IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAVIER QUEREGUAN, JOANNE A. QUEREGUAN, and AUREA E. QUEREGUAN,	)	
Plaintiffs,	)	
v.	)	C.A. No. 20298-MG
NEW CASTLE COUNTY, a political subdivision of the State of Delaware,	)	
Defendant/Third-Party Plaintiff,	)	
STATE OF DELAWARE,	)	
Third-Party Defendant.	)	

MASTER'S REPORT
(Motion of New Castle County for Summary Judgment)

Date Submitted: April 14, 2008
Final Report: April 22, 2008

Javier Quereguan, Joanne A. Quereguan, and Aurea E. Quereguan, Pro Se, Plaintiffs.

Eric L. Episcopo, Esquire and James A. Robb, Esquire, of New Castle County Law Department, Attorneys for New Castle County.

Laura L. Gerard, Esquire, of Department of Justice, Attorney for State of Delaware.

GLASSCOCK, Master

This is my report on New Castle County's Motion for Summary Judgment. This litigation involves a claim by the plaintiffs, Javier, Joanne and Aurea Quereguan, against defendant New Castle County (the "County") for nuisance or trespass. The County is the tenant of the former Absalom Jones School property (the "school property"). The plaintiffs' home and lot[1] is adjacent to the school property, and the school property is at a higher elevation than the plaintiffs' property. Sometime in the past, fill was added to the area of the school property adjacent to the plaintiffs' property, and held in place by a seven-foot-high retaining wall. That newly-leveled portion of the school property was used as a ball field. The retaining wall constitutes the boundary between the school property and the plaintiffs' property, and is separated from the plaintiffs' house by a small back yard.

According to the plaintiffs, water drains through the retaining wall and onto their property, resulting in property damage and personal injury.

Standard

Summary judgment will be entered where no genuine issue of material fact exists and the record demonstrates that the moving party is entitled to judgment as a matter of law. Chancery Court Rules, Rule 56; Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991). In considering a motion for summary judgment, I must view the facts in the light

[1]I assume for purposes of this motion that the plaintiffs' property is owned by Joanne and Javier Quereguan, by the entireties.

most favorable to the non-moving party, here the plaintiffs. Acro Extrusion Corp. v. Cunningham, Del. Supr., 810 A.2d 345, 347 (2002).

Discussion

1) *Law of the Case Doctrine.*

By prior opinion in this case, the presiding Vice Chancellor found that the claims of the plaintiffs were subject to the "natural flow of water" and "reasonable use"defenses: that is, that a landowner is not liable for the natural flow of water from his land onto the land of his neighbor, and that he may make reasonable use of his property, altering the natural flow, where such uses or improvements do not unreasonably burden the neighbor's interest. Quereguan v. New Castle County, Del. Ch., Parsons, V.C., No. 20298 (September 28, 2004)(Letter Order) at 4, *citing* Welden Farms Inc. v. Glassman, Del. Supr., 414 A.2d 500, 505 (1980). Those determinations are the law of this case. In the decision cited above, the Vice Chancellor dismissed a claim by the plaintiff[2] against a former owner of the school property, Red Clay School District (the "School District"). The Court noted that the complaint failed to allege an artificial condition unnaturally altering the flow of water in a manner that was unreasonable. For that reason, the Court dismissed the complaint against the School District, without prejudice and with leave to

[2]Plaintiff Javier Quereguan was the sole plaintiff at that time.

amend the complaint within 30 days. Id. Mr. Quereguan did not amend the complaint as permitted, however.

The County notes that the plaintiffs have failed to amend the complaint to contain the missing allegation, and argues that the same rationale under which the School District prevailed must apply to the plaintiffs' complaint against the County under the law of the case doctrine. The County asserts, therefore, that the complaint must be dismissed for failure to state a claim upon which relief can be granted. It is true that the natural flow/reasonable use defenses apply to the County's use of the school property, under the doctrine of law of the case. It is also true that the plaintiffs have failed to amend their complaint to allege an artificial condition causing damage, against either the County or the School District. However, the Vice Chancellor's decision was rendered four years ago. Had the County moved at that time to dismiss based on the same rationale by which the Court dismissed the School District, a dismissal may have been appropriate. In the intervening four years, the plaintiffs have hired an engineer, whose report indicates that he will testify that the fill placed on the school property, together with the retaining wall which holds the fill in place, serve to contain ground water above the natural ground level, and that the resulting hydrostatic pressure causes the water to spring through cracks in the retaining wall onto the plaintiffs' property, rather than percolating naturally through the various properties adjacent to and down-flow from the school property. Unlike the situation confronted by the Vice Chancellor in 2004, there is, therefore, a basis for

liability here. While it is true that the complaint was never amended to state this theory specifically, the theory of liability now advanced by the plaintiffs is no surprise to the County. Therefore, I am content to allow the complaint to conform to the evidence proffered, including the report of the plaintiffs' expert. Summary judgment based on the Court's September 28, 2004 Letter Order must be denied.

2) *The personal injury claims*.

The plaintiffs seek damages for personal injuries which they argue have resulted from their exposure to mold, which, they further argue, has resulted from the non-natural discharge of water onto their property from the school property. In order to prevail on these tort claims, the plaintiffs must demonstrate that the wrongful discharge of water was the proximate cause of their physical ailments. However, the plaintiffs have failed to allege specific facts or provide any evidence in discovery which would be sufficient to support a judgment. Fundamentally, they have failed to identify an expert or provide any expert opinion relating to the cause of their physical condition. Where, as here, the relationship between a medical condition and a wrongful act is not obvious to a lay person, expert testimony is required to establish proximate cause. E.g., Rayfield v. Power, Del. Supr., No. 434, 2003, Holland, J. (ORDER)(Dec. 2, 2003); *see* Brandt v. Rokeby Realty Co., Del. Super, no. 97C-10-132, Stokes, J. (Mem. Op.)(July 7, 2006)(discussing required quantum of expert testimony to establish proximate cause in case alleging that mold exposure resulted in physical injury). By prior Order of this

Court, the time for discovery has passed. The pretrial stipulation has been submitted. The plaintiffs have failed to identify a medical expert, or any other evidence on causation of physical injury, in discovery responses or via the pretrial stipulation. The plaintiffs have failed to answer the County's opening brief in support of its motion for summary judgment.[3] Because all the evidence, considered in the light most favorable to the plaintiffs, is insufficient to support a judgment for personal injury, the County is entitled to summary judgment on the personal injury claims.[4]

Conclusion

For the reasons stated above, the County's motion for summary judgement is denied in part. The County's motion for partial summary judgment on the plaintiffs' personal injury claims is granted. Because the only claim of plaintiff Aurea Quereguan was for personal injury, her claim is dismissed. The property damage claim and claim for injunctive relief asserted by plaintiffs Javier Quereguan and Joanne Quereguan remain for trial.

/s/ *Sam Glasscock, III*
Master in Chancery

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[3]By Order, the plaintiffs' answering brief in opposition to the County's opening brief in support of its motion for summary judgment on issues of liability was to have been filed by April 14, 2008.

[4] Because I reach this decision, I need not address the alternate ground, based on the statute of limitations, raised by the County in support of its motion to dismiss the personal injury claims.