

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO)	
)	
Plaintiff,)	Civil No. 1:12-cv-00130-JD
)	
v.)	
)	
WRIGHT-PIERCE,)	
)	
Defendant.)	

**PLAINTIFF’S MOTION FOR JUDGMENT AS A MATTER OF LAW
PURSUANT TO RULE 50(a) AS TO DEFENDANT’S COMPARATIVE
FAULT AND MITIGATION DEFENSES**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) submits this Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(a) as to Defendant Wright-Pierce’s (“WP”) Affirmative Defenses of Comparative Fault and Mitigation. On April 1, 2014, this Court issued an Order requiring WP to prove each of these defenses at trial with expert opinion testimony. Doc. # 136 (the “Order”). At trial, WP presented no expert opinion testimony supporting the essential elements of these defenses. Because WP failed to elicit any expert opinion testimony in support of these defenses, judgment as a matter of law should enter in favor of Wolfeboro and against WP. Furthermore, the jury should not be instructed as to these defenses and there should be no reference to these defenses on the special jury verdict slip.

PROCEDURAL POSTURE

On or about March 18, 2014, Wolfeboro filed motions in limine seeking to strike WP’s Affirmative Defenses of Comparative Fault and Mitigation (collectively, Wolfeboro’s “Motions”). See Doc. # 91 and 92. On or about April 1, 2014, the Court denied Wolfeboro’s Motions; however, the Court held that “the defendant is put on notice that it will be required to prove its mitigation and comparative fault defenses with expert opinion evidence.” In the Order,

the Court noted that Wolfeboro was seeking a dispositive ruling on the merits of the mitigation and comparative fault defenses based on the record evidence. Order, Page 4. The Court stated that the merits could not be resolved in the procedural posture of the case at that time, but noted that Wolfeboro may file a motion pursuant to Fed. R. Civ. P. 50(a) if appropriate. Id. In light of this Court's requirement that WP provide expert opinion testimony as to these defenses and WP's failure to provide any such expert opinion testimony at trial necessary to prove WP's affirmative defenses, Wolfeboro has filed the instant Motion for Judgment as a Matter of Law Pursuant to Rule 50(a).

LEGAL STANDARD

Fed. R. Civ. P. 50(a) provides as follows:

(a) Judgment as a Matter of Law

(1) In General: If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) Resolve the issue against the party; and

(B) Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

"A district court 'is permitted' to grant a Rule 50(a) motion, before the case goes to the jury, when 'it concludes the evidence is legally insufficient.'" Energynorth Natural Gas, Inc., 452 F.3d 44, 50 (1st Cir. 2006) (citing Unitherm Food Sys., Inc., 546 U.S. at 405). As described below, the evidence presented at trial is legally insufficient to support WP's Comparative Fault and Mitigation Affirmative Defenses.

ARGUMENT

A. WP's Comparative Fault Defense Fails As A Matter of Law For Lack of Expert Opinion Testimony.

WP's Answer to the Amended Complaint sets forth the following affirmative defenses concerning Comparative Fault:

FIFTH AFFIRMATIVE DEFENSE: If the Plaintiff was damaged as alleged, which WP denies, then said damage resulted from the Plaintiff's own negligent conduct. Accordingly, the Plaintiff is barred from recovery or its recovery must be reduced proportionately to its contributory negligence.

SIXTH AFFIRMATIVE DEFENSE: If the Plaintiff was damaged as alleged, which WP denies, then said damage resulted from the acts and/or omissions of persons or entities over which WP had no control and for whose conduct WP is neither legally liable nor responsible.

TENTH AFFIRMATIVE DEFENSE: The Plaintiff's claims are barred because all of the Plaintiff's damages, if any, arise from subsequent events that did not arise from any actionable claims against WP.

ELEVENTH AFFIRMATIVE DEFENSE: If the Plaintiff was damaged as alleged, said damages were caused by the intervening and/or superseding acts of other parties for whom WP is not responsible.

1. Fifth Affirmative Defense (Contributory Negligence)

WP's Fifth Affirmative Defense alleges "contributory negligence." New Hampshire law, however, does not recognize contributory negligence as a bar to damages, it recognizes comparative fault and a potential reduction in damages based on apportionment. N.H. RSA 507:7-d; Townsend v. Legere, 141 N.H. 593, 594-95 (1997); Jenks v. N.H. Motor Speedway, 2012 DNH 6 (D.N.H. 2012) (applying New Hampshire law as to comparative fault). Thus, for the purposes of this Motion, Wolfeboro will assume WP is articulating an affirmative defense predicated on comparative fault.

RSA 507:7-d clearly states that "the burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such

allegation.” RSA 507:7-d; see also Goudreault v. Kleeman, 158 N.H. 236, 256 (2009) (for comparative fault, the “defendant carries the *burdens of production and persuasion*”) (emphasis added). A defendant asserting the defense of comparative fault bears the burden of proving “the existence or amount of fault attributable” to the plaintiff. RSA 507:7-d.

The applicability of the doctrine of comparative negligence is “triggered by a plaintiff’s negligence.” Lavoie v. Hollinracke, 127 N.H. 764, 769 (1986); Broughton v. Proulx, 152 N.H. 549, 558 (2005). To prevail on its comparative fault defense, WP must therefore prove (1) that Wolfeboro was negligent and (2) that such negligent conduct caused its injuries. Estate of Joshua v. State, 150 N.H. 405, 407 (2003). More specifically, WP must establish that Wolfeboro had a duty to act with reasonable care, and that Wolfeboro breached that duty resulting in harm. Id.

The New Hampshire Supreme Court has held that where “scientific issues would be beyond the capacity of men of common experience and knowledge to form a valid judgment by themselves . . . expert evidence [is] required to assist a jury in its decision.” Wood v. Public Serv. Co., 114 N.H. 182, 186 (1974). Thus, expert testimony is required whenever “the matter to be determined is so distinctly related to some science, profession, business or occupation as to be beyond the ken of average layman.” Lemay v. Burnett, 139 N.H. 633, 635-36 (1995) (affirming dismissal of claim that defendant had negligently designed a swimming pool for want of expert testimony).

As stated by the Court in the Order, WP is required to prove its comparative fault defense with expert opinion evidence:

The professional negligence claim and comparative fault defenses in this case implicate specialized engineering, geotechnical, hydrological, and other scientific and professional principles and knowledge that are far beyond the common understanding of lay persons. Therefore, to succeed on its comparative fault

defenses, Wright-Pierce will have to present expert opinion evidence to show that Wolfeboro was at fault and the amount of Wolfeboro's fault. Order, Page 7.

At trial, WP called three expert witnesses: (1) Mr. Richard Moore, a Civil Engineer at City Point Partners, (2) Mr. DiGenova, a Geotechnical Engineer at Haley & Aldrich ("H&A"), and (3) Mr. John Kastrinos, a Hydrogeologist at H&A. None of these expert witnesses offered any expert testimony establishing (1) that Wolfeboro owed a duty of care to WP, (2) the extent of any such duty, (3) breach of any such duty, or (4) causation as to harm. None of these essential elements for a negligence claim against Wolfeboro were addressed by WP's experts.

There was no expert testimony at trial that Wolfeboro's operation of the Site in March and April caused damage to the Site that would otherwise not have occurred at a different loading rate. There has been no expert opinion testimony at trial that the Site would not have failed even at a lower loading rate. In fact, the evidence at trial indicates that the Site continues to suffer damage and is not functioning as designed and intended at a flow of 150,000 gpd (25% of WP's design flow rate), suggesting that minimal flows could have resulted in similar breakouts and failures. In sum, there is no expert opinion testimony that Wolfeboro's operation of the RIB System was negligent or caused or contributed to damage to the Site that would otherwise not have occurred at lower loading rates.

To present the issue of comparative fault to a jury, the defendant must present tangible evidence of such fault. Townsend, 141 N.H. at 595. If reasonable jurors could only reach a decision on the issue "by conjecture, chance, or doubtful and unsatisfactory speculation, it is the duty of the trial court to withdraw the issue from the consideration of the jury." Id. In cases where "there is no expert testimony that could support an inference of causal negligence, there is no issue for the jury... 'Otherwise the jury would be deciding the case on conjecture rather than reason.'" Brann v. Exeter Clinic, 127 N.H. 155, 159 (N.H. 1985) citing Jutras v. Satters, 96 N.H.

300, 302 (1950) (finding that jurors did not possess “engineering knowledge,” and therefore lack of expert testimony as to contributory negligence defense preclude jury instruction as to comparative fault). Any allocation of fault to Wolfeboro on a negligence standard would be based on nothing more than unsubstantiated speculation and conjecture absent any expert opinion testimony. Brann v. Exeter Clinic, 127 N.H. at 159 (holding that lack of expert opinion as to the question of whether plaintiff’s delay in seeking medical treatment was in some measure a cause of his death was fatal to defendant’s comparative fault defense and stating “where there is no expert testimony that could support an inference of causal negligence, there is no issue for the jury”).

In the absence of any expert testimony from WP’s experts as to any of the essential elements of a negligence claim, judgment as a matter of law should enter in Wolfeboro’s favor as to WP’s Fifth Affirmative Defense.

2. Sixth Affirmative Defense (Fault of Others).

WP’s Sixth Affirmative Defense states that:

if the Plaintiff was damaged as alleged, which WP denies, then said damage resulted from the acts and/or omissions of persons or entities over which WP had no control and for whose conduct WP is neither legally liable nor responsible. See Answer to Amended Complaint.

WP has not alleged that any other party, other than Wolfeboro, caused or contributed to Wolfeboro’s damages and WP’s experts offer no opinion that any third party is responsible for Wolfeboro’s damages. Because any determination of Wolfeboro’s “fault” must be measured by the comparative fault standard (e.g. negligence), and because WP’s experts offered no expert opinion testimony as to any third party who is allegedly at fault, judgment should enter in Wolfeboro’s favor as to WP’s Sixth Affirmative Defense.

3. Tenth Affirmative Defense (Subsequent Events)

WP's Tenth Affirmative Defense states:

the Plaintiff's claims are barred because all of the Plaintiff's damages, if any, arise from subsequent events that did not arise from any actionable claims against WP. See Answer to Amended Complaint.

Once again, to the extent this affirmative defense pertains to Wolfeboro's allegedly negligent conduct in "overloading" the RIB Site, which occurred after WP's negligence, this affirmative defense should be struck because WP cannot meet its burden of proof in the absence of any expert opinion testimony as to negligent conduct and causation. As such, judgment should enter in favor of Wolfeboro as to WP's Tenth Affirmative Defense.

4. Eleventh Affirmative Defense (Superseding Cause)

WP's Tenth Affirmative Defense states that "if the Plaintiff was damaged as alleged, said damages were caused by the intervening and/or superseding acts of other parties for whom WP is not responsible." See Answer to Amended Complaint. Once again, to the extent this affirmative defense pertains to Wolfeboro's allegedly negligent conduct in "overloading" the RIB Site, which occurred after WP's negligence, judgment should enter in favor of Wolfeboro because WP's experts have offered no expert opinion testimony to satisfy WP's burden of proof as to negligent conduct and causation.

B. WP's Affirmative Defense As to Failure to Mitigate Damages Fails As a Matter of Law For Lack of Expert Opinion Testimony.

In its Answer to the Amended Complaint, WP provides the following Third Affirmative Defense: "*The Plaintiff's claims are barred because it failed to mitigate its damages and/or has not sustained any actionable damages.*" See Answer to Amended Complaint, Page 26.

Under New Hampshire law, and as stated in the Order, WP has the burden to demonstrate that Wolfeboro failed to mitigate its damages. Flanagan v. Prudhomme, 138 N.H. 561, 575-76 (1994) (holding defendants failed to carry their burden of proving that plaintiffs failed to mitigate

damages for lost rental income); Parem Contracting Corp. v. Welch Constr. Co., 128 N.H. 254, 259 (1986) (holding that burden of going forward with evidence that all or part of the costs could have been avoided without undue risk or burden was on a breaching general contractor who allegedly breached a contract with a subcontractor).

Mitigation refers to the obligation of a plaintiff to “take such measures to lessen his or her loss as can be effectuated ‘with reasonable effort and without undue risk.’” Audette v. Cummings, 2013 N.H. LEXIS 140, at *7 (N.H. Dec. 24, 2013). Although there is sparse New Hampshire case law fully articulating the elements of a “failure to mitigate damages” affirmative defense, numerous courts around the country have detailed the essential elements: (1) there must be substantial evidence that there was something the plaintiff could do to mitigate his loss and that requiring the plaintiff to do so was reasonable under the circumstances; (2) it must be shown that the plaintiff acted unreasonably in failing to undertake the mitigating activity; and (3) there must be proof of a causal connection between the plaintiff’s failure to mitigate and his damages. Greenwood v. Mitchell, 621 N.W.2d 200, 205-07 (Iowa 2001) (requiring expert testimony to prove a failure to mitigate defense); Willis v. Westerfield, 839 N.E.2d 1179, 1188 (Ind. 2006) (requiring defendant to prove that plaintiff failed to exercise reasonable care and that such failure caused plaintiff to suffer identifiable harm not attributable to defendant’s negligent conduct).

As stated by the Court in the Order, WP is required to prove its mitigation defense with expert opinion evidence:

The mitigation issues here pertain to the design, engineering, operation, and failure of the RIB system and to the continued use of the Wolf 1A site.” Those matters implicate specialized engineering, geotechnical, hydrological, and other scientific and professional principles and knowledge that are far beyond the common understanding of lay persons. Therefore, expert opinion testimony will be required to show that Wolfeboro did not act reasonably in taking the measures it did or in failing to take other measures to mitigate its damages. Order, Page 6.

Once again, WP's experts offered no expert opinion testimony that: (1) Wolfeboro's failure to follow steps proposed by WP was unreasonable, (3) the steps actually taken by Wolfeboro to mitigate damages were not reasonable, or (4) there is any causal connection between Wolfeboro's failure to take the actions recommended by WP and the damages that occurred at the Site.

WP's allegation that Wolfeboro failed to mitigate its damages appears to stem entirely from WP's assertion that Wolfeboro failed to follow WP's advice as to how to address observed site damage; however, WP elicited no expert opinion testimony that Wolfeboro had any duty to specifically follow WP's advice as opposed to advice from other consultants. Even assuming that Wolfeboro "could" have undertaken a different course of conduct (other than the steps it actually did take to mitigate its damages), WP clearly has not met its burden of proof as to the second and third elements of its affirmative defense: providing expert opinion that Wolfeboro's alleged failure to undertake such conduct was unreasonable and the causal connection between the conduct and its damages. See Cox v. Keg Restaurants U.S., Inc., 935 P.2d 1377, 1380 (Wash. Ct. App. 1997) (holding there was insufficient evidence to submit issue of failure to mitigate based on plaintiff's refusal to begin physical therapy where there was no expert medical testimony based on a reasonable degree of medical certainty that this refusal prolonged the plaintiff's recovery); see also Kristoff v. Glasson, 778 N.E.2d 465, 474-75 (Ind. Ct. App. 2002) (where the defendant argued that the plaintiff's continuing headaches were the result of the plaintiff's failure to follow a recommended home exercise program, holding broadly "the mitigation of damages claim went to the issue of medical causation and, as such, required medical expert testimony"); Mroz v. Harrison, 815 N.E.2d 551, 557 (Ind. Ct. App. 2004) (refusal to instruct the jury on failure to mitigate damages was proper where the defendant alleged that

plaintiff failed to cooperate with prescribed treatment and exaggerated symptoms but did not present any medical expert testimony to establish a causal connection between these failures and an aggravation or increase in the plaintiff's injuries).

WP's experts also provided no expert opinion testimony that Wolfeboro's mitigation efforts were unreasonable. In fact, the opposite is true. Wolfeboro elicited fact witness testimony through David Ford and Linda Murray that it undertook significant efforts to attempt to mitigate and avoid further damage to the site. These efforts included, but were not limited to, the installation of sand traps, geotechnical evaluation, lowering flow rates consistently based on consultants' recommendations, performing additional site monitoring, engaging and consulting with additional professionals to further investigate the site conditions and damage. To date, Wolfeboro has spent \$274,062.97 toward these mitigation efforts. See Plaintiff's Exhibit 14, Item 5.

Further, one of Wolfeboro's expert witnesses, Mr. Cullen, testified that he reviewed Wolfeboro's mitigation efforts and that Wolfeboro has, in his opinion, performed all the mitigation efforts it could to address the unexpected issues and that such efforts were reasonable under the circumstances. Mr. Pelletier from the NHDES also testified that Wolfeboro's efforts to address the unexpected issues were reasonable from a regulatory perspective.

In the absence of any expert testimony from WP's experts that Wolfeboro failed to act reasonably in attempting to mitigate its damages, judgment as a matter of law should enter in Wolfeboro's favor as to WP's Third Affirmative Defense (Mitigation).

CONCLUSION

For the foregoing reasons, Wolfeboro respectfully requests that the Court grant its Motion for Judgment as a Matter of Law as to WP's Comparative Fault and Mitigation Affirmative Defenses.

Respectfully submitted,

TOWN OF WOLFEBORO

By its attorneys,

Date: May 7, 2014

/s/ Seth M. Pasakarnis

Hinckley, Allen & Snyder LLP

Rhian M.J. Cull, Esq. (*Pro Hac Vice*)

Seth M. Pasakarnis, Esq. (Bar #18971)

Daniel M. Deschenes, Esq. (Bar #14889)

11 South Main Street, Suite 400

Concord, NH 03301-4846

Tel: (603) 225-4334

spasakarnis@hinckleyallen.com

ddeschenes@hinckleyallen.com

rcull@hinckleyallen.com

CERTIFICATE OF SERVICE

I, Seth M. Pasakarnis, hereby certify that on this date a true and accurate copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Seth M. Pasakarnis

Seth M. Pasakarnis