STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2022-0101

Andrew Szewczyk & a. v. Continental Paving, Inc. & a.

RULE 7 APPEAL FROM VARIOUS ORDERS OF THE HILLSBOROUGH COUNTY SUPERIOR COURT NORTHERN DISTRICT
(Justice Diane M. Nicolosi)

BRIEF OF APPELLEE BELLEMORE PROPERTY SERVICES, LLC, ALSO KNOWN AS BELLEMORE CATCH BASIN MAINTENANCE

Gary M. Burt (N.H. Bar No. 5510)
Brendan D. O'Brien (N.H. Bar No. 267995)
PRIMMER PIPER EGGLESTON & CRAMER, PC
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3300
gburt@primmer.com
bobrien@primmer.com

Gary M. Burt will represent Bellemore Property Services, LLC at oral argument

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. The Project.

In 2015 and 2016, Continental Paving, Inc. ("Continental") repaved Route 3 (the "Project") pursuant to a contract with the New Hampshire Department of Transportation ("NHDOT"). Appendix II ("Apx. II"), p. 82 – 156. On September 1, 2016, Continental subcontracted with Bellemore Property Services, LLC ("Bellemore") to clean certain catch basins of material deposited there during Continental's repaving work. Apx. II, p. 157 – 168.

II. The Accident.

Andrew Szewczyk and Marian Szewczyk (collectively, "Appellants") allege that on October 21, 2016 they were injured when a vehicle hydroplaned into their vehicle, causing their vehicle to strike Appellants (the "Accident"). Apx. I, p. 13-29. Bellemore cleaned the catch basins near the scene of the Accident in mid-September and early October 2016. Apx. II, p. 170, ¶ 6. Bellemore last worked on the Project on October 4, 2016, seventeen days before the Accident. Apx. II, p. 171, ¶ 7. At that time, the catch basins in the area where the Accident occurred were functioning properly and were neither clogged, nor blocked. Apx. II, p. 171, ¶ 8.

On the day of the Accident, rain started at trace levels around midnight and continued throughout the day, with heavy rain from 6:00 PM to 8:00 PM. Apx. II, p. 172 – 213. According to the State Police Report regarding the Accident, "[t]he weather that day was producing light to heavy rainfall throughout the whole day and night. As a result, water build up was gathering in the breakdown lanes and clogging some of the catch basins due to debris in the road and breakdown lanes… ." Apx. II, p. 218. Trooper First Class Kieran Fagan ("Trooper Fagan"), who responded to the Accident, testified that water ponds in the area near the Accident and on other parts of Route 3 as a result of the grates covering catch basins being clogged with trash, pine needles, car parts, and other debris. Apx. II, p. 229 – 232, (Depo. p. 10:20 – 13:3). Trooper Fagan further testified that he recalled seeing two NHDOT employees using a rake or shovel to remove debris from the grate covering a

catch basin near the scene of the Accident after the Accident occurred. Apx. II, p. 241, (Depo. p. 33:1-20).

The NHDOT's log from the date of the Accident confirms that two NHDOT employees responded to the scene of the Accident shortly after it occurred and reported a "clogged storm drain." Apx. II, p. 248. Mark Bolduc ("Bolduc"), an NHDOT employee who arrived at the scene shortly after the Accident, testified that he cleaned the grate covering the catch basin near where the Accident occurred. Apx. II, p. 267, 282-83, (Depo. p. 18:3-12; 58:15 – 59:1). Bolduc further testified that he recalled removing cardboard, plastic bottles, and beer cans from a catch basin near the scene of the Accident, but did not recall removing construction debris. Apx. II, p. 272, (Depo. p. 48:14-19).

Joseph Maguire ("Maguire"), the other NHDOT employee to respond to the Accident, explained that NHDOT employees constantly have to clean debris from the tops of catch basins in the area near the Accident because the area floods. Apx. II, p. 303-04, (Depo. p. 14:21 – 15:7). Maguire also testified that he cleaned the tops of the catch basins in the area of the Accident after the Accident occurred. Apx. II, p. 311-12, (Depo. p. 22:16 – 23:5). Maguire recalled leaves and items from vehicles, not construction debris, clogging the catch basins near the scene of the Accident. Apx. II, p. 325, (Depo. p. 36:1-12).

III. Appellants' Purported Engineering Expert.

Against the consistent and uncontroverted evidence that debris covered the top of a catch basin near the scene of the Accident, causing it to flood on October 21, 2016, Appellants offered a report and affidavit by purported engineering expert Thomas Broderick ("Broderick"). Apx. III, p. 320 – 343. Broderick opined that "[t]he most likely mechanism for the travel lane flooding that precipitated the October 21, 2016 accident appears to be settlement/displacement of the Polyethylene Liners that had been recently installed in one or more catch basins in close proximity to the accident site." Apx. IV, p. 39.

Broderick, however, did not know if a polyethylene liner was installed in the catch basin near the scene of the Accident on October 21, 2016. Apx. IV, p. 46-47, (Depo. p. 24:20 – 25:8). He also could cite no evidence suggesting that a polyethylene liner in the

catch basin near the scene of the Accident was disturbed or damaged before the Accident. Apx. IV, p. 49, (Depo. p. 35:17-21). Broderick performed no testing with respect to whether a damaged or defective polyethylene liner could have caused the flooding near the scene of the Accident. Apx. IV, p. 44, 47, 48, (Depo. p. 16:17-19, 28:10-17, 29:18-22). Broderick also could not specify whether the relevant polyethylene liner was defectively manufactured, incorrectly installed, and/or damaged after installation. Apx. IV, p. 34. To explain why the catch basin began to drain when NHDOT workers were clearing debris from the grate covering the catch basin, Broderick opined that the catch basin's polyethylene liner exited the outlet pipe at the same moment. Apx. IV, p. 35.

IV. The Trial Court's Orders.

As no evidence supported that Bellemore breached any duty owed to Appellants or that any action or inaction by Bellemore caused or contributed to cause the Accident, Bellemore moved for summary judgment. Apx. II, p. 67-77. Appellants objected to this motion, relying primarily on Broderick's report and affidavit. Apx. III, p. 249 – 390. Bellemore moved to strike Broderick's report and affidavit as Broderick ignored eyewitness testimony to reach his conclusions, based his conclusions on a nonexistent methodology, and relied on speculation to support his opinions. Apx. IV, p. 3 – 74.

On June 3, 2021, the trial court granted Bellemore's motion to strike Broderick's report and affidavit. Apx. VI, p. 20 – 30. The court correctly found that Broderick's opinions were "based entirely on pure speculation without any factual support," and Broderick "did not employ any scientific methodology in this case." Apx. VI, p. 29. The trial court concluded its analysis by noting that "[d]ue to his lack of pertinent expertise, the lack of scientific testing, and the purely speculative nature of [Broderick's] theory, his testimony will offer nothing to the jury in their search for the truth." Apx. VI, p. 30. Appellants moved for reconsideration of this order, but the trial court denied their motion on June 21, 2021. Apx. VI, p. 73.

In its order striking Broderick's opinions, the trial court granted Appellants leave to supplement their objection to Bellemore's motion for summary judgment. Apx. VI, p. 30. Appellants thereafter filed a supplemental objection that relied primarily on a report by a

different purported engineering expert, Richard Murphy ("Murphy"). Apx. VI, p. 74 – 88. After Appellants filed their supplemental objection, the trial court granted Bellemore's motion for summary judgment. Apx. VI, p. 131-152. With respect to Murphy, the trial court explained that his opinion "as to causation… is speculative and would not be helpful to the jury." Apx. VI, p. 143. The trial court also noted that Murphy "did not examine any discovery specific to this case other than plans," had "no relevant experience with the roadway at issue," identified no experience with the relevant polyethylene liners, and "presented no scientific methodology or analysis in his report." Apx. VI, p. 143, 144.

In granting Bellemore's motion for summary judgment, the trial court recognized that Appellants could not present any evidence that Bellemore "caused or substantially contributed to the condition that caused the flooding" on the day of the Accident. Apx. VI, p. 148-49. Although Appellants did not argue that they could succeed based on a theory of *res ipsa loquiter*, Apx. VI, p. 150-51, the trial court nevertheless analyzed the doctrine in its summary judgment order. Apx. VI, p. 150-52. The trial court correctly concluded that Appellants could not survive summary judgment even if they had argued that *res ipsa loquiter* should apply as Bellemore's negligence could not be inferred based on the relevant material facts. Apx. VI, p. 151.

Appellants moved for reconsideration of the trial court's order granting Bellemore's motion for summary judgment, but the trial court denied Appellants' motion. Apx. VI, p. 252. Thereafter, Appellants appealed to this Court.

SUMMARY OF THE ARGUMENT

The trial court's decision to exclude Broderick and Murphy's testimony was not an unsustainable exercise of discretion. Broderick's opinion that a polyethylene liner became dislodged and prevented a catch basin near the scene of the Accident from draining on October 21, 2016 is based entirely on speculation. Broderick did not know if a polyethylene liner was installed in the relevant catch basin on October 21, 2016, admitted that no evidence supported that that liner was damaged, and acknowledged that it was unknown if Bellemore's cleaning of the catch basin could damage the polyethylene liner. Broderick did not test his hypothesis that a damaged polyethylene liner blocked the catch basin's outlet pipe and could identify no scientific methodology that he used to determine that the liner could collapse and pass through the catch basin's outlet pipe as he suggested.

Given the numerous problems with Broderick's opinions, the trial court did not commit an unsustainable exercise of discretion by striking his report and affidavit. Broderick's conclusions are not based on sufficient facts or data, they were not reached through a scientific methodology, and his conclusions were not formulated using any specialized knowledge. Broderick's opinion regarding the cause of the flooding shortly before the Accident amounts to nothing more than a guess. His speculation as to what may have occurred is not admissible expert testimony under New Hampshire law. Murphy's opinions are even more flawed as he failed to review relevant discovery, has no experience with the area where the Accident occurred, and presented no scientific methodology or analysis in his report.

With Broderick and Murphy's testimony excluded, the trial court correctly granted Bellemore's motion for summary judgment as Appellants' theory that a damaged polyethylene liner caused the flooding on the day of the Accident was based entirely on speculation. Appellants bear the burden of proving what caused the flooding shortly before the Accident occurred. They cannot meet this burden by suggesting that it is possible that a damaged polyethylene liner blocked a nearby catch basin at the relevant time. As the trial court recognized, Appellants cannot survive summary judgment based on speculation.

This Court should affirm the trial court's order granting Bellemore's motion for summary judgment as no evidence supports that any action or inaction by Bellemore caused or contributed to cause flooding on the day of the Accident.

ARGUMENT

I. The Trial Court Did Not Engage In An Unsustainable Exercise Of Discretion By Excluding Appellants' Experts As The Experts Employed No Scientific Methodology, Ignored Contradictory Eyewitness Testimony, And Relied On Speculation To Reach Their Conclusions.

Although Appellants begin their brief with an argument regarding the trial court's order granting Bellemore's motion for summary judgment, the trial court granted Bellemore's motion for summary judgment only after excluding Appellants' experts. As the trial court's decision to exclude Appellants' experts was critical to its summary judgment order, an analysis of the order striking Appellants' experts should precede an argument regarding the summary judgment order.

As explained below, the trial court's decision to exclude Broderick and Murphy was not an "unsustainable exercise of discretion." *Gray v. Commonwealth Land Title Ins. Co.*, 162 N.H. 71, 77 (2011). Appellants cannot "demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of" Appellants' case. *Id.* This Court should affirm the trial court's order striking Broderick's report and affidavit and its ruling striking Murphy's report as Appellants' purported experts ignored relevant evidence and did not employ a scientific methodology to reach their conclusions. N.H. Rev. Stat. Ann. § 516:29-a provides that "[a] witness shall not be allowed to offer expert testimony unless the court finds:

(a) Such testimony is based upon sufficient facts or data;

(b) Such testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case."

N.H. Rev. Stat. Ann. § 516:29-a. Broderick and Murphy cannot meet these criteria, and the trial court was therefore correct to strike them.

A. Broderick's Opinions Are Not Based On Sufficient Facts Or Data, Are Not The Product Of A Reliable Methodology, And Are Unsupported By Any Scientific Testing Or Analysis.

As an initial matter, Broderick's opinions are not based on sufficient facts or data. To reach his conclusion that the grate covering the catch basin in the area of the Accident was not clogged on October 21, 2016, Broderick ignored:

- The State Police Report regarding the Accident stating that "[t]he weather that day was producing light to heavy rainfall throughout the whole day and night. As a result, water build up was gathering in the breakdown lanes and clogging some of the catch basins due to debris in the road and breakdown lanes…." Apx. II, p. 218.
- Trooper Fagan testifying that he recalled seeing two NHDOT employees using a rake or shovel to remove debris from the grate covering a catch basin near the scene of the Accident after the Accident occurred. Apx. II, p. 241, (Depo. p. 33:1-20).
- The NHDOT's log from the date of the Accident stating that two NHDOT employees responded to the scene of the Accident shortly after it occurred and reported a "clogged storm drain." Apx. II, p. 248.
- Maguire testifying that he cleaned the tops of the catch basins in the area of the Accident after the Accident occurred. Apx. II, p. 311-12, (Depo. p. 22:16 – 23:5).

As the trial court recognized, Broderick rejected this evidence because it did not support the conclusion that he wanted to reach. Apx. VI, p. 24-25.

To the extent that Broderick addressed evidence that contradicted his desired conclusion, Broderick considered skewed versions of the relevant facts rather than evidence regarding the actual circumstances leading up to the Accident. To exclude fallen leaves as a possible cause of a blockage on the grate covering the catch basin near the scene of the Accident, Broderick visited the scene of the Accident in March, a different time of year than when the Accident occurred and during a period when far fewer leaves would be

present. Apx. IV, p. 31. Broderick failed to consider that given the amount of leaves falling in late October, some of them could be blown or otherwise deposited on the grate covering the catch basin near where the Accident occurred. During his deposition, Broderick admitted that he had no information regarding the amount or location of leaves near the scene of the Accident on October 21, 2016. Apx. IV, p. 67, (Depo. p. 108:9-14).

Broderick also claimed that NHDOT patrolled for debris in the area of the Accident on October 21, 2016, but Bolduc, the NHDOT employee whose testimony Broderick is apparently relying on for this position, did not testify that he or anyone else patrolled the area on the day of the Accident. Apx. III, p. 160, (Depo. p. 70:1-13). Similarly, although Broderick noted that the area where the Accident occurred was swept until September 21, 2016, he failed to explain how the area not being swept for a month before the Accident could support that leaves or other roadway debris did not block the catch basis near the scene of the Accident on October 21, 2016. Apx. III, p. 288.

A purported expert cannot ignore evidence simply because it does not support the conclusion that he wants to reach. Broderick's report and affidavit demonstrate, however, that ignoring inconvenient facts is exactly what Broderick did. Apx. IV, p. 34, 73. As the trial court explained, "Broderick rejected the foregoing accounts of witnesses present at the scene after the accident, stating that he 'disagreed' with what these witnesses 'seemed to recall or not recall.' … In his report, Mr. Broderick states that '[a]lthough the Depositions of the DOT employees indicate that the water was freed up due to removal of roadway debris on top of the grate, it is doubtful that this was the case.'" Apx. VI, p. 24. "[E]xpert testimony that ignores existing data and is based on speculation is inadmissible." *Brill v. Marandola*, 540 F. Supp. 2d 563, 568 (E.D. Pa., 2008).

As the relevant facts do not support Broderick's desired conclusion, Broderick instead relied on speculation to opine that he could not rule out a polyethylene liner in the catch basin near the scene of the Accident "as the reason for the drainage problem on the night of October 21, 2016." Apx. IV, p. 31. Regarding how the polyethylene liner could be responsible for the flooding, Broderick:

> hypothesized that at some point prior to the accident the downspout of the polyethylene liner detached and fell to the bottom of the catch basin. It remained there until the heavy rain began to fill the catch basin, causing the detached liner to float. The liner then pressed against the catch basin's outflow pipe, partially or fully blocking it, causing the water to completely fill the catch basin and flow onto the highway. After the accident, at the precise time that DOT employees were raking the top of the catch basin grate the water pressure reached sufficient levels to force the detached liner to fold and flow through the catch basin's outflow pipe. This caused the water to finally subside.

Apx. VI, p. 26. This incredible sequence of events is based entirely on speculation.

Broderick did not know if a polyethylene liner was installed in the catch basin near the scene of the Accident on October 21, 2016. Apx. IV, p. 46-47, (Depo. p. 24:20 – 25:8). Even if one were installed, Broderick admitted that no testimony or other evidence supported that the relevant polyethylene liner was disturbed or damaged before the Accident. Apx. IV, p. 49-50, (Depo. p. 36:12 – 37.5). Broderick's claim that the polyethylene liner cannot be ruled out as a cause of the flooding near the scene of the accident is nothing more than speculation. "Expert opinion testimony may be excluded 'where it amounts to no more than mere speculation or a guess from subordinate facts that do not give adequate support to the conclusion reached.'" *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 406 (2013) (quoting *Sevigny's Case*, 337 Mass. 747, 751 (1958)); *see also Thornhill v. City of Detroit*, 142 Mich. App. 656, 661 (1985) (excluding two experts: one who incorrectly assumed that "the frothing occurred after the EMS team arrived, while the facts clearly show that the frothing commenced prior to the team's arrival" and a second whose opinion was based on the first expert's opinion which "was without a sufficient factual basis."); *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (excluding an expert's opinion because it was based on an "unrealistic and speculative assumption").

In addition to relying on speculation rather than evidence, Broderick failed to employ any scientific methodology to reach his opinions. Broderick did not test his theory

of how the catch basin near the scene of the Accident became blocked on October 21, 2016, nor perform any analysis of how the blockage may have occurred. Apx. IV, p. 44, 47, 48, (Depo. p. 16:17-19, 28:10-17, 29:18-22). Instead of testing his hypothesis, Broderick summarized selected facts from depositions, then speculated as to what conclusions those facts could support. Such a methodology required no specialized knowledge, and Broderick's conclusions are therefore not proper expert opinions. *See* N.H. Evid. R. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if… the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"). When a purported expert's opinion is reached without using any specialized knowledge, that opinion will not assist in the "search for truth," and the expert must be precluded from offering it. *Johnston v. Lynch*, 133 N.H. 79, 88 (1990).

Without testing, Broderick's theory of how the catch basin became blocked with a polyethylene liner is entirely unsupported. *See State v. Cressey*, 137 N.H. 402, 410 (1993) (recognizing that when an expert's opinions are not based on testing or a scientific methodology, they cannot be effectively explored through cross examination). Broderick could not say how much force would be necessary to cause a polyethylene liner to separate, nor whether Bellemore's cleaning of the catch basin produced sufficient force to cause such a separation. Apx. IV, p. 48 (Depo. p. 29:18-22). When questioned regarding the basis for his theory that a polyethylene liner could float to the level of the pipe, Broderick similarly admitted that it was untested and unsupported. Apx. IV, p. 56-57 (Depo. p. 64:23 – 66:12). As Broderick's testimony confirms, his opinion regarding the cause of the flooding on October 21, 2016 is not expert testimony supported by testing and the application of specialized knowledge, but rather a personal opinion based on speculation.

Appellants rely on *Stachulski v. Apple New England, LLC* to support that Broderick's speculative personal opinions are admissible expert testimony, but the circumstances of that case are distinguishable for the facts of this matter. *See generally* 171 N.H. 158 (2018). In *Stachulski*, the expert:

> relied upon the following facts when formulating his opinion, to a reasonable degree of medical certainty, that the plaintiff contracted salmonella from the defendant-restaurant's hamburger: (1) the plaintiff's medical records recounted his diagnosis of non-typhodial salmonella, which is typically food-borne; (2) the plaintiff owned a pet lizard, with whom his wife and daughter also had contact, yet neither became ill; (3) the plaintiff's brother-in-law also ate a hamburger at the defendant's restaurant and suffered similar gastrointestinal symptoms; (4) the plaintiff prepared the meals that he and his wife ate from home, yet his wife did not become ill; (5) the plaintiff's wife has celiac disease, making her more prone to contract salmonella and other infections; and (6) the plaintiff presented symptoms within the six to 72 hour incubation, or "look-back," period for salmonella following his meal at the defendant's restaurant.

Id. at 164-65. The expert in *Stachulski* knew that the plaintiff had eaten a hamburger at defendant's restaurant. Broderick does not know if a polyethylene liner was installed in the catch basin near the scene of the Accident. Apx. IV, p. 46-47 (Depo. p. 24:20 – 25:8). The expert in *Stachulski* also knew that the plaintiff had been diagnosed with salmonella. Broderick does not know if a polyethylene liner in the catch basin near the scene of the Accident was damaged before the Accident. Apx. IV, p. 46 (Depo. p. 23:21 – 24:9). The expert in *Stachulski* excluded other causes of the plaintiff's salmonella based on the evidence. Broderick ignores evidence supporting that debris covering the catch basin's grate, not a broken polyethylene liner, caused the flooding on the day of the Accident. Apx. II, p. 218, 248. Finally, the expert in *Stachulski* explained that the timing of the plaintiff's symptoms was consistent with the hamburger being the cause of the plaintiff's salmonella. Broderick's opinion relies on the incredible claim that the catch basin's polyethylene liner collapsed at the exact moment that NHDOT workers were clearing debris from the grate covering the catch basin. Apx. IV, p. 35.

The expert in *Stachulski* not only relied on the evidence, but also used a differential etiology, a methodology that has been recognized as reliable in medical diagnosis and causation cases, to reach his conclusions. *See* 171 N.H. at 165. A differential etiology is

well-recognized in the medical field as it relies upon research literature, testing, and verification. *See Goudreault v. Kleeman*, 158 N.H. 236, 247-48 (2009). Broderick's alleged methodology has no similar support, and he did not rely on any research literature or scientific studies to support his hypothesis. Broderick also ignored eyewitness testimony and speculated as to what may have caused flooding near the scene of the Accident. Unlike the expert in *Stachulski*, Broderick is attempting to offer unsupported speculation as expert testimony. Such speculation "is not helpful to the court in its search for the truth." *In re Gina D.*, 138 N.H. 697, 703 (1994).

The expert in *Stachulski* was also a medical doctor who specialized in infectious disease. *See* 171 N.H. at 165. His experience was directly relevant to the matter at issue: the cause of the plaintiff's exposure to salmonella. Broderick does not have similar experience with respect to the cause of the flooding on the day of the Accident. Although he has general experience with workplace safety on construction sites, he never worked with polyethylene liners before being retained as an expert in this matter. Apx. IV, p. 43, (Depo. p. 9:12-14). Accordingly, Broderick cannot rely upon his "experience" with polyethylene liners to support his hypothesis, making testing and scientific analysis even more critical to support his opinions. As Broderick repeatedly admitted, however, he performed no testing to support his hypothesis that a polyethylene liner separated and clogged the catch basin near the scene of the Accident. Apx. IV, p. 44, 47, 48, (Depo. p. 16:17-19; 28:10-17; 29:18-22). Without experience with polyethylene liners and any testing to support his theory, Broderick's conclusion is nothing more than a guess as to what may have caused flooding near the scene of the Accident.

The trial court correctly ruled that Broderick could not offer his speculative personal opinions as expert testimony. The trial court summarized the numerous deficiencies in Broderick's testimony as follows:

> Here, Mr. Broderick's opinion does not merely rely on certain assumptions to fill gaps in the available evidence. Instead it is based entirely on pure speculation without any factual support. There is no evidence in the record that the polyethylene liner was defective or damaged or that the downspout detached from

> the rest of the liner. There is no evidence that the downspout could become detached as a result of water pressure or general damage from the catch basin cleaning process. Indeed, Mr. Broderick has provided no evidence of any liner failing and blocking the outflow pipe of a catch basin in the manner he is suggesting occurred in this case. Mr. Broderick did not even know if a polyethylene liner was actually installed in the catch basin at issue at the time of the accident. (Doc. 57, Ex. C at 24-25.)
>
> Moreover, Mr. Broderick did not employ any scientific methodology in this case. Mr. Broderick did not perform any testing of what amount of pressure would cause a downspout to detach, and whether such pressure was used in this case. (Doc. 57, Ex. C at 84-85.) Mr. Broderick testified that he "did not use any scientific methods to evaluate the product or the properties of the product," including whether the detached portion of the liner was sufficiently buoyant to float. (Id. at 66.) Mr. Broderick also explicitly testified that he was offering no opinion that the weld in the liner was defective. (Id. at 90.)

Apx. VI, p. 29.

Broderick's theory is nothing more than a personal opinion by a generally-experienced expert who has no specific experience with polyethylene liners. His testimony confirms that he employed no scientific methodology to reach his conclusions, and his opinions were not formulated using any specialized knowledge. Broderick ignored evidence that was inconsistent with the conclusions that he wanted to reach, and he failed to perform any testing to confirm that his theory was even possible. The trial court did not engage in an unsustainable exercise of discretion by striking Broderick's report and affidavit, and this Court should affirm the trial court's order.

B. Murphy Did Not Reach His Opinions Using A Reliable Methodology As Required By N.H. Rev. Stat. Ann. § 516:29-a.

The trial court was also correct to strike Murphy's opinions. Tellingly, Appellants did not rely on Murphy's opinions to oppose Bellemore's motion for summary judgment until Broderick's report and affidavit were stricken. Like Broderick, Murphy ignored witness testimony, used a nonexistent methodology, and relied on speculation to reach his

conclusions. Murphy also relied "expressly on information communicated to him by Mr. Broderick, including the fact that a polyethylene liner had been installed in the catch basin." Apx. VI, p. 144. As explained above, Broderick admitted that he did not know if a polyethylene liner was actually installed in the relevant catch basin, undermining Murphy's conclusions. *See Vasquez v. Mabini*, 606 S.E.2d 809, 811 (Va. 2005) ("Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible.")

Murphy did not perform any scientific analysis to reach his conclusion that a damaged polyethylene liner caused the flooding near the scene of the Accident. Based on his report, Murphy's methodology involved speaking with Broderick and reviewing highway plans, drainage computations, construction drawings, and local climatological data. Apx. VI, p. 85-87. Murphy did not perform any testing to determine how a polyethylene liner could become displaced, how much force would be necessary to displace a polyethylene liner, and/or whether Bellemore's cleaning of the catch basin produced sufficient force to cause a displacement. Apx. VI, p. 85-87. The trial court correctly concluded that "Murphy presented no scientific methodology or analysis in his report." Apx. VI, p. 144.

Murphy also failed to opine that any action or inaction by Bellemore caused the flooding. His analysis was limited to evaluating the drainage near the scene of the Accident, not the cause of flooding on October 21, 2016. Murphy did not conclude that anything Bellemore did caused the settlement or displacement of the polyethylene liner in the catch basin near the scene of the Accident, nor explain what Bellemore should have done differently to avoid the liner's settlement or displacement. Apx. VI, p. 85-87. Murphy claimed that the installation of the polyethylene liner, the cleaning of the catch basins, and/or the sweeping of the nearby roadway following construction activity may have contributed to the liner's displacement. Apx. VI, p. 85-87. Murphy did not specify which of these actions resulted in the alleged displacement of the polyethylene liner, nor identify any act by Bellemore as being the cause of the October 21, 2016 flooding.

As the trial court correctly concluded, neither Broderick, nor Murphy offered a reliable expert opinion that satisfied the requirements of New Hampshire law. Both purported experts ignored the relevant evidence, employed no scientific methodology to reach their conclusions, and offered opinions based entirely on speculation. Their opinions amount to nothing more than guesses regarding what could have caused the flooding at the time of the Accident.

II. The Trial Court Correctly Granted Bellemore's Motion For Summary Judgment As Appellants' Theory That Bellemore Contributed To Cause Flooding On The Day Of The Accident Is Based Entirely On Speculation.

Absent their purported experts' testimony, Appellants offered no evidence that anything Bellemore did or failed to do contributed to cause the flooding shortly before the Accident. The Accident occurred seventeen days after Bellemore last worked on the Project. Apx. II, p. 171, ¶ 7. Consistent with its subcontractual obligations, Bellemore cleaned the catch basins of material deposited there during Continental's repaving work. Apx. II, p. 157 – 168. When Bellemore finished working on the Project, the catch basins in the area where the Accident occurred were functioning properly and were neither clogged, nor blocked. Apx. II, p. 171, ¶ 8.

Appellants speculate that a polyethylene liner within a catch basin near the scene of the Accident caused the flooding, but they presented no evidence that Bellemore contributed to cause the Accident. Appellants claim that NHDOT, Continental, and Bellemore were "collectively" negligent, but Appellants cannot specify which party was negligent, nor how that party's negligence contributed to cause the Accident. *See* Appellants' Brief, p. 12. Appellants further claim that they "introduced reliable evidence that the construction work, including the milling, disassembly of the catch basins, assembling of the catch basins, and the repaving work, caused debris to go within the catch basins, along with the cleaning work, which caused the blockage of the outlet pipe," *see* Appellants' Brief, p. 32, but they offer nothing more than speculation that one of these events contributed to cause the Accident. No evidence supports that a polyethylene liner

blocked a catch basin near the scene of the Accident, and no evidence supports that Bellemore was responsible for the blockage.

Appellants' claim that the trial court improperly weighed the evidence regarding the cause of the flooding near the scene of the Accident is incorrect. As the trial court explained, "[t]he issue is not whether the flooding was caused by debris deposited onto the grates by motorists or nature," Apx. VI, p. 147, but rather whether Appellants had presented any evidence supporting that a polyethylene liner had blocked the catch basin shortly before the Accident. The trial court concluded that Appellants had not presented any evidence supporting their theory, explaining:

> it is Plaintiffs who bear the burden to establish causation by act or inaction by Defendants as well as legal fault. It is not enough to prove that the possibility exists that a liner could or might block a pipe in the catch basin, Plaintiffs must prove by a preponderance that one or both Defendants caused or substantially contributed to the condition that caused the flooding. The question then is whether, construing all the evidence in the Plaintiffs' favor, there is sufficient evidence for a reasonable jury to find a cause of flooding attributable to each Defendant that is not based on speculation. The Court answers this question in the negative.

Apx. VI, p. 148-49. As the trial court recognized, the theoretical possibility that a polyethylene liner could block a catch basin is not evidence that such an event actually occurred shortly before the Accident. Apx. VI, p. 150. That Appellants offered no evidence that a polyethylene liner was actually installed in the relevant catch basin demonstrates that their theory of liability with respect to Bellemore is entirely theoretical. Apx. VI, p. 150.

Although Appellants did not argue that liability could be imposed on Bellemore based on a theory of *res ipsa loquiter*, the trial court nevertheless analyzed whether Appellants could survive summary judgment had they included such an argument. Apx. VI, p. 150-51. The trial court correctly concluded that Appellants still could not survive summary judgment as Bellemore's negligence could not be inferred based on the relevant material facts. Apx. VI, p. 151. For *res ipsa loquiter* to apply "it is necessary that (1) the

accident be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) other responsible causes are sufficiently eliminated by the evidence." *Rowe v. Pub. Serv. Co. of New Hampshire*, 115 N.H. 397, 399 (1975). As the trial court explained, Appellants could not satisfy these criteria:

> Looking at the totality of the evidence favorable to the non-moving party, none of the three prongs could be met to warrant a *res ipsa loquiter* instruction. Bellemore and Continental have been separately charged with negligence, and neither had exclusive control over the catch basin. Bellemore should not be held liable for a defective weld, if that were the cause of the cone disengaging. Nor should Continental be held liable for damage to the integrity of the weld if Bellemore caused the damage by misuse of the cleaning equipment. Furthermore, although a jury may not affirmatively conclude that a blocked grate caused the flooding, on the presented evidence, it cannot be eliminated as a possible cause. Finally, NHDOT, although immune, or Martinez Construction [the company that installed the polyethylene liners during the Project], cannot be excluded as a potentially liable party.

Apx. VI, p. 151-52. The trial court correctly reasoned that Bellemore cannot be found liable based on *res ipsa loquiter*.

When Bellemore last worked on the Project, the catch basins in the area where the Accident occurred were functioning properly and were neither clogged, nor blocked. Apx. II, p. 171, ¶ 8. Appellants have offered no evidence that Bellemore caused or contributed to cause the flooding seventeen days later that allegedly caused the Accident. The trial court was therefore correct to grant Bellemore's motion for summary judgment, and this Court should affirm the trial court's order.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order striking Broderick, the trial court's ruling striking Murphy, and the trial court's order granting Bellemore's motion for summary judgment.

Respectfully submitted,

BELLEMORE PROPERTY SERVICES, LLC,

By Its Attorneys,

PRIMMER PIPER EGGLESTON
& CRAMER PC,

Date: July 18, 2022 By: /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)
Brendan D. O'Brien (N.H. Bar No. 267995)
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3300
gburt@primmer.com
bobrien@primmer.com

STATEMENT WITH RESPECT TO ORAL ARGUMENT

As the trial court's orders were correctly decided, Bellemore does not request oral argument. In the event that the Court decides that oral argument would be of assistance to it, Bellemore designates Gary M. Burt to represent its interests.

Date: July 18, 2022 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Brief do not exceed 9,500 words.

Date: July 18, 2022 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION

I hereby certify that on this day a copy of this Brief was served via the Court's electronic filing system on all counsel of record.

Date: July 18, 2022 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

BRIEF ADDENDUM

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Andrew Szewczyk and Marian Szewczyk

v.

Continental Paving, Inc., et al.

Docket No. 216-2019-CV-00644

ORDER

Plaintiffs have brought this action alleging claims for negligence and negligent infliction of emotional distress arising out of a motor vehicle accident. Defendants Continental Paving, Inc. and Bellemore Property Services, LLC have moved for summary judgment. In their objection to the pending motions, Plaintiffs rely on the opinions of their expert witness, Thomas Broderick. Defendants now move to strike the report and affidavit generated by Mr. Broderick. Plaintiffs object. The Court held a hearing on the motions to strike on March 29, 2021. For the reasons that follow, the motions to strike are GRANTED.

Factual Background

On October 21, 2016, Plaintiffs were traveling southbound on Route 3 in Nashua when their vehicle encountered flooding on the highway. Plaintiffs lost control of their vehicle and ended up on the side of the road. Another southbound vehicle subsequently encountered the flooding and also began hydroplaning, striking Plaintiffs' vehicle and causing them to sustain injuries.

At the time of the accident, Defendant Continental Paving was repaving Route 3 pursuant to a contract with the New Hampshire Department of Transportation ("DOT").

(Bellemore Statement of Material Facts (Doc. 41) ¶ 3.) Continental Paving subcontracted with Defendant Bellemore to clean the catch basins on Route 3. (Id. ¶ 4.) Bellemore cleaned the catch basins in the area of the accident in mid-September and early October 2016. (Id. ¶ 6.) Bellemore's final day on the project was October 4, 2016. (Id. ¶ 7.)

The catch basins in question are covered with a large metal grate. Beneath the grate is a polyethylene liner that consists of two components. The first component is a four-foot square top that sits over the entrance to the catch basin. (Bellemore Mot. Strike (Doc. 53), Ex. C.) The second component is a twenty-inch diameter downspout that extends into the catch basin one foot. (Id.) The downspout is welded to the top of the liner. (Id.)

Analysis

Plaintiffs seek to introduce the testimony of Thomas Broderick for the purpose of establishing the cause of the flooding on the day of the accident. Defendants argue that Mr. Broderick's opinion is inadmissible expert testimony as it is lacking in scientific and evidentiary support. New Hampshire Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "[E]xpert testimony must rise to a threshold level of reliability to be admissible." Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 148 N.H. 609, 614 (2002). In determining the reliability of an expert's testimony, the Court in Baker Valley adopted the framework set forth in Daubert v. Merrel Dow Pharmas., Inc., 509 U.S. 579 (1993).

The New Hampshire legislature has since codified this framework at RSA 516:29-a, which provides:

> I. A witness shall not be allowed to offer expert testimony unless the court finds:
> (a) Such testimony is based upon sufficient facts or data;
> (b) Such testimony is the product of reliable principles and methods; and
> (c) The witness has applied the principles and methods reliably to the facts of the case.
> II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:
> (1) Have been or can be tested;
> (2) Have been subjected to peer review and publication;
> (3) Have a known or potential rate of error; and
> (4) Are generally accepted in the appropriate scientific literature.
> (b) In making its findings, the court may consider other factors specific to the proffered testimony.

Under this analysis, "[t]he trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony." Baker Valley, 148 N.H. at 616.

"Importantly, the Daubert test does not stand for the proposition that scientific knowledge must be absolute or irrefutable." State v. Dahood, 148 N.H. 723, 727 (2002). "[W]hen the *application* of a scientific methodology is challenged as unreliable under Daubert and the methodology itself is otherwise sufficiently reliable, outright exclusion of the evidence in question is warranted only if the methodology was so altered by a deficient application as to skew the methodology itself." State v. Langill, 157 N.H. 77, 88 (2008) (emphasis in original); see also Daubert, 509 U.S. at 594–95 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."). "Where errors do not rise to the level of negating the basis for the reliability of the principle itself, the adversary process is available to highlight the errors and permit the fact-finder

to assess the weight and credibility of the expert's conclusions." Langill, 157 N.H. at 88 (citation omitted). "[A]s long as an expert's scientific testimony rests upon good grounds, . . . it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." Id.

In his report, Mr. Broderick ruled out the collection of debris on the top of the catch basin grate as a contributing factor to the flooding. This conclusion was based in part on a view of the site that Mr. Broderick took on March 6 and 19, 2018. (Doc. 57, Ex. B at 10.) He reports that "it was clear to me, that the space of the ramps and roadway left the roadway a significant distance from the nearest trees and it is highly unlikely that a sufficient amount of leaves could find their way to high speed travel lanes to create any potential problem to drainage flow." (Id.) At his deposition, Mr. Broderick testified that he did not know how many leaves fell or blew onto the roadways in the area of the accident on October 21, 2016. (Doc. 53, Ex. B at 108.) Nevertheless, based on his view and his consideration of deposition testimony that the DOT had patrolled the area for debris earlier on the day of the crash, Mr. Broderick ruled out leaves as a contributing factor to the flooding. (Id.)

In contrast to Mr. Broderick's opinion, New Hampshire State Trooper First Class Kieran Fagan testified that water generally ponds on Route 3 as a result of the grates covering the catch basins becoming clogged with trash, pine needles, and other debris. (Doc. 41, Ex. H at 11-13.) Trooper Fagan testified that he observed two DOT employees removing debris with rakes and shovels from the grate of a catch basin near the scene of the accident after it occurred. (Id. at 33.) The DOT's event log indicates that two

employees responded to the scene and reported a "clogged storm drain." (Doc. 41, Ex. I.) DOT employee Mark Bolduc testified that he cleaned the grate over the catch basin after the accident, and recalled removing cardboard, plastic bottles, and been cans. (Doc. 41, Ex. J. at 18, 48, 58-59.)

Joseph Maguire, another DOT employee, testified that he also cleaned the tops of the catch basins in the area of the accident, and recalled removing leaves and other items discarded from vehicles. (Doc. 41, Ex. K at 22-23, 36.) He testified that he believed Mr. Bolduc had been at the scene for approximately ten minutes by the time he arrived, and that when he did arrive "Mark [Bolduc] had it [the grate] open[1] but the water was maybe halfway across the far left lane and diminishing once it was—he cleared the top, it flowed right in." (Id. at 20-21.) Neither DOT employee reported removing any construction debris from the grates.

Mr. Broderick rejected the foregoing accounts of witnesses present at the scene after the accident, stating that he "disagreed" with what these witnesses "seemed to recall or not recall." (Doc. 57, Ex. C at 13.) In his report, Mr. Broderick states that "[a]lthough the Depositions of the DOT employees indicate that the water was freed up due to removal of roadway debris on top of the grate, it is doubtful that this was the case." (Doc. 57, Ex. B at 13.) He bases this opinion on the fact that there was no historical flooding at this specific site and there has been no flooding since. Therefore, he concluded that the

[1] Plaintiffs appear to claim that this meant that Mr. Bolduc had removed the top of the grate, based on testimony by Luis Martinez, who interpreted "open" to mean that Mr. Bolduc had "opened [the grate] to look at the bottom." (Doc. 49, Ex. 14 at 42.) However, Mr. Martinez is not a DOT employee, and it is clear from his testimony that he is speculating. Moreover, Mr. Bolduc testified that he never opens the grate in the event of flooding, and only even cleans debris off the top. (Doc. 41, Ex. J at 18.)

flooding must have been due to "a surprise condition" unrelated to normal debris. (Id. at 14.)

Mr. Broderick hypothesized that the "surprise condition" was a dislodged section of the polyethylene liner. Specifically, Mr. Broderick states in his report that:

> It is likely that if the manufacture of the product was defective, or installed improperly, the liner for the basin at this location would have come dislodged and would be of sufficient size to partially block the outflow pipe to the point that way would back up in the basin and on to the roadway until the obstruction could be removed. Also, through photos and depositions it has been demonstrated that the welds are not necessarily solid throughout the liner, and that cleaning operations for the catch basins introduce high pressure jetting, and movement of the rigid cleaning hoses from the Vactor Trucks as an outside factor that introduce vibration and disturbance by rubbing against the liners in place during those operations. This would provide sufficient disturbance to dislocate a downspout from the top of the liner at the weld. Also, in the Deposition or Mr. Tsoukalas, it was stated that sometimes when there is asphalt from construction operations that falls onto the top of the liner, it is chiseled off of the liner, or removed by mechanical means. This would also cause a disturbance to the liner.

(Doc. 57, Ex. B at 10.) "Since there were no reports of drainage issues at this location prior to this rain event . . . , it can be assumed that the pipes to the outfall of the system were not blocked due to debris build-up in the system, but something that had recently occurred within the basin, such as blockage from a dislodged liner that had floated up to the outlet pipe due to the rain event." (Id. at 12.)

Mr. Broderick stated that because the downspout liner is relatively thin and flexible, it would bend and fold if sufficient force was applied to it. "Thus, if it were to become dislodged and fall into a basin, it would float up with the water level to the outflow pipe and bend with the water pressure to be forced through the pipe, after the water pressure forced the folding of the product." (Id.) Mr. Broderick noted that "[t]his would not immediately occur, but would result after the water backed up and over the basin,

combined with the weight . . . of roadway water build up as a result of the blockage." (Id.) "It is also likely that when the DOT employees were clearing any debris that had washed down to the grate and partially blocked it at the top of the roadway, the two events occurred concurrently and it was assumed that the problem was at the top of the basin instead of inside the basin." (Id.)

In other words, Mr. Broderick hypothesized that at some point prior to the accident the downspout of the polyethylene liner detached and fell to the bottom of the catch basin. It remained there until the heavy rain began to fill the catch basin, causing the detached liner to float. The liner then pressed against the catch basin's outflow pipe, partially or fully blocking it, causing the water to completely fill the catch basin and flow onto the highway. After the accident, at the precise time that DOT employees were raking the top of the catch basin grate[2] the water pressure reached sufficient levels to force the detached liner to fold and flow through the catch basin's outflow pipe. This caused the water to finally subside. Mr. Broderick concludes that this is "[t]he only reasonable explanation." (Id. at 13.)

Despite offering these opinions, Mr. Broderick does not consider himself to be an expert in the manufacture of polyethylene liners and has "never dealt with these polyethylene liners before." (Doc. 57, Ex. C at 114.) Although he worked for the Massachusetts Department of Transportation for forty-one years, Massachusetts does not use polyethylene liners. (Id. at 9.) Mr. Broderick did not know who supplied the liner in this case, and only learned of its general properties by performing an internet search.

[2] Although Plaintiffs assert that Mr. Broderick concluded that the flooding was "not associated with surface debris," (Pls.' Obj. to Mot. Strike (Doc. 63) at ¶ 14), Mr. Broderick stated in his affidavit that the flooding was "exacerbated by some debris on the grates" and observed that "the DOT employees were clearing any debris that had washed down to the grate and partially blocked it." (Doc. 53, Ex. C at 2-3.)

(Id. at 87-88.) Further, he testified that he had no evidence of a polyethylene liner separating and falling into a catch basin, or a catch basin ever flooding as a result of a detached liner. (Id. at 35, 37.)

Mr. Broderick's theory that the liner detached refers to the possibility that the liner contained a manufacturing defect. (Doc. 57, Ex. B at 14.) However, there is no evidence to support such a conclusion, and Mr. Broderick explicitly testified that he was offering no opinion that the weld in the liner was defective. (Id., Ex. C at 90.) Mr. Broderick also speculates that the liner may have become damaged in connection with the roadwork being performed on the highway. For example, Luis Martinez testified that the liners can become damaged when the grate is removed from the road, as it needs to be cut out of the asphalt, and either the cutting or the associated vibration can damage the liner. (Pls.' Reply Statement of Material Facts (Doc. 49), Ex. 14 at 20.) Christopher Tsoukalas, a Bellemore employee, testified that at times the hot top used in paving will collect on the liner and has to be removed with a hammer and chisel. (Id., Ex. 13 at 79.) However, there is no evidence that the liner in this case was damaged or had to be cleaned in this manner.

Mr. Broderick's final theory is that the liner was damaged during the catch basin cleaning process. Specifically, he notes that the cleaners used both an 8-inch diameter vacuum hose as well as a 450-psi spraying hose and a 4000-psi jetting hose, all of which are placed through the liner's downspout. (Doc. 57, Ex. B at 11.) According to Mr. Tsoukalas, cleaning the catch basin necessarily involves the cleaning equipment coming into contact with the liner's downspout. (Doc. 49, Ex. 13 at 58.) Mr. Broderick hypothesizes that the impact of the high-pressured water and the hoses on the downspout

damaged the liner and its weld, causing or contributing to the downspout's separation. (Doc. 57, Ex. B at 14.) However, Mr. Broderick also testified that he has no knowledge or evidence of a liner ever detaching as a result of the catch basin cleaning process. (Id., Ex. C at 36-37.)

Mr. Broderick explicitly stated that he did no testing to validate any of his hypotheses. (Doc. 57, Ex. C at 16, 28-29.) During his deposition, Mr. Broderick stated that he "could not find any scientific testing from anybody that I talked to at DOT or any information that was provided that showed me what type of testing they do on that product before they put it in." (Id. at 68.) He did no testing of the force required to break a liner. (Id. at 28.) He also stated that he has not done any calculations or analysis to approximate the magnitude or direction of force that could be applied to a polyethylene liner during cleaning operations. (Id. at 84-85.) When asked what amount of force would be sufficient to dislocate a downspout from the top of the liner at the weld, he replied: "I have no actual figure on the pressure, but I know the liner does have some flexibility to it and water pressure is quite strong and water pressure up against something that's plastic that has some give to it will force it through a pipe." (Id. at 85.) He did no calculations as to how much pressure would be required to force the downspout through the outflow pipe. (Id. at 93.)

"Generally, under New Hampshire law, the assumptions upon which an expert bases an opinion 'are matters which affect the weight of the evidence but do not [necessarily] . . . preclude its admissibility.'" State v. Whittaker, 158 N.H. 762, 773 (2009) (quoting State v. Lavoie, 152 N.H. 542, 546 (2005)). "Provided that the trial court finds that the expert's methodology is reliable, it is up to the fact finder to determine the weight

and credibility to be accorded the expert's testimony." Id.; see State v. Arsenault, 115 N.H. 109, 111 (1975) ("If [evidence] is of aid to a judge or jury, its deficiencies or weaknesses are a matter of defense which affect the weight of the evidence but does not determine its admissibility."). However, the supreme court has noted that "facts assumed in [a] hypothetical scenario opined upon by an expert must be supported by the evidence and resemble the case before the jury." Beckles v. Madden, 160 N.H. 118, 128 (2010).

Here, Mr. Broderick's opinion does not merely rely on certain assumptions to fill gaps in the available evidence. Instead it is based entirely on pure speculation without any factual support. There is no evidence in the record that the polyethylene liner was defective or damaged or that the downspout detached from the rest of the liner. There is no evidence that the downspout could become detached as a result of water pressure or general damage from the catch basin cleaning process. Indeed, Mr. Broderick has provided no evidence of *any* liner failing and blocking the outflow pipe of a catch basin in the manner he is suggesting occurred in this case. Mr. Broderick did not even know if a polyethylene liner was actually installed in the catch basin at issue at the time of the accident. (Doc. 57, Ex. C at 24-25.)

Moreover, Mr. Broderick did not employ any scientific methodology in this case. Mr. Broderick did not perform any testing of what amount of pressure would cause a downspout to detach, and whether such pressure was used in this case. (Doc. 57, Ex. C at 84-85.) Mr. Broderick testified that he "did not use any scientific methods to evaluate the product or the properties of the product," including whether the detached portion of the liner was sufficiently buoyant to float. (Id. at 66.) Mr. Broderick also explicitly testified that he was offering no opinion that the weld in the liner was defective. (Id. at 90.)

"Expert witnesses are called to give their opinions on subjects about which they have special knowledge and experience, upon the assumption that, by reason of these qualifications, they will be able to assist the jury in its search for the truth." Brown v. Bonnin, 132 N.H. 488, 494 (1989) (quoting Bill v. New England Cities Ice Co., 90 N.H. 435, 456 (1940)). Here, Mr. Broderick lacks any experience in the product that is central to his hypothesis. Moreover, said hypothesis is created out of whole cloth, and lacks any evidentiary support. Cf. Vasquez v. Mabini, 606 S.E.2d 809, 811 (Va. 2005) ("Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible."). Finally, his opinion of the unlikelihood that leaves in October found their way to the grate provides no assistance to the jury based on his expertise or knowledge of the area. Due to his lack of pertinent expertise, the lack of scientific testing, and the purely speculative nature of Mr. Broderick's theory, his testimony will offer nothing to the jury in their search for the truth.

Accordingly, for the foregoing reasons, Defendants' motions to strike Mr. Broderick's testimony are GRANTED. In light of this determination, the Court grants Plaintiffs leave to supplement their objections to Defendants' motions for summary judgment within the next thirty (30) days with a response by Defendants thirty (30) days after. If no supplement is filed, the Court will rule.

SO ORDERED.

June 2, 2021

Diane M. Nicolosi, Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/03/2021

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

JUNE TERM, 2021
JURY TRIAL DEMANDED

SUPERIOR COURT

ANDREW SZEWCZYK AND MARIAN SZEWCZYK

v.

CONTINENTAL PAVING, INC; BELLEMORE PROPERTY SERVICES, LLC., ALSO KNOWN AS BELLEMORE CATCH BASIN MAINTENANCE; AND NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

#216-2019-CV-00644

PLAINTIFFS' MOTION TO RECONSIDER SUPERIOR COURT'S ORDER TO STRIKE PLAINTIFFS' EXPERT, THOMAS F. BRODERICK, P.E.

NOW COME the Plaintiffs, Andrew Szewczyk and Marian Szewczyk, by and through their attorneys, McDowell & Morrissette, P.A., and respectfully files this motion to reconsider the Superior Court's Order to strike the Plaintiffs' expert, Thomas F. Broderick, P.E. pursuant to Superior Court Rule 12 (e). The Plaintiffs' provide as follows:

1. The instant case arises out of the flooding of the F.E. Everett Turnpike on October 21, 2016. The State of New Hampshire and its contractors, Continental Paving, Inc. and Bellemore Catch Basin Maintenance, were involved in a highway reconstruction project which involved repaving of the highway and the alteration and adjustments to the catch basins along the sides of the highway and in the middle of the highway between the north bound and south bound lanes. The Defendants filed a Motion to Strike the report and testimony of Thomas F. Broderick, P.E. where they have questioned the reliability and the methodology and the opinions of Mr. Broderick. The Superior Court's Order striking the opinions and testimony of Mr. Broderick must be reconsidered and reversed. The Superior Court misapplied the legal standards

DENIED.

Honorable Diane M. Nicolosi
June 23, 2021

Clerk's Notice of Decision
Document Sent to Parties
06/24/2021

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Andrew Szewczyk and Marian Szewczyk

v.

Continental Paving, Inc., et al.

Docket No. 216-2019-CV-00644

ORDER

Plaintiffs filed this action alleging negligence and negligent infliction of emotional distress arising out of a motor vehicle accident. Defendants Continental Paving, Inc. and Bellemore Property Services, LLC have moved for summary judgment. In their objection to the pending summary judgment motions, Plaintiffs initially relied on the expert opinion of Thomas Broderick. Defendants moved to strike Mr. Broderick's opinion, which this Court granted on June 2, 2021. In its order, the Court granted Plaintiffs leave to file a supplemental objection to the Defendants' summary judgment motions. (See Order, Nicolosi J., June 2, 2021.) Plaintiffs filed a supplemental objection on July 22, 2021 and submitted with it another expert engineer's report and an affidavit by the Plaintiffs' attorney, Mark Morrissette, with photographs. Defendants separately move to strike counsel's affidavit, and Plaintiffs object. For the following reasons, the motions to strike are GRANTED and DENIED in part, and the motions for summary judgment are GRANTED.

Factual Background

On October 21, 2016, Plaintiffs were injured in a motor vehicle accident on Route 3 (also known as the Everett Turnpike) in Nashua, New Hampshire. (Pl.'s Resp. to the Statement of Material Facts in Supp. of Bellemore Prop. Servs., LLC's Mot. for Summ. J. and Bellemore Prop. Servs., LLC's Resp. to Pl.'s Statement of Add'l Material Facts (hereinafter "Bellemore SOMF") ¶¶ 1, 20; Pl.'s Response to the Def., Continental Paving, Inc.'s Statement of Material Facts (hereinafter "Continental SOMF") ¶ 1.) While driving near Exit 4, Plaintiffs encountered flooding in the breakdown and left lanes. (Bellemore SOMF ¶ 20.) Plaintiffs' vehicle hydroplaned off of the highway. (Id.) Plaintiffs exited their vehicle. (Id. ¶ 1.) While outside their vehicle, a second vehicle hydroplaned, striking Plaintiffs' vehicle, which then struck and injured Plaintiffs. (Id. ¶¶ 1, 20.)

At the time of the accident, Continental Paving was repaving Route 3 pursuant to a contract with the New Hampshire Department of Transportation (NHDOT). (Id. ¶ 3.) Continental Paving subcontracted with Bellemore to clean the catch basins along Route 3. (Id. ¶ 4.) Between mid-September 2016 and October 4, 2016, Bellemore cleaned the catch basins along the highway. (Id. ¶¶ 6, 7.) Also during this time, NHDOT employees monitored the catch basins along Route 3 at least weekly and before storms. (See Maguire Dep. at 24:9-13; Bolduc Dep. at 8:11-17.)

A catch basin consists of a metal frame and top grate. (Continental Paving Interrog. ¶ 12.) Immediately underneath the frame is a polyethylene liner, which is "held in place [in the catch basin] with the masonry work (mortar and brick), the weight of the cast iron frame and grate, and concrete backfill placed around the cast iron frame and grate to lock it into place." (Id. ¶ 20.) A polyethylene liner consists of two parts—a flat, rectangular top and a cylindrical tube underneath that are attached together. In some

circumstances, the two parts can separate. (Martinez Dep. at 16:12-19.) According to Christopher Tsoukalas, a former Bellemore employee, if the bottom part separated from the top, "[i]t would crash to the bottom of the storm drain and you would see it." (Tsoukalas Dep. at 59:5-8.) If a polyethylene liner fell to the bottom, it would have to be removed so it did not clog the pipe. (Id. at 59:9-19.)

Mr. Tsoukalas described the general way that Bellemore would clean catch basins. He would mark the catch basins, remove the top of the catch basin, and place pipes into the storm drain. (Id. at 20:1-21:6.) He would vacuum up dirt, debris, and water from the catch basin, and then empty the water back out into the storm drains. (Id. at 20:1-21:13.) Mr. Tsoukalas indicated that chunks of construction debris would sometimes fall into the storm drains, and if those chunks were vacuumed up, they would cause damage to the pipes. (Id. at 40:5-41:23; but see Bolduc Dep. at 50:19-51:6 (stating that construction debris would not clog a catch basin because the tops were covered during the paving process).) He testified that, in the cases where a chunk could not be vacuumed up, someone would need to enter the storm drain and chisel the chunks of debris. (Tsoukalas Dep. at 40:5-41:23.) There was no evidence that this occurred with the catch basin at issue.

Joshua Moss, a former Bellemore employee, testified that damage to the liners is "very seldom," but "usually" happens when work is being done in the catch basin. (Moss Dep. at 33:22-34:7 ("If they are down there replacing a pipe or doing work on a pipe, [the liners] crack.").) Mr. Tsoukalas testified that, as debris is being vacuumed out of the catch basin, the pipe "absolutely" comes into contact with the polyethylene liner because the pipe would be moved around to access all areas of the catch basin. (Tsoukalas Dep. at

58:15-22.) In contrast, however, Mr. Moss testified that the pipe does "[n]ot necessarily" come into contact with the sides of the liner because the pipe stands straight up. (Moss. Dep. at 20:7-13.) Luis Martinez, the owner of Martinez Construction, the company that installed or replaced the liners on an as need basis as part of the construction project, testified that sometimes, in the process of raising catch basins, polyethylene liners can get damaged and separated. (Martinez Dep. at 17:7-22, 19:8-19.)

Mr. Tsoukalas also testified that sometimes construction debris would collect around the base of the liner. (Tsoukalas Dep. at 79:10-80:2.) He said that he "would try to chisel it out with hammers," but was not always successful. (Id.) He said that he would not have made a note if he had chiseled debris off of a liner. (Id. at 80:10-12.) He did not testify to specifically chiseling any debris off a liner in a catch basin near the accident. There was no evidence that this occurred with the catch basis at issue during the 2016 construction project. There is no evidence that that any liner, if one was even present before the 2016 construction, was damaged when the catch basin at issue was adjusted to sit at the right height in connection with the new pavement or during cleaning after the construction was completed.

Included in Continental Paving's and NHDOT's contract regarding the Route 3 repavement was a General Construction Requirement that stated: "Polyethylene liners has [sic] been included for installation at the discretion of the Engineer." (Bellemore's Ex. 2 at 5.) According to Continental Paving:

> Installation of new [polyethylene catch basin] liners was done as needed – at structures which did not currently have a liner, or ones where the existing liner was not suitable for re-installation during the reconstruction and adjustment of the casting by Martinez Road Construction. Continental Paving, Inc. has no specific record as to exact locations along the FE Everett Turnpike that new liners were installed under the respective

> Contracts. All new [polyethylene] [l]iners were manufactured and supplied by Continental Paving, Inc.

(Continental Paving Interrog. ¶ 16.) If an existing polyethylene liner was in good condition, it was re-used in the catch basin. (Id. ¶ 19.) If it was not re-usable or if there was no liner already in the catch basin, a new liner would be installed consistent with the above. (Id. ¶ 19.) According to Continental Paving, "[n]o [catch basin] would have been reconstructed without a [catch basin] liner installed." (Id. ¶ 21.) This is corroborated by Mr. Martinez, who installed the polyethylene liners for Continental Paving and could not remember seeing a catch basin on the Everett Turnpike without a liner. (Martinez Dep. at 14:19-15:3, 20:7-9.) Other individuals involved in the project could not remember or otherwise speak to whether there was a polyethylene liner installed at the catch basin near the accident site. (See Tsoukalas Dep. at 49:10-18 ("I noticed that there was a couple [catch basins] that didn't have them."), 58:4-8 ("Most of them had them. . . . I might have had a couple that didn't have them, but I'm not really sure."); Moss Dep. at 34:18-23 ("I don't remember seeing any liners on the Everett.").)

On the day of Plaintiffs' accident, "rain started at trace levels around midnight and continued throughout the day, with heavy rain from 6:00 PM to 8:00 PM." (Bellmore SOMF ¶ 10.) Due to the rain, water was pooling on the roadway and in the catch basins. (Id. ¶ 11.) After the accident, Trooper Kieran Fagan was the first to respond to the scene. He testified that "the roadway was clearly wet" and "[p]uddles were building up all over." (Fagan Dep. at 10:20-11:20.) Trooper Fagan's report from that night states that "[t]he vehicle struck a large body of water that had spilled over into the highspeed lane as a result of the catch basin being clogged." (Bellemore's Ex. G at 4.)

Trooper Fagan had been assigned to the Everett Turnpike for many years and testified that the road at the area of the accident "dips down to the left before it starts going up." (Fagan Dep. at 10:20-11:20.) He testified that over the course of his time as a trooper, he "could almost pick out" the locations where the tops of catch basins would be clogged. (Id.) He specifically noted debris such as "trash, pine needles, car parts, [and] sand," as well as "dirt" and "small car parts," as building up on the tops of catch basins during heavy rainstorms. (Id. at 10:20-13:3, 15:3-22.) He testified that such an event was not unusual: he "had many reports about overflow of the water going to the high-speed . . . lanes," and would sometimes "take [his] cruiser back and forth" over the debris build up to loosen up "whatever trash is there" to allow the water to flow into the catch basin. (Id. at 11:22-13:3.) He said: "This particular area is no different. That water was coming down. [The catch basin] clogged over. The water was spewing into the high speed lane." (Id.) However, though Trooper Fagan testified that he used his cruiser to break up any clogs on top of the catch basin, and he remembered the NHDOT employees using "a rake or shovel" to "pull[] the debris away from" the catch basin, he did not see any debris that night and did not remember what NHDOT pulled out of the catch basin. (Id. at 17:22-18:16, 33:4-20, 34:12-15.)

Responding to the scene after Trooper Fagan came NHDOT employees Mark Bolduc and Joseph Maguire. While at the scene, Mr. Maguire and Mr. Bolduc cleaned and inspected the tops of the catch basins. (Maguire Dep. at 23:1-13.) Mr. Bolduc did not remember much from the night of the accident. He testified that his cleaning efforts that night were limited to the top of the metal grate; he did not open and clean the interior of the catch basin or remove the polyethylene liner. (Bolduc Dep. at 17:12-18-12.) He

identified debris that would be typically be removed from storm drains: "[c]ardboard, plastic bottles, [and] beer cans," (id. at 48:14-16), but he did not create a log of what debris was removed from the catch basins that night. (Id. at 59:7-9.) He stated that resurfacing would not cause debris that would clog a catch basin because something is placed over the grate to prevent materials from getting in. (Id. at 50:18-51:6.) An earlier stage of the resurfacing process—called "milling"—could create debris that could clog catch basins, but Mr. Bolduc had not seen that before because a street sweeper simultaneously picks up such debris. (Id. at 51:7-52:15.)

Mr. Maguire testified that there are a number of catch basins near Exit 4, but "the one where [he] perceived the incident to have happened is the low point of that area of highway and is at the bottom of a super elevation." (Maguire Dep. at 14:14-15:7; see also id. at 35:12-23.) He described that area of Route 3: "[W]hen the storms really blast down, the water carries trash along the concrete barrier wall, and it will stop on a catch basin and when that one won't work, it moves to the next catch basin, and moves to the next catch basin until it reaches that particular one which is the low point." (Id. at 23:14-24:1.) He said they "have to stay constantly cleaning the tops of debris" that tends to be from vehicles. (Id. at 14:14-15:7, 36:1-12.)

Mr. Maguire said that the water in the left lane was approximately six inches deep, about ankle-height, and potentially higher at the time of the accident. (Id. at 21:8-13, 22:7-9.) He testified that, before he arrived, Mr. Bolduc had opened the catch basin and once "he cleared the top, [the water] flowed right in." (Id. at 20:21-21:2; see also id. at 32:5-11 (clarifying that they "clean the tops" of the catch basis; they "do not pop – the cap").) At another, he said either Mr. Bolduc or a fireman had cleared the catch basin, as

"it was cleared before [he] got there and there was a whirlpool going on [and water] was dropping rapidly." (Id. at 36:16-37:1.) He said it did not take long—he guessed around five minutes—for the water to dissipate. (Id. at 34:16-18.) He and Mr. Bolduc "did not leave until it was completely clear and both sides of it were cleaned" of trash. (Id. at 24:2-8; see also id. at 37:2-14.) Mr. Maguire testified that neither he nor Mr. Bolduc removed a polyethylene liner from any catch basin. (Id. at 34:2-6.)

Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III; see N.H. Super. Ct. R. 12(g)(1). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006). In evaluating a motion for summary judgment, the Court considers "the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991).

Analysis

I. Defendants' Motions to Strike Attorney Morrissette's Affidavit

In conjunction with their supplemental opposition to Defendants' motion for summary judgment, Plaintiffs submitted an affidavit by their attorney, Mark D. Morrissette, "attesting to the accuracy of several photos . . . demonstrating that the polyethylene liners regularly are damaged during the construction work such that the top of the liner becomes

separated from the cylinder." (Pls.' Supp. Opp. to Defs.' Mots. Summ. J. at 9.) The photographs attached to the affidavit "relate to a job site taking place on Wellington Road, Manchester, New Hampshire during the week of July 12, 2021." (Morrissette Aff. ¶ 4.) Attorney Morrissette claims these photos "overwhelmingly demonstrate the regular and consistent damage" to the liners. Defendants move to strike this affidavit and the photographs because (1) they are irrelevant and (2) Attorney Morrissette is not qualified to provide testimony regarding polyethylene liners, especially that the pictured damage occurs "regularly . . . during construction work." (Bellemore Prop Servs.' Mot. Strike at 2; see also Continental Paving's Mot. Strike.)

Under New Hampshire Rule of Evidence 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." "Irrelevant evidence is not admissible." N.H. R. Ev. 402. Plaintiffs claim that these photographs are circumstantial evidence that go towards Defendants' causation or contribution to their injuries, (see Pls.' Obj. Defs.' Mot. Strike at 4), and that the photographs support the conclusions of Mr. Murphy and Mr. Broderick that polyethylene liners can separate in a catch basin, (see id. at 5-6.)

The Court finds that the photographs are relevant. The Court will accept through counsel's affidavit that the photographs are of like polyethylene liners used and manufactured by Continental in both projects and that they reflect the fact that the rectangular top and cylindrical portions of the liners can separate under some circumstances. In fact, there is no real dispute that the liners can be damaged during construction when the grates are removed with some force. The Court does not, however,

accept the conclusion or opinion of Attorney Morrissette that these photographs "overwhelmingly demonstrate the regular and consistent damage" to the liners in circumstances relevant to this case. This is not a statement of fact from a knowledgeable witness, nor is Attorney Morrissette a qualified expert based on his experience or education. Furthermore, there are no attestations from a knowledgeable witness as to how the photographed liners were damaged "during . . . construction work." (Morrissette Aff. ¶ 1.)

Accordingly, the Court GRANTS the motions to strike except to the extent that the photographs will be allowed to demonstrate that the cone of the liner can detach from the top in some circumstances.

II. Richard Murphy's Expert Report

Plaintiffs also submitted an expert report written by a hydrologic/hydraulic engineer, Richard Murphy, in conjunction with their supplemental objection to summary judgment. Mr. Murphy evaluated the original and as built plans for the roadway and drainage system, and he opined that the drainage system was adequate to handle the rainfall at the time of the accident. He identified three possible causes for the flooding: a localized blockage of the drainage inlet structure within the catch basin by a free floating part of the basin liner; a blockage above the grate from debris; and a structural failure of the local drainage network conveyance piping. He ultimately concluded that the first option was the likely cause of the flooding.

Defendants argue that Mr. Murphy's report suffers from the same shortcomings as did Thomas Broderick's previously-stricken expert report. Though Defendants do not explicitly move to strike Mr. Murphy's report, the argument is implicit in Defendants'

oppositions to summary judgment, that an unreliable and speculative expert opinion should not be considered by the jury or the Court on summary judgment. Therefore, the Court will first address the admissibility of Mr. Murphy's opinion on the likely cause of the flooding.

New Hampshire Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "[E]xpert testimony must rise to a threshold level of reliability to be admissible." Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 148 N.H. 609, 614 (2002). In determining the reliability of an expert's testimony, the Court in Baker Valley adopted the framework set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

The New Hampshire legislature has since codified this framework at RSA 516:29-a, which provides:

> I. A witness shall not be allowed to offer expert testimony unless the court finds:
> (a) Such testimony is based upon sufficient facts or data;
> (b) Such testimony is the product of reliable principles and methods; and
> (c) The witness has applied the principles and methods reliably to the facts of the case.
> II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:
> (1) Have been or can be tested;
> (2) Have been subjected to peer review and publication;
> (3) Have a known or potential rate of error; and
> (4) Are generally accepted in the appropriate scientific literature.
> (b) In making its findings, the court may consider other factors specific to the proffered testimony.

(Emphasis added.) Under this analysis, "[t]he trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony." Baker Valley, 148 N.H. at 616. "[A]s long as an expert's scientific testimony rests upon good grounds, . . . it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." State v. Langill, 157 N.H. 77, 88 (2008). If the jury would not be allowed to consider the expert opinion, it cannot serve as evidence to defeat a summary judgment motion.

Plaintiffs represent that Mr. Murphy "is an engineer and hydrologist, with significant experience with drainage system plans, as built, along with other [NHDOT] standard construction drawings." (Pls.' Supp. Opp. to Defs.' Mots. Summ. J. at 2.) As part of his report, Mr. Murphy considered the following documents: (1) drainage computations for the Everett Turnpike from 1994; (2) plans of the proposed Everett Turnpike project from 1996; (3) Federal Highway Administration Hydraulic Engineering Circulars; (4) NHDOT standard construction drawings of Type A grate and frame, Type B grate and frame, and a polyethylene liner; and (5) National Oceanic and Atmospheric Administration climatological data from October 2016. (Id. Ex. 1 at 1.) He also received some information orally from Mr. Broderick. (Id.)

Mr. Murphy's report states:

> The overall body of information reviewed indicates that the travel lane flooding that precipitated the accident of October 21, 2016 could have been attributed to the following.
>
> a. Localized blockage of nearby drainage inlet structures due to settlement/displacement of polyethylene catch basin liners installed

during 2016 Route 3 [northbound] and [southbound] Resurfacing Operations

b. Age-related structural failure of local drainage network conveyance piping (due to material deterioration and or sediment abrasion)
c. Debris-related surface grate blockage (and subsequent travel lane by-pass flow) at highway runoff catch basins or drop inlets upgradient of the accident location

However, given the relatively short time period between the installation of the polyethylene catch basin liners (including the cleaning of the drainage structures, and sweeping of the roadway from construction activities), and the occurrence of the subject accident, and the lack of any verifiable evidence of local drainage system structural and/or operational deficiencies prior to installation of the liners, it appears that a runoff drainage blockage due to liner settlement/displacement is the most likely travel lane flooding mechanism of the three listed above.

(Id. ¶ 5.) Mr. Murphy's report concluded that the highway drainage system could have "accommodate[d] the maximum hourly precipitation rate of the storm that occurred on the night" of the accident and with the recent cleaning. (Id. at ¶ 3.) Additionally, he concluded that the spacing of the catch basin grate was small enough to "preclude entry" by "debris sufficient in size to block that structure's outlet piping." (Id.) At issue, he also opined "it is doubtful that there would be sufficient accumulation of roadway debris to block the inlet grate of any catch basin along Route 3" near the accident, and thus, "[t]he most likely mechanism for the travel lane flooding . . . appears to be settlement/displacement of the Polyethylene Liners that had been recently installed in one or more catch basins in close proximity to the accident site." (Id.)

The Court agrees with Defendants that the opinion as to causation expressed in Mr. Murphy's report is speculative and would not be helpful to the jury. Mr. Murphy did not examine any discovery specific to this case other than plans. He has no relevant experience with the roadway at issue. He cites no experience with Continental liners, and it is unknown if they are widely used in the industry or Massachusetts. It appears that

he has never examined one of Continental's liners or gathered information from other knowledgeable experts or users that would inform his opinion. Mr. Murphy's report relies expressly on information communicated to him by Mr. Broderick, including the fact that a polyethylene liner had been installed in the catch basin. However, as this Court noted in its June 2, 2021 Order, "Mr. Broderick did not even know if a polyethylene liner was actually installed in the catch basin at issue at the time of the accident." (Order at 10.) Although a jury could reasonably infer from the testimony provided in connection with the summary judgment motions that a liner was installed in the catch basin as part of the 2016 construction project, there is no evidence that the catch basin was examined by anyone after the accident to determine whether the cone portion of the liner was missing, facts fundamental to Plaintiffs' theory and Mr. Murphy's opinion, or whether the liner was still intact. Nor does Mr. Murphy's report identify any source of information establishing that a liner, assuming one was installed, was damaged by any act of a particular defendant or was defective as a result of an ineffective welding process (something for which Bellemore would bear no responsibility), or that any procedure employed by either defendant would use enough force to cause it to separate after installation.

Furthermore, Mr. Murphy presented no scientific methodology or analysis in his report. While he identified three potential causes or contributing factors to the flooding, he cursorily concludes that "a runoff drainage blockage due to liner settlement/displacement is the most likely travel lane flooding mechanism." (Pl.'s Supp. Obj. to Defs.' Mot. Summ. J. ¶ 5.) He does not explain how a polyethylene liner would settle or displace. And, even if a part of the liner was displaced and free floating in the catch basin, no testing was done to see whether the part could actually be forced through

the drainage system to disappear from the pit. Additionally, Mr. Murphy does not explain why the two other causal possibilities he identifies were rejected except for the timing of the cleaning of the catch basins fourteen days before the accident and the fact that no flooding had occurred before or after the date of the accident. Given the testimony of the NHDOT employees and the State police officer who were very familiar with the persistent littering problem that it can occur within a day, the failure to consider the testimony leaves his exclusion of the debris as a cause on a very shaky base. Most importantly, the Court is not persuaded that Mr. Murphy is more able, based on his education and experience, to draw the ultimate conclusion on causation than a lay jury would be. See Vasquez v. Mabini, 606 S.E.2d 809, 811 (Va. 2005) ("Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible."); see also State v. Cressey, 137 N.H. 402, 405 (1993) ("The reliability of evidence is of special concern when offered through expert testimony because such testimony involves the potential risks that a jury may disproportionally defer to the statements of an expert . . . and that a jury may attach extra importance to an expert's opinion simply because it is given with the air of authority that commonly accompanies an expert's testimony."). Such conclusory reasoning does not meet the statutory requirement for admissible expert testimony, is not based on sound facts or experience, and is not helpful the jury. Thus, the Court will not be consider Mr. Murphy's opinion on causation in evaluating Defendants' motions for summary judgment.

III. Defendants' Motions for Summary Judgment

Defendants each move for summary judgment on similar grounds. Continental Paving argues that the cause of the flooding was due to debris collection on top of the

grates and points to the testimony of three witnesses—Trooper Fagan, Mr. Bolduc, and Mr. Maguire—to support its position. Continental asserts that Plaintiffs' expert reports, even if considered, do not create a genuine dispute of material fact as to the cause of the flooding. Similarly, Bellemore argues that there is no evidence that Bellemore caused or contributed to Plaintiffs' accident. Further, Bellemore argues that it owed Plaintiffs no duty. Plaintiffs, in turn, contend that there is a genuine dispute of material fact regarding the cause of the flooding.

In order for Plaintiffs to succeed on their negligence claims, they "must establish that the defendant[s] owed a duty to the plaintiff[s], breached that duty, and that the breach proximately caused the claimed injury." Estate of Joshua T. v. State, 150 N.H. 405, 407 (2003). "The proximate cause element involves both cause-in-fact and legal cause." Id. "'Cause-in-fact,' also called 'but for' causation, requires the plaintiff to produce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed." 101 Ocean Blvd., LLC v. Foy Ins. Grp., 174 N.H. 130, ___, 2021 WL 1045906 (decided Mar. 19, 2021) (slip op. at 8). "Legal cause requires the plaintiff to establish that the negligent conduct was a substantial factor in bringing about the harm." Id. "The negligent conduct need not be the sole cause of the injury; however, to establish proximate cause, the plaintiff must prove that the defendant's conduct caused or contributed to cause the harm." Id.

In their supplemental objection, Plaintiffs argue that "there are several contested issues of fact about the source of the flooding[:] what was done by the [NHDOT] employees who responded to the scene of the accident; and, whether the catch basins were functional after the significant construction work, adjustments made to the catch

basin, and the cleaning and removal of materials from the catch basin after repair and maintenance work was completed on the catch basins." (Pls.' Supp. Obj. to Defs.' Mots. Summ. J. at 4.) Plaintiffs contend that "[e]ach of these contested areas, including the source of the flooding and whether it was roadway debris versus something internal in the catch basin, directly relates to whether Continental Paving, Inc. and Bellemore Catch Basin Maintenance acted with reasonable care in undertaking their work responsibilities and whether any actions or omissions proximately caused the injuries to the Plaintiffs." (Id. at 4-5.) Plaintiffs argue that Defendants' theory that the flooding was caused by debris clogging the catch basin is speculative.

The Court reframes the question. The issue is not whether the flooding was caused by debris deposited onto the grates by motorists or nature. There is certainly adequate evidence from which a reasonable jury could conclude that debris on the top of the catch basin was the culprit. Both Trooper Fagan and Mr. Maguire noted that the area of the accident is at a low point in the road. (See Fagan Dep. at 10:20-11:20, Maguire Dep. at 14:14-15:7, 23:14-24:1.) Trooper Fagan testified that, from his experience, he could almost identify which catch basins would clog with debris, especially during heavy rainstorms. (See Fagan Dep. at 10:20-13:3, 15:3-22.) He remembered NHDOT employees using "a rake or shovel" to "pull[] the debris away from the catch basin," but did not see what they removed from the catch basin. (Id. at 33:4-20, 34:12-15.) Mr. Maguire testified that once either Mr. Bolduc or a fireman had cleared the top of the catch basin, the approximately six inches of accumulated water that he observed when he arrived cleared with a whirlpool effect in about five minutes. (See Maguire Dep. at 20:21-21:13, 22:7-9, 34:16-18, 36:16-37:1.) NHDOT documents work performed by its

employees to open the catch basin when called to the scene of the flooding. (See NHDOT Log.) To the extent there was ambiguity about the use of the term "open" by the off scene NHDOT supervisor, the men on scene who accomplished the work unequivocally testified that they would have addressed only the grate on the top of the basin and would not have removed the grate to access the interior. Although neither Mr. Maguire nor Mr. Bolduc could remember or identify what debris they may have removed from the top of the catch basin that night, Mr. Maguire stated that they both stayed until the area was clear of trash. (Id. at 24:2-8.) And, although it is true that no witness had a vivid recollection of details four years later, all were collectively able to describe the layout of the highway in the relevant area and a tendency for debris to accumulate at the low point where the specific catch basin lies, as well as speak to the actions taken the night of the accident, either from memory or documents, that reflect a clearing of debris from the catch basin.

On the other hand, a jury could find the memories or credibility of defense witnesses lacking and conclude that the cause of the flooding is undetermined or must be from some cause other than debris. Defendants, however, do not bear the burden of proving the road debris was the cause of the flooding. Rather, it is Plaintiffs who bear the burden to establish causation by act or inaction by Defendants as well as legal fault. It is not enough to prove that the possibility exists that a liner could or might block a pipe in the catch basin, Plaintiffs must prove by a preponderance that one or both Defendants caused or substantially contributed to the condition that caused the flooding. The question then is whether, construing all the evidence in the Plaintiffs' favor, there is sufficient evidence for a reasonable jury to find a cause of flooding attributable to each

Defendant that is not based on speculation. The Court answers this question in the negative.

With respect to Plaintiffs' theory that the flooding was caused by a dislodgment of the polyethylene liner in the basin, the Court has already excluded Mr. Broderick's opinion and, although Mr. Murphy can testify as to the adequacy of the drainage system to handle the rainstorm, the Court will not consider Mr. Murphy's opinion on causation for the reasons articulated in section II, *supra*. However, a lay jury arguably is capable of understanding the testimony relative to how a liner could obstruct the water flow into an outflow pipe, thereby causing water to back up, even without the ultimate opinion of the experts. There is no real dispute that the top of Continental's liners can separate from the cone portion under certain circumstances or possibly due to a defect. And, it is common sense that, if a part of a liner detached and fell into the sump and was free floating, it could block the outflow pipe and the interfere with the flow of water. Assuming all of this to be true, Plaintiffs' trouble, however, is that there is no evidence that any part of the liner in the catch basin disengaged or is missing. If a cone fell off during Bellemore's cleaning process or the weld gave way as a result of Continental's manufacturing defect, the rectangular top would remain under the grate and frame and be held in place by the brick and concrete. There is no evidence that any examination took place at a time proximate to the accident or at any point thereafter to determine whether the cone portion of the liner is gone with rectangular portion remaining. Continental's records are devoid of evidence that it was ever requested to inspect, repair or replace any liner of any catch basin in the vicinity of the accident after the 2016 construction was complete, which would have generated a paper trail, nor is there record of a warranty claim made by NHDOT or credit

given for a defective liner. (See Bauer Affid. ¶ 8, 11.) Therefore, even if some of the circumstances described – manual scraping of road material off the liner, high powered jetting of the system, a cleaning pipe coming into contact with the cylindrical portion of the liner, or removal of the grate and frame to open the basin to access the interior -- could conceivably damage a liner, taking and construing all the facts in Plaintiffs' favor, there is no evidence that these actions occurred. Indeed, there is no direct evidence from any witness or record about whether a liner existed in the catch basin at issue prior to the 2016 project that was reinstalled after adjustment; whether a new one was installed for the first time or as a replacement for a damaged liner; or whether the catch basin at issue was even one selected by the engineer to be cleaned by Bellemore after it was adjusted to accommodate the new pavement during the cleaning process.

Nor can a reasonable inference in Plaintiffs' favor be drawn as to Defendants' fault based on the totality of the evidence. There is a lacking of sufficient data or even anecdotal evidence to suggest that disengagement of the cone from the top of the liners after installation is a common or likely occurrence. Furthermore, even assuming that a liner was installed and the cone disengaged, Plaintiffs' explanation for why it is missing is also inadequately supported, even if Mr. Broderick were allowed to offer it as a possibility. There is no evidence as to what water pressure it would take for a free floating liner to fold and be transported out of the catch basin to disappear through the piping system or that such an occurrence has ever happened. Neither expert conducted any tests nor was there any information from the industry that would support this possibility.

Even without any direct evidence or historical evidence from which a reasonable inference can be drawn that a dislodged liner part caused the flooding, Plaintiffs seem to

suggest that, should the jury resolve the dispute in their favor as to whether debris on top of the grate caused the flooding, then the only other possible explanation is that the liner blocked the outflow pipe for a period and then disappeared into the pipe at the same time NHDOT employees were working to remove debris from the grate, a remarkable coincidence. The Court, however, must consider all the facts to Plaintiffs'' advantage. The argument is akin to a theory of *res ipsa loquiter*, that negligence can be inferred based on the occurrence of an injurious event. See Rowe v. Public Service Co. of New Hampshire, 115 N.H. 397, 399 (1975) (citing Blankenship v. Wagner, 273 A.2d 412, 414 (Md. 1971)). (Based on circumstantial evidence, "the facts of the occurrence warrant[] the inference of negligence.")

> For that doctrine [of res ipsa loquiter] to apply it is necessary that (1) the accident be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) other responsible causes are sufficiently eliminated by the evidence. Smith v. Company, 97 N.H. 522, 524, 92 A.2d 658, 659 (1952); Restatement (Second) of Torts s 328D(1) (1965). This doctrine does not do away with the well established rules of law that a person asserting negligence has the burden of proof and that the mere fact of injury does not indicate negligence on the part of anyone. Gobbi v. Moulton, 108 N.H. 183, 185, 230 A.2d 747, 749 (1967); W. Prosser, Law of Torts s 39 at 218 (4th ed. 1971)

(Id.) Looking at the totality of the evidence favorable to the non-moving party, none of the three prongs could be met to warrant a *res ipsa loquiter* instruction. Bellemore and Continental have been separately charged with negligence, and neither had exclusive control over the catch basin. Bellemore should not be held liable for a defective weld, if that were the cause of the cone disengaging. Nor should Continental be held liable for damage to the integrity of the weld if Bellemore caused the damage by misuse of the cleaning equipment. Furthermore,

although a jury may not affirmatively conclude that a blocked grate caused the flooding, on the presented evidence, it cannot be eliminated as a possible cause. Finally, NHDOT, although immune, or Martinez Construction, cannot be excluded as a potentially liable party.

Accordingly, Defendants' motions for summary judgment are GRANTED.[1]

SO ORDERED.

January 9, 2022

Diane M. Nicolosi, Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/10/2022

[1] Because the Court finds the issue of causation dispositive, it need not address Bellemore's argument that it had no duty of care towards Plaintiffs.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

JANUARY TERM, 2022
JURY TRIAL DEMANDED

SUPERIOR COURT

ANDREW SZEWCZYK AND MARIAN SZEWCZYK

v.

CONTINENTAL PAVING, INC; BELLEMORE PROPERTY SERVICES, LLC, & NH DOT
#216-2019-CV-00644

PLAINTIFFS' MOTION TO RECONSIDER THE SUPERIOR COURT'S GRANT OF SUMMARY JUDGMENT

NOW COME the Plaintiffs, Andrew Szewczyk and Marian Szewczyk, by and through their attorneys, McDowell & Morrissette, P.A., and respectfully files this Motion for Reconsideration pursuant to Superior Court Rule 12(e). The Plaintiffs provide as follows:

STANDARD OF REVIEW

1. The Superior Court should reconsider its ruling on the Defendants' motions for summary judgment where the Honorable Court has overlooked or misapprehended the law with respect to the burden of proof associated with a claim based on negligence and the Superior Court did not consider the evidence in the light most favorable to the Plaintiffs such that all favorable inferences should have been afforded to the Plaintiffs. Amica Insurance Company v. Mutrie, 167 N.H. 108, 111 (2014). The Court has either overlooked or was not provided with the necessary testimony of Mr. Maguire. Mr. Maguire's testimony is in sharp contrast to the evidence relied on by the Superior Court. *See*, ¶¶ 6-11.

2. The Superior Court has also adjudged contested material facts where such factual assessments are reserved to the trier of fact. *See*, State v. Newman, 148 N.H. 287, 292 (2002). It is important for the Superior Court to consider the Plaintiffs' Complaint in its review of its Orders on summary judgment. The Plaintiffs alleged in ¶¶ 10-12 of their Complaint that the

DENIED. Based on the record submitted prior to the reconsideration motion, the plainitffs have not pointed to any facts or law that the Court misapprehended or overlooked.

Honorable Diane M. Nicolosi
February 1, 2022

Clerk's Notice of Decision
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