

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JEAN-GILLES THIBAUT AND GLORIA
THIBAUT, HIS WIFE,

Appellants

v.

NANCY KERR,

Appellee

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 596 WDA 2017

Appeal from the Order Entered April 11, 2017
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD16-5536

BEFORE: BENDER, P.J.E., OLSON, J., and STABILE, J.

DISSENTING MEMORANDUM BY BENDER, P.J.E.: FILED: March 9, 2018

The Majority, relying on the Restatement (Second) of Torts § 303, determines that Nancy should have realized that walking toward the tree was likely to affect Jean-Gilles's standing on the ladder in such a manner as to create an unreasonable risk of harm to him. I disagree. Jean-Gilles described the incident as follows:

[Nancy's Attorney]: So Nancy comes into the backyard, she starts walking towards the tree?

[Jean-Gilles]: Uh-huh.

[Nancy's Attorney]: Right so far?

[Jean-Gilles]: Yeah.

[Nancy's Attorney]: Okay. And from your observation, she was maybe going to walk under the branch that you were cutting?

[Jean-Gilles]: Correct.

[Nancy's Attorney]: Okay.

[Jean-Gilles]: Uh-huh.

[Nancy's Attorney]: And when you saw her walking in that direction, you said something to her, like, Nancy, get away, or don't walk under the branch, something like that?

[Jean-Gilles]: That is when I motioned (indicating). I lost the balance myself because I was afraid the branch was going to fall on her head.

[Nancy's Attorney]: Okay. So while you were saying, Nancy, get away, or something like that you, you make a motion with [your] right hand, also?

[Jean-Gilles]: Yes, and this is why I lost -- I lost and I went back and (indicating)...[.]

[Nancy's Attorney]: Like when you were waving at Nancy, when you were waving her out of the way, how far away from you was she?

[Jean-Gilles]: She was about, I would say, 8 feet, 8 feet in the ball park.

Deposition of Jean-Gilles, filed 1/9/2017, at 18-19, 22-23.

Based on the foregoing, I do not believe that Nancy should have realized that, by starting to walk towards Jean-Gilles on the ladder and in the direction of the tree branch he was cutting, she would affect Jean-Gilles in such a way as to create an unreasonable risk of harm to him. Accordingly, I respectfully dissent.