miller a "thumbs up" before Miller started the chainsaw; 2) on page 48, when asked whether Miller can recall any conversation "where [Baney] was asked or directed to be a spotter or safety coordinator for the first tree," Miller responded in the negative; 3) on pages 51 and 52, when asked again whether Miller had any conversations with Baney—when Miller arrived at the Kinley residence—about Baney serving as the safety coordinator or spotter for the tree-cutting, Miller responded in the negative regarding the first tree, but Miller again noted that Miller "put [his] thumb up" after Baney positioned himself "in perfect view of [Miller]"; 4) on page 66, Miller again noted that Baney gave Miller "the thumbs up" while standing approximately 100 feet away; 5) on page 69, Miller noted, again, that Baney gave Miller "the thumbs up" before Miller "put the final cut in the tree"; 6) on page 100, Miller noted that Baney walked over with Miller and stood in "a work spot" ; 7) on page 98, when asked whether Miller ever told Baney that Baney was to be the spotter, Miller responded in the negative; and 8) on pages, 96, 97, 137 and 139, Miller noted that Baney never "verbally" articulated that Baney was acting as the safety coordinator and spotter for Miller. *Miller Deposition* at 33, 48, 51, 52, 66, 69, 96, 97, 100, 137, 139.

Defendants Gerald Kinley and Debra Kinley filed a motion for summary judgment on January 17, 2022. The Honorable Ryan M. Tira, in his Order of May 5, 2022, granted the motion with respect to Defendant Debra Kinley, and denied the motion with respect to Defendant Gerald Kinley. Defendants Ronald Baney and Gerald Kinley filed Motions for Summary Judgment on April 5 and April 19, 2024, which are now before this Court.

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)).

In the matter of *Accu-Weather, Inc. v. Prospect Commc'ns, Inc.*, our Superior Court described the proper 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:

A. Whether Defendant Ronald Baney is entitled to summary judgment on the claims asserted against him to docket 22-00349.

B. Whether Defendant Gerald Kinley is entitled to summary judgment on the claims asserted against him to docket 20-01214.

IV. Response:

A. Defendant Ronald Baney 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.

B. Defendant Gerald Kinley is not entitled to summary judgment, as explained by Judge Tira's Order of May 5, 2022.

V. Discussion:

Reviewing the record in the light most favorable to Miller, the Court finds that Defendant Ronald Baney 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. Simply stated, no reasonable jury could find by a preponderance of the evidence that, by giving Miller a "thumbs up" signal, Baney assumed a duty to Miller to ensure that Miller safely cut

the tree. Our Supreme Court, in *Althaus ex rel. Althaus v. Cohen*, opined the following regarding the element of duty in a claim of negligence:

> 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).”).

Reviewing the record in the light most favorable to Miller, the interaction between Miller and Baney on the day of the tree-cutting incident does not present a genuine issue of material fact as to a necessary element of the cause of action. Of the necessary elements of negligence, 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. Furthermore, because “[t]he existence of a duty is predicated upon the relationship between the parties at a specific point in time,” this Court must analyze the relationship between Miller and Baney at the time of the tree-cutting incident as alleged by Miller. 639 A.2d at 1217.

Utilizing our Supreme Court’s factor analysis of whether a duty exists, the record here shows that on “the relationship between the parties,” Miller and Baney were not in a relationship (special or otherwise), as contemplated by the *Althaus* Court, at the Kinley residence based on the record. 756 A.2d at 1169. There was no agreement—prior to (or during) the date of the tree-cutting incident—between Miller and Baney that Baney would serve as a spotter and/or safety coordinator at that specific point in time. *Miller Deposition* at 33, 48, 51, 52, 66, 69, 96, 97, 100, 137, 139. On “the social utility of the actor's conduct,” while being a spotter and/or safety coordinator would likely serve a social utility, the record indicates, again, that there was no agreement—prior to (or during) the date of the tree-cutting incident—between Miller and Baney that Baney would serve as a spotter and/or safety coordinator at that specific point in time. 756 A.2d at 1169; *Miller Deposition* at 33, 48, 51, 52, 66, 69, 96, 97, 100, 137, 139. On “the nature of the risk imposed and foreseeability of the harm incurred,” while there are generally risks—depending on various factors—in the cutting of trees and harm that could foreseeably occur in such an endeavor, the record indicates, again, that there was no agreement—prior to (or during) the date of the tree-cutting incident—between Miller and Baney that Baney would serve as a spotter and/or safety coordinator at that specific point in time for the cutting of those trees. 756 A.2d at 1169; *Miller Deposition* at 33, 48, 51, 52, 66, 69, 96, 97, 100, 137, 139. On “the consequences of imposing a duty upon the actor,” it is difficult to imagine that the *Althaus* Court

contemplated imposing a duty on an individual, such as Baney—who did not agree to serve as a spotter and/or safety coordinator at the specific point in time—and then holding this individual responsible for consequences that emanate from a role in which he or she did not agree to serve. 756 A.2d at 1169. Similarly, it is also it is difficult to imagine that our Supreme Court contemplated that the imposition of such a duty and burden served the broader "public interest." *Id.*

ORDER

AND NOW, this 18th day of June, 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 Ronald Baney for trial. For that reason, Baney's Motion for Summary Judgment is **GRANTED**. As explained within Judge Tira's Order of May 5, 2022, Gerald Kinley's Motion for Summary Judgement is **DENIED**.

By the Court,

____
William P. Carlucci, Judge

WPC/aml

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