VERMONT SUPREME COURT
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Case No. 2021-144

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

JANUARY TERM, 2022

Town of Rutland* v. F.A.S. Trucking, Inc. et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	CASE NO. 577-10-18 Rdcv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

In this negligence case, plaintiff, the Town of Rutland, appeals from the civil division's orders granting summary judgment to defendants FAS Trucking, Inc. and RA Filskov & Sons, Inc. and denying the Town's motion to amend its complaint and join Vermont Railway, Inc. as a defendant. We affirm.

In October 2018, the Town filed a complaint against RA Filskov alleging, in relevant part, as follows. RA Filskov is a construction contractor that specializes in railroad projects. Vermont Railway operates railroads on land owned by the State of Vermont, and it leases railroad rights-of-way from the State. Under terms of various lease and license agreements, the Town maintains water and sewer lines along Vermont Railway rail lines, as well as a manhole providing access to the sewer system. In 2016 RA Filskov constructed a railroad spur pursuant to a contract with Vermont Railway. In the course of this construction, RA Filskov negligently buried the Town's sewer manhole with stone aggregate. As a result, the Town suffered harm because it could no longer access its sewer system and the increased vibration from railroad traffic placed the water and sewer lines in imminent risk of failure.[1]

The Town later amended its complaint to add Filskov Brothers, Inc. as a defendant. The substantive allegations remained effectively the same, but the Town now averred that one or both

[1] The Town's complaint also alleged RA Filskov "wrongfully interfered with the Town's property rights, including without limitation, the right of access" to the Town's water and sewer lines. To the extent that the Town attempted to raise claims other than negligence in its complaint, it did not pursue them below and does not address them on appeal.

defendants buried the manhole.[2] In December 2018, the Town amended its complaint a second time to add FAS Trucking as a defendant. Again, the substantive allegations did not change, but the Town now claimed that one or more defendants buried the manhole. Later in December 2018, the Town filed a notice of dismissal of RA Filskov without prejudice.

In July 2019, FAS Trucking moved to dismiss the Town's complaint for failure to join Vermont Railway as a necessary party. The Town opposed this motion, and the court denied it. FAS Trucking subsequently filed a third-party complaint against Vermont Railway seeking indemnification under the terms of their construction contract. Vermont Railway, in turn, pleaded a counterclaim against the Town for indemnification under the terms of their agreements, in the event Vermont Railway was required to indemnify FAS Trucking.

The Town moved to dismiss FAS Trucking's third-party complaint against Vermont Railway, arguing that it deliberately did not sue Vermont Railway and that allowing FAS Trucking to bring Vermont Railway into this case would interfere with the Town's strategic litigation decisions and unnecessarily complicate the case. The court denied the Town's motion, and Vermont Railway remained in the case as a third-party defendant.

Following further discovery, in April 2020, the Town successfully moved to reinstate RA Filskov as a defendant. RA Filskov filed a cross-claim against Vermont Railway for indemnification.

In June 2020, FAS Trucking moved for summary judgment, arguing there was insufficient evidence to show it played any role in the allegedly negligent acts or that the Town suffered any injury to its water or sewer systems. The Town sought and the court granted an extension of time for the Town's responsive memorandum to allow the Town additional time to conduct discovery. Ultimately on January 5, 2021, the court granted summary judgment in favor of FAS Trucking. It agreed with FAS Trucking regarding causation and did not reach the issue of damages.

Meanwhile, on the date of oral argument for FAS Trucking's motion for summary judgment, the Town had moved to amend its complaint to add Vermont Railway as a defendant. The proposed amended complaint sought an injunction against Vermont Railway to move the railway spur to uncover the manhole. In its motion, the Town reasoned that if the court found it had not been harmed yet but would be harmed in the future, there would be no adequate remedy at law, so the Town should be entitled to equitable relief in the alternative.

On January 21, 2021, RA Filskov moved for summary judgment. Like FAS Trucking, it argued the Town had not adduced sufficient evidence to show RA Filskov had played any role in covering the manhole or that the Town suffered or would suffer any damage to its water or sewer systems. The court concluded there was a triable issue of fact as to whether RA Filskov covered the manhole, but it granted summary judgment because the Town had failed to adduce sufficient evidence to withstand summary judgment as to actual damages.

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[2] It is not clear whether any discovery or motion practice was ever directed toward Filskov Brothers. As discussed below, the court eventually dismissed the Town's claims against Filskov Brothers and the Town has not appealed that dismissal, so we do not address it.

Following these summary judgment decisions, the court sought clarification from the parties as to the status of the claims against Filskov Brothers and whether its rulings had essentially disposed of the third-party claims, cross-claims, and counterclaims. The parties responded that all claims against all parties were ready for final judgment, and the court dismissed all the remaining claims against all parties with prejudice. No party has appealed those dismissals, and we do not address them.

In a separate order, the court denied the Town's motion to amend its complaint to seek injunctive relief against Vermont Railway. The court reasoned that the summary judgment decisions rendered this motion moot and that the motion was untimely. This appeal followed.

The Town argues the trial court erred in granting summary judgment to FAS Trucking and RA Filskov. We review the trial court's grant of a motion for summary judgment de novo. In re Mayo Health Care, Inc., 2003 VT 69, ¶ 3, 175 Vt. 605 (mem.). Summary judgment is appropriate when the moving party has demonstrated "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "In determining whether a genuine issue of material fact exists, all reasonable doubts and inferences are allowed to the nonmoving party." Mayo Health Care, 2003 VT 69, ¶ 3.

The elements of negligence are well-settled. A plaintiff must prove four elements:

> (1) that the plaintiff was owed a legal duty by the defendant; (2) that the defendant breached that duty; (3) that the defendant's conduct was the proximate cause of the plaintiff's injuries; and (4) that the plaintiff suffered actual damage as a result of the negligence.

Gilman v. Me. Mut. Fire Ins. Co., 2003 VT 55, ¶ 15, 175 Vt. 554 (mem.).

The Town contends that the trial court misconstrued the law and evidence regarding damages, and thereby erroneously granted summary judgment to RA Filskov. The Town's theory on damages was one of future harm: that vibrations from the rail traffic had increased the risk that the manhole and sewer lines underneath would fail.[3] The trial court concluded there was insufficient evidence for a jury to determine that future damage would likely occur as a result of rail traffic. The Town's evidence of damages consisted principally of the testimony of its expert witness, an engineer. The engineer testified that the vibrations from rail traffic could cause the sewer lines to collapse, but that "I cannot say it's likely to happen." He testified that pipes of this kind are known to collapse of their own accord. His strongest statement in favor of the Town was that the vibrations are "more likely than not to increase the potential for rupture and catastrophic failure." The court concluded this evidence would require the jury to speculate to find in favor of the Town on damages.

[3] Although the complaint also alleges injury related to the Town's inability to access its manhole, the Town does not raise this issue on appeal, so we do not address it.

We agree. Although future damages may be cognizable in a tort claim under certain circumstances, the abstract nature of the alleged injury does not alter a plaintiff's elementary burden: to prove "by a preponderance of the evidence, the extent and nature of their damages" and "that such damages are the direct, necessary, and probable result of defendant's negligent act." Langlois v. Town of Proctor, 2014 VT 130, ¶ 45, 198 Vt. 137 (quotation omitted) (emphasis added); see also Howley v. Kantor, 105 Vt. 128, 133 (1933) (explaining that evidence supporting future damages for negligence claim "must be of such a character that the jury can find that there is a reasonable certainty or a reasonable probability that the apprehended future consequences will ensue from the original injury" and "[c]onsequences which are contingent, speculative, or merely possible are not entitled to consideration in ascertaining the damages"). The Town's evidence was simply insufficient to go to a jury. Even if the jury were to credit all of the Town's expert's opinions and discredit any countervailing evidence, it could not conclude without speculation that the covered manhole would probably result in damage to the septic system. The jury could at best conclude that covering the manhole more likely than not increased the potential for system failure by some unknown degree. The trial court correctly concluded there was no triable issue of fact as to damages.

To support its claim of error, the Town cites to the Restatement as well as two out-of-state cases. These sources of law, though not binding, nevertheless bolster the trial court's conclusions. The Restatement defines "physical harm" to include "the physical impairment . . . of real property or tangible personal property." Restatement (Third) of Torts: Phys. & Emot. Harm § 4 (2010). It explains that "any level of physical impairment is sufficient for liability; no minimum amount of physical harm is required. Thus any detrimental change in the physical condition of . . . property counts as a harmful impairment; there is no requirement that the detriment be major." Id. cmt. c. Although the Town can point to a technical change—vibrations over its manhole—there is insufficient evidence to show the change was or would be detrimental. As the Restatement notes, evidence of physical harm "requires more than simply a change in the condition of the plaintiff's body or property; that change must be detrimental." Id. Under the Town's theory, every pedestrian who walks over a manhole could be liable for negligence by virtue of having altered the physical state of the sewer system and increased to some unknown degree the possibility of a crack or break in the septic system. This would be an absurd result. The Town's argument stretches our law on tort damages beyond its breaking point.

The two out-of-state cases that the Town cites align with the Restatement. In Brafford v. Susquehanna Corp., 586 F. Supp. 14 (D. Colo. 1984), the plaintiffs alleged that radiation exposure had increased their risk of cancer and caused chromosomal damage. The district court's analysis focused on the present chromosomal injury rather than the risk of future harm, so the case is of little utility here. Nevertheless, the district court found a triable issue of fact as to damages based on evidence stronger than the Town has adduced in this case. As the district court explained, "plaintiffs have produced experts of national renown who express their opinion that the extent of subcellular damage resulting to [the] plaintiffs because of their exposure to the radiation constitutes a present physical injury." Id. at 17. Even assuming for the sake of argument that injury principles from cellular radiation cases could be applicable to property damage cases, the Town's evidence here supported only speculative injury whereas the Brafford plaintiffs' experts opined that an injury had already occurred.

In Swank Enterprises, Inc. v. All Purpose Services, Ltd., 2007 MT 57, ¶¶ 18-19, 154 P.3d 52, the court considered whether the application of improper paint to the tanks and pipes of a city's water treatment plant resulted in "physical injury" within the meaning of the city's insurance policy. The Montana court held "that the term 'physical injury' refers to a physical and material alteration resulting in a detriment." Id. ¶ 18. It concluded that a detriment had occurred because the improper paint did not sufficiently protect the pipes and tanks and thereby reduced their value. No such evidence was adduced by the Town here. Thus, to the extent Swank's analysis of insurance terminology has any bearing on this Court's standard of "actual damage" in tort cases, Gilman, 2003 VT 55, ¶ 15, we agree with the trial court's conclusion that there was insufficient evidence for a jury to determine that the rail spur and covered manhole would probably cause damage to the Town's sewer system.

Although the trial court did not reach the element of damages with respect to FAS Trucking because it had first found causation wanting, our holding regarding damages applies equally to all defendants. The Town did not allege any different type of harm caused by each defendant; it averred that one or more defendants were liable in negligence for the same alleged damage to the Town's water and sewer systems. Thus, we affirm the trial court's grant of summary judgment to FAS Trucking on the basis that the Town did not put forth sufficient evidence for a jury to find in its favor on the element of damages. See State v. VanBuren, 2018 VT 95, ¶ 70, 210 Vt. 293 ("This Court may affirm the trial court's judgment on any basis, even if not relied upon by the trial court or briefed by the parties.").

Even if we had not affirmed on damages, however, we would affirm the grant of summary judgment to FAS Trucking for the same reason as the trial court. With respect to causation:

> The plaintiff bears the burden of producing evidence sufficient for a reasonable jury to conclude that the defendant's negligent action or omission caused the plaintiff harm. Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise or suspicion, is an insufficient foundation for a verdict, and thus where the jury could only find for the plaintiff by relying on speculation, the defendant is entitled to judgment.

Bernasconi v. City of Barre, 2019 VT 6, ¶ 11, 209 Vt. 419 (quotation and citation omitted).

FAS Trucking asserted that its role with regard to the rail spur was limited to laying rail track on a bed already prepared by others, that it was not aware of a manhole under the bed, and that, in any event, it stopped laying rail short of where the manhole is located because a pile of rocks was blocking its way. The Town did not present evidence to contradict these assertions. Instead, it proffered evidence that, prior to construction of the rail spur, FAS Trucking removed rail siding of the "Qualitad" track, which was adjacent to but separate from the rail spur that covered the manhole. The Town also relied on an invoice which stated that FAS Trucking "pulled the rest of the Qualitade [sic] switch apart and graded out track bed." Though its argument is not clear, the Town seems to suggest that a jury could infer from this evidence that when grading out the Qualitad track bed, FAS Trucking spread some material onto the nearby manhole. In its appellate brief, the Town does not point to evidence of exactly how far away the

Qualitad track was from the manhole or the rail spur; it asserts merely that FAS Trucking "worked in the area" of the manhole. The Town's evidence is too thin. Though it may have been possible for FAS Trucking's work in the Qualitad area to have spilled over to the nearby manhole, the vague invoice proffered by the Town "raises a mere conjecture" that that is what happened. Id. We agree with the trial court that the Town failed to establish a genuine issue of material fact that FAS Trucking covered the manhole, and this was fatal to its negligence claim.

Finally, the Town argues the trial court erred in denying its motion to amend its complaint to add Vermont Railway as a defendant. We review the trial court's ruling on a motion to amend the complaint for abuse of discretion. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 4, 184 Vt. 1.

As explained in its motion to amend, the Town sought to add Vermont Railway as a defendant for the purpose of obtaining an injunction to move the rail spur. The proposed amended complaint did not assert a different theory of the case or separate type of injury caused by Vermont Railway. An injunction is not a standalone claim. It is a form of relief which may be available if a plaintiff prevails on its underlying claim and demonstrates a "clear" right to this extraordinary remedy. See Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 212 (2000). An injunction "may issue only in cases presenting some acknowledged and well[-]defined ground of equity jurisdiction, as when it is necessary to prevent irreparable injury or a multiplicity of suits." Vt. Div. of State Bldgs. v. Town of Castleton Bd. of Adjustment, 138 Vt. 250, 256 (1980); see also Fenwick v. City of Burlington, 167 Vt. 425, 431 (1997) (explaining that, in determining whether injunction is appropriate, trial court should consider "the relative injury sought to be cured as compared with the hardship of injunctive relief" (emphasis added) (quoting Thompson v. Smith, 119 Vt. 488, 509 (1957))). Here the Town seeks an injunction to prevent future alleged injury, which we have already held it failed to establish. Because the Town would not be able to support a negligence claim against Vermont Railway for want of actual damages, it would not be entitled to any form of relief, whether equitable or legal. The trial court thus acted within its discretion to deny the Town's motion to amend.[4] Although the court denied the motion as moot, we consider it to have been futile. See Vasseur v. State, 2021 VT 53, ¶ 7 ("Amendment is futile if the amended complaint cannot withstand a motion to dismiss.").

Affirmed.

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[4] Though we need not consider timeliness, we note that the Town waited to file its motion to amend its complaint seeking an injunction against Vermont Railway until the date of oral argument for the last summary judgment motion in the case, well beyond the scheduling order deadline and over seven months after the deadlines set in the scheduling order for pretrial motions and trial readiness. And the Town had twice previously opposed Vermont Railway's entrance into the case. There is no question that the Town could have sued Vermont Railway and sought an injunction from the outset. Under such circumstances, the prejudice arising from such a lengthy delay is apparent. The trial court "has discretion in administering [Vermont Rule of Civil Procedure 20] to ensure fairness to all the potential parties," Breslauer v. Fayston Sch. Dist., 163 Vt. 416, 428 (1995), and it need not grant leave to amend under Rule 15 unless "justice so requires," V.R.C.P. 15(a). The court here acted well within its discretion to deny the Town's motion as untimely.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Timothy B. Tomasi, Superior Judge,
Specially Assigned