NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Joanne R. Stover v. The Inn At The Ridge, et al.*, CL 2018-9697

Dear Counsel:

This matter came before the court on January 8, 2021 on the Demurrer of Third Party Defendant B&J Services, LLC ("B&J") to the Third Party Complaint of Third Party Plaintiff Town of Washington.

FACTUAL BACKGROUND

This case arises from an incident in which Joanne Stover ("Plaintiff") fell and was injured in the area of a driveway apron covering a culvert on the property of the White Moose Inn ("Inn") located in the Town of Washington,

OPINION LETTER

Virginia. The Inn had applied for a land use permit in November 2013 to install a driveway apron that would provide vehicular access over a storm pipe adjacent to the Inn's driveway and parking area. Am. Compl. ¶ 23. The project was subsequently performed by various contractors and subcontractors, including B&J, and completed in April 2014. *Id.* ¶ 26. In particular, B&J excavated portions of the driveway entrance and adjoining drainage ditch and sidewalk and installed a drainpipe in the drainage ditch at the driveway apron, which created a depression in the ground. *Id.* ¶¶ 85-86. B&J "then turned the work over to the paving contractor" to be finished. *Id.* ¶ 85. The paving contractor paved over the driveway apron and adjoining drainage ditch area. *Id.* ¶ 85. The Inn "self-managed the construction work." *Id.* ¶ 28 (internal quotation marks omitted).

On July 10, 2016, more than two years after the work was completed by the paving contractor, Plaintiff was a guest at the Inn and was told by an employee that she could walk near the project site to retrieve her vehicle from the parking area. *Id.* ¶¶ 34-35. The project site was obscured from Plaintiff's view by a wooden fence adjacent to the driveway apron. *Id.* ¶ 37. When Plaintiff reached the project site, she fell into the depression at the driveway apron and drainpipe, sustaining injuries to her left foot and ankle. *Id.*

PROCEDURAL BACKGROUND

Plaintiff's Amended Complaint, filed on January 31, 2020, contains separate claims of negligence against B&J and the Town of Washington. B&J filed a Demurrer to Plaintiff's Amended Complaint on February 12, 2020.

On August 28, 2020, the Town of Washington filed a cross-claim for contribution and equitable indemnification against B&J. On September 10, 2020, B&J filed a Demurrer to the Town of Washington's cross-claim.

At a hearing on October 9, 2020, the court sustained B&J's Demurrer to Plaintiff's Amended Complaint with prejudice. The court also designated the Town of Washington's cross-claim against B&J as a third-party complaint and gave B&J time to file additional responsive pleadings. B&J filed an updated Demurrer to the Town of Washington's third-party complaint on October 27, 2020.

ANALYSIS

"The function of a demurrer is to test the legal sufficiency of the facts alleged." *Filak v. George*, 267 Va. 612, 617 (2004) (citations omitted). "A demurrer admits the truth of all facts alleged in a motion for judgment but does not admit the correctness of the pleader's conclusions of law." *Id.* (citations omitted).

I. The Order Sustaining B&J's Demurrer to Plaintiff's Amended Complaint With Prejudice

At the outset, the court believes it would be helpful to explain in greater detail the basis of the court's decision sustaining B&J's Demurrer to Plaintiff's Amended Complaint with prejudice.

It is well-established that the:

> elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach

> was the proximate cause of injury, resulting in damage to the plaintiff.

Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc., 271 Va. 206, 218 (2006) (citation omitted).

The court's focus will be on proximate cause, which is an "act or omission which, in natural and continuous sequence, *unbroken by an efficient intervening cause*, produces [an] event, and without which that event would not have occurred." *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 589 (2000) (emphasis added) (citations and internal quotation marks omitted). An intervening (or superseding) cause "constitutes a new effective cause and operates independently of any other act, *making it and it only the proximate cause of injury*." *Maroulis v. Elliott*, 207 Va. 503, 511 (1966) (emphasis added) (citation and internal quotation marks omitted). Further, although proximate cause is usually an issue decided by the finder of fact, it can be a question of law decided by the court "when reasonable minds could not differ." *Kimberlin v. P.M. Transport, Inc.*, 264 Va. 261, 266 (2002) (citations omitted). In the case at bar, proximate cause is a question of law to be decided by the court.

The *Restatement (Second) of Torts* explains that, ordinarily, "the failure of a third person to act to prevent harm to another threatened by [an] actor's negligent conduct is not a superseding cause." *Restatement (Second) of Torts* § 452(1).[1] There is, however, an exception:

> [w]here, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.

Id. § 452(2).

Various factors should inform a court's decision "that all duty and responsibility for the prevention of the harm has passed to the third person," including:

> the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations.

Id. § 452, Comment f.

If, after considering these factors:

> the court finds that full responsibility for control of the situation and prevention of the threatened harm has passed to the third person, his failure to act is then a superseding cause, which will relieve

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[1] In *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 131 (1980), the Court cited the *Restatement (Second) of Torts* with approval (for legal principles on intervening/superseding causes).

the original actor of liability.

Id.

Virginia case law is consistent with these provisions of the *Restatement*. For example, *Edgerton v. Norfolk S. Bus Corp.*, 187 Va. 642 (1948) held:

> Where a second tort-feasor becomes aware, or by the exercise of ordinary care should be aware, of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter by an independent act of negligence brings about an accident, the condition created by the first tort-feasor becomes merely a circumstance of the accident, but is not a proximate cause thereof. The original negligence of the first tort-feasor is legally insulated by the intervening independent negligence of the second tort-feasor, and the latter becomes the sole proximate cause of the accident.

187 Va. at 657-58 (1948) (quoting *Hubbard v. Murray*, 173 Va. 448, 455 (1939)) (internal quotation marks omitted).[2]

Without deciding whether B&J breached a legal duty when it performed its subcontract at the Inn, any duty it might have had to prevent harm to Plaintiff had shifted from B&J to another party at the time Plaintiff sustained her injuries. It is not necessary for the court to decide to which party the duty shifted. It was, however, the decision of this court in sustaining B&J's Demurrer to Plaintiff's Amended Complaint that, as a matter of law, it was no longer B&J's duty to prevent harm to Plaintiff at the time she sustained her injuries.

The court considered the factors in the *Restatement* in coming to this conclusion. First, any number of third parties were in a better position to prevent harm to Plaintiff because the project site on which B&J worked had been completed for over two years prior to Plaintiff sustaining her injuries. Second, a third party should have known whether the condition was dangerous after it had existed for over two years. Third, at least one third party had a special relationship with the Plaintiff that B&J lacked.[3] Finally, the passing of over two years from when B&J created the condition and when Plaintiff sustained her injuries is sufficient time for a third party's failure to prevent harm to Plaintiff to be a superseding cause.

In summary, it was the decision of this court in sustaining B&J's Demurrer to Plaintiff's Amended Complaint with prejudice that B&J's actions were not the proximate cause of Plaintiff's injury because the duty to prevent harm to Plaintiff at the time she sustained her injuries had shifted to another party and acted as a superseding cause that cut off B&J's liability.

II. Third-Party Contribution Claim

B&J argues that the Town of Washington failed to state a contribution claim

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[2] *See also Maroulis, supra*, 207 Va. at 510-11.

[3] As a guest staying at the Inn, Plaintiff was an invitee, and the Inn had a duty to "give notice or warning of an unsafe condition which [was] known to [it]." *See, e.g., Culpepper v. Neff*, 204 Va. 800, 804-05 (1964) (citations omitted).

against it because Plaintiff does not have an enforceable cause of action against B&J as evidenced by the court sustaining B&J's Demurrer to Plaintiff's Amended Complaint with prejudice. Dem. to Third-Party Compl. ¶ 8. The Town of Washington argues that a contribution claim is only unavailable if Plaintiff *never* had an enforceable cause of action against B&J, and the court's order regarding B&J's Demurrer to Plaintiff's Amended Complaint did not rule as such. Opp'n to Dem. at 3-5. B&J is correct and the Town of Washington is only partially correct.

In the first place, "if [a demurrer] is sustained it is a decision on the merits of the cause." *Griffin v. Griffin*, 183 Va. 443, 449 (1945). Thus, contrary to the Town of Washington's contention, the court did rule on whether Plaintiff had an enforceable cause of action against B&J.

Further, "before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought." *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 529 (2003) [hereinafter "*Pulte*"] (citation and internal quotation marks omitted). Accordingly, for contribution to lie:

> the injured party's cause of action against the third-party defendant need not be *presently* enforceable; it merely is necessary that the plaintiff, at *some time* in the past, have had an enforceable cause of action against the party from whom contribution is sought.

Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp., 234 Va. 54, 58 (1987) (emphasis in original) (citation omitted).

In other words:

> while contribution will lie if the injured party's cause of action is not presently enforceable but was enforceable at some time in the past, contribution is unavailable if the injured party "*never* had an enforceable cause of action against the target of the contribution claim."

Pulte, 265 Va. at 529 (emphasis in original) (citation omitted).

In *Pulte*, the Peckinpaughs, homeowners in Fairfax County, Virginia, filed a motion for judgment against Pulte Home Corporation ("Pulte"), the builder of their home, for damages allegedly caused by its use of a defective product and against the manufacturer of the defective product, Parex, Inc. ("Parex"). 265 Va. at 521. Pulte filed a cross-claim against Parex that included a contribution claim. *Id.* Parex filed demurrers to the Peckinpaugh's complaint and Pulte's cross-claim against it, and both demurrers were sustained. *Id.* at 522. Thereafter, Pulte settled the Peckinpaughs' claim against it. *Id.* Pulte then appealed the trial court's decision to sustain Parex's demurrer to Pulte's contribution cross-claim. *Id.* The Supreme Court of Virginia held that Pulte's contribution cross-claim against Parex could not lie because "[t]he trial court's action in sustaining Parex's demurrer to the Peckinpaughs' amended motion for judgment was tantamount to a holding that the Peckinpaughs *never* had an enforceable cause of action against Parex." *Id.* at 529-30 (emphasis in original).

The facts of the instant case are similar. Plaintiff filed a complaint

against B&J, the Town of Washington, and others. The Town of Washington filed a contribution cross-claim (now third-party claim) against B&J. B&J filed demurrers to Plaintiff's complaint and the Town of Washington's third-party claim. The court sustained B&J's demurrer to Plaintiff's complaint with prejudice because B&J was not the proximate cause of Plaintiff's injuries. Sustaining B&J's Demurrer to Plaintiff's Amended Complaint was thus "tantamount to a holding that [Plaintiff] *never* had an enforceable cause of action against [B&J]." *Id.* (emphasis in original). In other words, because B&J was not the proximate cause of Plaintiff's harm *at the time she sustained her injuries*, then Plaintiff never had a cause of action against B&J. The Town of Washington thus does not have a third-party contribution claim against B&J.

III. Third-Party Equitable Indemnification Claim

B&J argues that the prerequisite to an equitable indemnification claim (that its negligence caused Plaintiff's injury) does not exist in the instant case because of the court's order sustaining B&J's Demurrer to Plaintiff's Amended Complaint with prejudice. Dem. to Third-Party Compl. ¶ 14. The Town of Washington, however, argues that the court's order only ruled that "Plaintiff failed to state a cause of action against B&J," not that B&J was not negligent. Opp'n to Dem. at 3.

First, as discussed, *supra*, "if [a demurrer] is sustained it is a decision on the merits of the cause." *Griffin*, *supra*, 183 Va. at 449. Thus, contrary to the Town of Washington's contention, the court did rule on whether B&J was negligent.

With respect to the merits of the Town of Washington's argument, "[e]quitable indemnification arises when a party without personal fault, is nevertheless legally liable for damages caused by the negligence of another." *Carr v. Home Ins. Co.*, 250 Va. 427, 429 (1995). "A prerequisite to recovery based on equitable indemnification is the initial determination that the negligence of another person caused the damage." *Id.*

In *Carr*, an automobile accident occurred between Carr and two employees of Green Thumb Enterprises ("Green Thumb"). *Id.* at 428. Carr's liability insurance carrier denied coverage, so Green Thumb sought uninsured motorist coverage from its insurer, Home Insurance Company ("Home"). *Id.* Home settled with Green Thumb. *Id.* Home filed a motion for judgment against Carr alleging that Carr's negligence caused the accident. *Id.* Carr filed a plea of the statute of limitations. *Id.* at 428-29. Home filed an amended motion for judgment seeking recovery against Carr based on equitable indemnification. *Id.* at 429. The trial court denied Carr's plea and subsequently granted Home's motion for summary judgment against Carr. *Id.* Carr appealed, and the Supreme Court of Virginia held that the elements necessary to support equitable indemnification in favor of Home were not met because "at the time Home filed its motion for judgment, there had been no determination that Carr's actions were negligent or that her negligence caused the damages claimed by Green Thumb." *Id.*

The Supreme Court of Virginia ruled similarly in *Pulte*, *supra*. Pulte also brought an equitable indemnification cross-claim against Parex. 265 Va. at 521. The Court held that Pulte's equitable indemnification claim against Parex "cannot win under *Carr* because there has been no determination that any act or

omission of Parex caused the damage to the Peckinpaughs' house."[4] 265 Va. at 528-29.

The facts here are an even stronger case for the result in *Carr* and *Pulte*. Here, the court determined that B&J was not the proximate cause of Plaintiff's injury because the duty to prevent harm to Plaintiff had shifted to another party at the time Plaintiff sustained her injuries such that it became a superseding cause that cut off B&J's liability. In other words, there *has* been a determination that no act or omission of B&J caused Plaintiff's harm, unlike in *Carr* and *Pulte* where no such determination had been made. The Town of Washington thus does not have a third-party equitable indemnification claim against B&J because the prerequisite that the negligence of another person (*i.e.*, B&J) caused Plaintiff's injury has not been met.

CONCLUSION

For the reasons set forth, B&J's Demurrer to the Town of Washington's Third-Party Complaint is SUSTAINED WITH PREJUDICE.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

[4] *See also Rivanna Solid Waste Auth. v. Ven Der Linde*, No. 07-376, 2009 WL 7339892, at *3-*4 (Va. Cir. Ct. July 21, 2009) ("[A] mere allegation of negligence on the part of another party is not enough to establish a cause of action for indemnification").

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOANNE R. STOVER	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2018-9697
	)	
THE INN AT THE RIDGE, LLC, *et al.*	)	
	)	
Defendants	)	

ORDER

THIS MATTER came before the court on January 8, 2021 on the Demurrer of Third Party Defendant B&J Services, LLC ("B&J") to the Third Party Complaint of Third Party Plaintiff Town of Washington.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, it is hereby

ORDERED that B&J's Demurrer is SUSTAINED WITH PREJUDICE, and it is further

ORDERED that B&J is DISMISSED WITH PREJUDICE as a third party defendant.

ENTERED this 28th day of January, 2021.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

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