THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2022-0101

Andrew Szewczyk and Marian Szewczyk

Plaintiffs, Appellants

v.

Continental Paving, Inc., NH Department of Transportation and Bellemore Property Services, Inc.

Defendants, Appellees

MANDATORY APPEAL FROM A FINAL DECISION OF THE HILLSBOROUGH COUNTY, NORTHERN DISTRICT, SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLEE CONTINENTAL PAVING, INC.

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Statement of Facts

There were three eyewitnesses to the condition of the storm drain shortly after the accident on October 21, 2016, on the F.E. Everett Turnpike, Nashua, NH. One witness was a State Trooper and the other two witnesses were New Hampshire Department of Transportation employees.

Trooper First Class Kieran M. Fagan was the State Trooper who responded to the scene. Trooper Fagan's patrol responsibilities were South of Exit 5 on 293 all the way down through the Bedford Tolls, through Merrimack and down to Nashua. App. II[1] at 225-226. Trooper Fagan had that patrol responsibility for 17 years and he was patrolling the Everett on a regular basis in 2016. App. II at 226. On October 21, 2016, Trooper Fagan was dispatched to the scene of southbound in the area of Exit 4 for a vehicle into the Jersey barrier. App. II at 230. As he responded, Trooper Fagan observed that the roads were wet and that puddles were building up all over the road, not just in the high-speed breakdown lane. App. II at 230.

Trooper Fagan reports in his written report "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 throughout the course of several months." App. II at 218. Trooper Fagan explained that when he used the word debris in his report, he meant trash such as plastic, cans, sand, dirt, pine needles and small car parts. App. II at 234. According to Trooper Fagan, this accident was not caused by what was below the grate, but what was on top of it. App. II at 236. He could see there was "stuff swirling around" and knew exactly why the water spilled into the high-speed lane. App. II at 237.

[1] "App." means Appendix filed by Plaintiffs/Appellants.

Trooper Fagan observed the DOT employees who came to unclog the catch basins. App. II at 241. He observed that the DOT employees had a rake or a shovel and were pulling debris away from the grate. App. II at 241. It was typical trash buildup along the Jersey barriers. App. II at 242.

Another individual who arrived at the scene was Mark B. Bolduc. Mr. Bolduc has been employed with the New Hampshire DOT for approximately 15 years. App. II at 254. Mr. Bolduc was one of the individuals sent due to the flooding on the highway and helped clear it. App. II at 261-262. Mr. Bolduc testified that when there is flooding and he is called out, he does not open the catch basins; rather he cleans the debris on top of it. App. II at 267. Mr. Bolduc did not take the covers off any catch basins that night. App. V at 96. Mr. Bolduc cleaned off several catch basins, not just one. App. V at 97.

Mr. Bolduc also explained that if there was something inside the catch basin not allowing it to drain that would be a situation where they would be malfunctioning and they would have to call someone else out to help alleviate the problem. App. III at 43-44. The records establish that Mr. Bolduc and the other New Hampshire DOT worker were working on clearing the drains for about 45 minutes and if the storm basins themselves were defective and clogged on the inside they would have been there a lot longer. App. III at 44. Mr. Bolduc concludes that it was debris on top of the catch basin that was causing the clogging. App. III at 45.

Mr. Bolduc was asked at his deposition "how soon after a street sweeper passes through does debris collect, in your experience?" App. V at 316. Mr. Bolduc's response was "the same day". App. V at 316. When

asked why, he responded "people like throwing their trash out the window or it blows out of the back of a truck". App. V at 316.

Joseph W. Maguire has worked for the New Hampshire DOT department for almost 11 years. App. II at 295-296. Mr. Maguire's job responsibility includes maintaining, observing or inspecting the Everett Turnpike from Exit 6 all of the way to the Massachusetts border. App. II at 296-297.

On October 21, 2016, Mr. Maguire received a call from his patrol foreman asking that he meet Mark Bolduc because they had flooding and an accident. App. II at 302. Mr. Maguire believes he arrived approximately 10 minutes after Mr. Bolduc arrived. App. II at 303. He confirmed that at this point there was more than just one catch basin clogged. App. II at 304. It is an area where they constantly must clean debris off the tops of the basins. App. II at 304. Mr. Maguire testified that once Mark Bolduc cleaned the top of the grates "water flowed right in." App. II at 309. Mr. Maguire instructed Mr. Bolduc to inspect the catch basins after the accident cleared and he also participated in cleaning off the tops of the catch basins. App. II at 311-312. He and Mr. Bolduc did not leave that evening until the basin was completely clear of six pack holders, paper and leaves as they did not want to come back out that evening. App. II at 313.

Mr. Maguire also agreed with Mr. Bolduc that they did not open any catch basin cover on that night. App. II at 320. Mr. Maguire also confirms that they were onsite about 45 minutes. App. III at 58.

If a liner was replaced at the location of the plaintiff's accident, it is most unlikely that no records would exist either by Continental, the New Hampshire DOT, or the New Hampshire State Police. App. III at 60-62.

Continental does not have any record which suggests that at any time the New Hampshire DOT or anyone else requested Continental to come and inspect and/or repair and/or replace the subject catch basins in the vicinity of this accident at any time after October 21, 2016. App. III at 60-62.

Summary of Argument

The plaintiffs' experts Thomas Broderick and Richard Murphy were properly stricken because neither witnesses' testimony rises to the threshold level of reliability. The experts have not conducted any testing to support the theory that the polyethylene liner became dislodged due to a manufacturing defect, nor do they point to or rely on the testing of other experts. Both of plaintiffs' experts lack any familiarity with or expertise on polyethylene liners and neither are experts on the manufacture of polyethylene liners. Their opinions are speculative and will not assist the jury and therefore property excluded.

Continental Paving, Inc.'s motion for summary judgment was properly granted. The undisputed evidence is that debris on the top of the grates caused the flooding and once the debris was removed the water flowed right in. There is no claim that Continental Paving, Inc. caused or contributed to cause the debris to accumulate on the grates. Rather, plaintiffs argue that it was not debris that caused the flooding, but rather something inside the storm drain such as a dislodged polyethylene liner. Plaintiffs have an alternative theory for how the polyethylene liner became dislodged – either a manufacturing defect by Continental Paving, Inc. or by a disturbance to the cone by an external force by Bellemore Property

Services, Inc. Plaintiffs' theory is in direct contradiction of the undisputed eyewitness testimony of the State Trooper and two NH DOT employees who responded to the scene of the flooding, who all concluded that the flooding was caused by the debris on the grates, not anything under the grates. The speculative alternative theory of plaintiffs' experts does not create a material fact in dispute and was insufficient to defeat the grant of summary judgment.

Argument

A. The Superior Court correctly struck plaintiffs' experts because their testimony would not offer any assistance to the jury in their search for the truth because the experts lack pertinent expertise, did not perform any scientific testing, and because of the speculative nature of their opinions.

The trial court acts as a gatekeeper to ensure that expert testimony is both relevant and reliable. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589 (U.S. 1993) (explaining that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"); Baker Valley Lumber v. Ingersoll-Rand Co., 148 N.H. 609, 616 (2002) ("The 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"); id at 614 (drawing on the analysis set forth in Daubert for determining admissibility of expert testimony); Baxter v. Temple, 157 N.H. 280, 298 (2008) ("[t]he role of the Court when ruling on a Daubert motion is not to resolve the scientific debate,

but to determine whether [the] plaintiff['s] experts have a reliable basis for their testimony"). Hence, the trial court must determine whether the expert qualifies as an expert, *i.e.*, whether he or she has "sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case." Baker Valley Lumber, 148 N.H. at 616 (citation omitted).

Under New Hampshire Rule of Evidence 702, "an expert may be qualified on the basis of 'knowledge, skill, experience, training, or education.'" Id. at 612 (quoting N.H. R. Ev. 702). Further, "the expert's testimony must concern 'scientific, technical or other specialized knowledge.'" United States v. Shay, 57 F.3d 126, 132 (1st Cir. Mass. 1995) (quoting Federal Rule of Evidence 702, other citation omitted); N.H. R. Ev. 702 ("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")

In addition, "expert testimony must rise to a threshold level of reliability to be admissible." Baxter v. Temple, 157 N.H. 280, 284 (2008). In order for expert testimony to be considered to be reliable the trial court must find that: "(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." RSA 516:29-a, I(a)-(c); Baker Valley Lumber, 148 N.H. at 616 ("The proper focus for the trial court is the reliability of the expert's methodology or technique"). "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." RSA 516:29-a, II(a)(1)-(4). "In making its findings, the court may consider other factors specific to the proffered testimony." RSA 516:29-a, II(b).

Finally, the expert testimony "must 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" United States v. Shay, 57 F.3d 126, 132 (1st Cir. Mass. 1995) (citation omitted). "The fundamental question that a court must answer in determining whether a proposed expert's testimony will assist the trier of fact is 'whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.'" Id. at 132 (citations omitted).

Thomas Broderick, PE opines that the polyethylene liner dislodged either due to a manufacturing defect [by Continental Paving, Inc.] or a disturbance to the cone from an external force [by Bellemore Property Services, Inc.]. App. IV at 175. Mr. Broderick has not done any testing to support his theory and therefore was properly excluded as an expert because his testimony cannot be regarded as reliable. See N.H. R. Ev. 702. Mr. Broderick's opinions are based solely on speculation. Mr. Broderick has not done any testing whatsoever to attempt to verify his theory of either a manufacturing defect or a disturbance to the cone from an external force. And he has not even attempted to point to or rely on any testing of others.

Mr. Broderick concedes that testing a hypothesis is the hallmark of science.

> Q. By the way, isn't the hallmark of science testing the hypothesis?
> A. Yes, it is.
> App. IV at 197.

During his deposition, Mr. Broderick testified as follows:

> Q. So what testing did you do to attempt to validate your hypothesis?
> A. I did not do testing on it.
> App. IV at 184.
> Q. And my understanding is you have done no testing in this case and that would include testing of what force would be required to break a polyethylene liner and what type of debris over the grates would be required in order to block water from flowing into the grates; is that correct?
> A. That's correct.
> App. IV at 187.

> Q. So again, as I understand it, you've done no testing to determine the amount of force necessary to break one of those liners; is that correct?
> A. Correct.
> App. IV at 188.

Mr. Broderick does not rely on testing by anyone else.

> Q. You would agree with me, do you not, that science requires testing of hypotheses to see if they are accurate, correct?
> A. Correct, and I 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 or how they get the products approved. They seem to be manufactured by contractors, not suppliers.
> App. IV at 197.

Not only has Mr. Broderick not performed any testing specific to this case, but he has also not ever performed testing of the type required to render the opinions in this case in any other case.

> Q. Have you ever analyzed stresses in a weld?
> A. No, I haven't.
> Q. Have you ever completed a failure analysis on a weld?
> A. No, I haven't.
> Q. Have you done any calculations or analysis to approximate the magnitude of force that could be applied to a liner during catch basin cleaning operations?
> A. No, I haven't.
> Q. I'm sorry. You have not. Is that what you said?
> A. That's correct.
> Q. Have you done any calculations or analysis to approximate the direction of force that could be applied to the liner during catch basin cleaning operations?
> A. No, I haven't.
> Q. What magnitude of force would constitute a sufficient disturbance to dislocate a downspout from the top of the liner at the weld as you refer to on page 10 of your report?
> A. 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.
> Q. But nothing that you have tested, correct?
> A. Correct.
> App. IV at 201-202.

The Second Circuit's decision in Brooks v. Outboard Marine Corporation, 234 F.3d 89, (2nd Cir. 2000) provides guidance here. In Brooks, the plaintiff brought suit in relation to the amputation of his son's hand by an outboard boat motor. Id. at 90. The plaintiff's expert hypothesized that a propeller guard or a kill switch (an emergency shut off device) may have either prevented the accident or at least reduced its severity. Id. One of the

defendants involved in the case sought to exclude the expert's testimony regarding the alleged safety measures that could have been implemented to prevent the accident on the basis that the expert "was unsuited by education or experience to testify about the kind of boat and engine in question, and also that his conclusion that the kill switch would have activated and prevented or lessened the severity of the accident was untested and unsupported by any examination of the actual boat or motor, or the interview of any witnesses." Id. at 91. The district court granted the defendant's request to preclude the expert's testimony on the basis that it "was 'unreliable and speculative, and would not assist the jury in its determination of facts at issue in [the] case[,]'" id., for the reasons raised by the defendant. Id. The Second Circuit affirmed the district court's ruling in part because the expert "had never attempted to reconstruct the accident and test his theory." Id. at 92; id. (stating that: "failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony"). Here there is a complete lack by Mr. Broderick of any attempt to test his theory making his opinions unreliable and speculative.

In addition to not conducting any testing, Broderick did not even research the properties of the polyethylene used for the liners and had no information regarding the identity of the supplier of the polyethylene.

> Q. But who supplied the polyethylene to Continental?
> A. I have no idea.
> Q. So if you don't know who supplied the polyethylene, how could you have looked up the yield strength on the internet?
> A. I looked up what the product was and the different properties that it had.

> Q. From a general standpoint, not from the standpoint of the actual polyethylene used here, correct?
> A. Correct, because I don't know who their supplier is for their polyethylene.
> App. IV at 202.

Mr. Broderick did not do any calculations or analysis to determine how much pressure would be required to force a separated down spout down the outflow pipe. App. IV at 204-205. He did not do any calculations or analysis to determine what percentage of the outlet pipe opening would need to be blocked to cause flooding of the road. App. IV at 204-205.

As mentioned above, Mr. Broderick's opinion is that the polyethylene liner dislodged either due to a manufacturing defect or a disturbance to the cone from an external force. Mr. Broderick is not qualified to provide an opinion on a manufacturing defect[2]. Even if the cone dislodged as plaintiffs contend, Mr. Broderick himself does not know why. He has done no testing of his *either-or* theory. Mr. Broderick's opinion is no more than speculation.

Mr. Broderick also cannot provide any opinion regarding the manufacturing process of polyethylene liner or any alleged defect whereas he concedes that he is not an expert in this area. He has no experience at all with polyethylene liners and therefore is not qualified to testify to a manufacturing defect.

> A. …I've never dealt with these polyethylene liners before.
> App. IV at 209.

[2] Mr. Broderick is also not qualified to provide an opinion on the external force by Bellemore Property Services, Inc. required to disturb the cone. Continental Paving, Inc., however, is focusing its arguments herein on the first part of plaintiffs alternative theory that the polyethylene liner became dislodged due to a manufacturing defect by Continental Paving, Inc.

Q. Do you consider yourself an expert on the manufacture of polyethylene liners?
A. No.
App. IV at 209.

Even though Mr. Broderick hypothesizes about a defective liner, he has never inspected the liner, has not done any testing of polyethylene liners, has never previously dealt with polyethylene liners and most significantly admits that he is not an expert on the manufacture of polyethylene liners. Even without Mr. Broderick's admission, clearly he is not qualified to testify that the polyethylene liner dislodged due to a manufacturing defect. Such an opinion by Mr. Broderick is pure speculation and therefore would not assist the trier of fact to understand the evidence.

Plaintiffs' other expert, Richard Murphy PE, is a hydrologist who was retained by Mr. Broderick to evaluate the "highway drainage conditions". App. VI at 84-85. Mr. Murphy assessed the as built plans of the highway and the drainage system and opined that the system was designed reasonably appropriately to handle the volume of water that was generated by the rain event on October 21, 2016. App. VI at 87. Mr. Murphy's role was specific as is evident by his report including his summary of the very limited materials he reviewed. App. VI at 85. Mr. Murphy did not inspect the scene of the accident or the roadway or any of the catch basins; he did not remove the grates or have a camera placed down the grates to check on the actual conditions of the catch basins and the liners; he did not inspect any polyethylene liners; he did not performed any testing on any polyethylene liners; he did not review Trooper Fagan's

report; he did not review the transcripts of any of the 10 depositions[3] taken in this case; and he has not reviewed any discovery responses. App. VI at 85. Mr. Murphy's opinion that the most likely mechanism for the flooding was settlement/displacement of the polyethylene liners, is not based on sufficient facts or data and therefore properly excluded. See RSA 516:29-a.I.(a).

To determine the reliability of expert testimony, the trial court must comply with RSA 516:29-a. Stachulski v. Apple New England, LLC, 171 NH 158, 163 (2018). Mr. Murphy's opinion is not based on sufficient facts or data where there is a complete absence by him of a review of any discovery in this case. Mr. Murphy's opinion that the most likely mechanism for the flooding was settlement/displacement of the polyethylene liners, is not the product of reliable principle or methods. See RSA 516:29-a.I.(b). Like Broderick, Murphy did not conduct any testing at all and failed to provide any basis or foundation for his opinion. App VI at 84-87.

Both experts were property excluded because their speculative opinions do not rise to a threshold level of reliability.

B. Continental Paving, Inc.'s Summary Judgment was properly granted where there are no genuine issues of material fact and Continental Paving, Inc. is entitled to judgment as a matter of law.

Continental Paving Inc.'s motion for summary judgment was properly granted because there are no genuine issues of material fact. A fact

[3] The following witnesses have provided deposition testimony: Alan Vignola, Andrew Szewczyk, Christopher Tsousalas, Joseph Maguire, Joshua Moss, Lisa Szewxzyk, Luis Martinez, Mark Bolduc, Thomas Broderick and Trooper Kieran Fagan.

is "material" if it affects the outcome of the litigation under the applicable substantive law. Palmer v Nan King Restaurant, Inc., 147 N.H. 681, 683 (2002). If the evidence does not reveal any genuine issue of material fact and the moving party is entitled a judgment is a matter of law, the motion for summary judgment will be granted. VanDemark v. McDonalds Corp., 153 N.H. 753, 756 (2006), citing Sintros v. Hammen, 148 N.H. 478, 480 (2002). Here the material facts are undisputed, and no reasonable basis exists to dispute the facts.

The plaintiffs argue that the notion that the roadway debris caused the flooding was strongly contested. Appellants brief, page 25. It is true that the plaintiffs contest that roadway debris cause the flooding, but the plaintiffs failed to present any evidence to dispute the eyewitness testimony of Trooper Fagan and the two NH DOT workers, all of whom agree that the flooding was caused by the roadway debris. See Appendixes 1 – VI. The adverse party to a motion for summary judgment may not rest on mere allegations or denials of his pleadings, but his response, by affidavits or reference to depositions, answers to interrogatories, or admissions must set forth specific facts showing that there is a genuine issue for trial. See RSA 491:8-a IV. Plaintiffs have not produced any eyewitness testimony disputing the testimony of Trooper Fagan and the New Hampshire DOT witnesses. Rather plaintiff relies on the speculative opinion of their expert Mr. Broderick who simply attempts to ignore the eyewitness accounts but does not totally do so. Mr. Broderick does not entirely rule out the debris' role in causing the flooding. Mr. Broderick opines that the flooding was exacerbated by some debris on the grates at the low point where the flooding occurred. App. IV at 175.

Plaintiffs' theory of what caused the storm drain to be clogged on the day of the accident is not grounded in fact; it is an unsupported hypothetical of how a dislodged polyethylene liner could potentially cause a blockage and flooding. The plaintiffs' experts have not even committed to how the liner dislodged; not surprisingly considering the speculative nature of the opinion. Just because plaintiffs contend that a dislodged liner could cause a clog in the drainpipe, that does not create a genuine issue of material fact where there is no dispute of the facts pertaining to the clog on the date of loss. There were three eyewitnesses to the condition of the storm drains, and all agree that the reason the storm drains were clogged and not functioning was due to debris on the top of the grates that were preventing water from flowing through the grates. Again, plaintiffs have not produced any conflicting eyewitness testimony. Plaintiffs' conclusory allegation that the construction activities created a flooding situation is not a fact. Plaintiffs' experts' dismissal of the eyewitness accounts is not a fact. Plaintiffs' experts' speculative opinions are not facts.

The facts supported by the record is that the flooding situation was created by debris on top of the grates. After the NH DOT employees removed debris on top of the catch basins, they did carry the water away and continue to do so to this day without any repair or alteration to the basin or liner.

Trooper Fagan reported that water buildup was gathering in the breakdown lanes and clogging some of the catch basins due to debris in the road and breakdown lanes throughout the course of several months. Trooper Fagan said the accident was not caused by what was below the grade, but what was on top of it. Trooper Fagan observed the DOT

employees using a rake or a shovel and pulling debris away from the grate. Trooper Fagan had a memory of the accident and clearly testified as to the reason the grate was clogged. He also provided information as to how the debris gathers on the highway indicating that it's from people who throw trash out of their cars and from material coming out of trash trucks.

DOT employee Mark B. Bolduc testified when there is flooding on the highways and he is called out to correct the problem they do not open the catch basins, but only clean the material that is on top of it. Mr. Bolduc further testified that even when a street sweeper passes, in his experience debris collects the same day because people are throwing their trash out the window or blows of the back of a truck. Mr. Bolduc concluded that it was debris on top of the catch basin that was causing the clog.

Joseph Maguire was the other New Hampshire DOT employee who responded to the scene. Mr. Maguire testified that once Mark Bolduc cleaned the top of the grate "water flowed right in."

The eyewitness testimony of Trooper Fagan and the two New Hampshire DOT employees is undisputed. Plaintiffs argue these facts are in dispute. But the plaintiffs have not provided any affidavit, reference to deposition testimony, answers to interrogatories or any admission showing there is a genuine issue of material fact for trial. The DOT employees and Trooper Fagan all concluded that it was the debris that was covering the top of the grates that caused the flooding. These facts are not in dispute. Speculative opinions by plaintiffs experts are insufficient to defeat Continental Paving, Inc.'s motion for summary judgment because the speculative opinions are not "material" and do not affect the outcome of the case.

Plaintiffs' claims against Continental Paving, Inc. are for negligence. "A plaintiff claiming negligence must show that the defendant owed the plaintiff a duty, that the duty was breached, that the plaintiff suffered an injury, and that the defendant's breach was the proximate cause of the injury." Ronayne v. State, 137 N.H. 281, 284 (1993). Plaintiffs have not argued that Continental Paving Inc. had a duty to clear the debris off the tops of the grates or to inspect the grates for debris. Further plaintiffs have not offered any evidence of a breach of the standard of care by Continental Paving, Inc. Plaintiffs have not disclosed an expert who opines that Continental Paving, Inc. breached the standard of care. Rather, plaintiffs' expert only provide a theory for how a dislodged polyethylene liner could become dislodged and cause a blockage. Mr. Broderick's speculative theory is that the polyethylene liner could become dislodged: either by a) a manufacturing defect by Continental Paving, Inc.; or b) disturbance by an outside force such as cleaning by Bellemore Property Services, Inc. Whether or not a product such as a polyethylene liner is defective is beyond the ken of the average juror. "Expert testimony is required when the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." Laramie v. Stone, 160 N.H. 419, 427 (2010). "This requirement serves to preclude the jury from engaging in idle speculation . . . ." Lemay v. Burnett, 139 N.H. 633, 634 (1995) (quotation omitted). Plaintiffs have no expert who will opine that the polyethylene liner was defective. Expert testimony is required on the subject matter of product defect, but plaintiffs do not have an expert. Even if plaintiffs' experts are not excluded, neither of plaintiffs'

experts provide an opinion that the liner at issue was defective, nor are they qualified to provide such an opinion.

Although Broderick includes in his written report that the polyethylene liner could have become dislodged due to a manufacturing defect, during his deposition he stated he is not going to provide any opinion that the weld was defective.

> Q. Ok. So you're not providing an opinion in this case that the weld was defective, correct?
> A. Correct.
> App. IV at 203.

Broderick also acknowledges that he has not read any testimony in this case of any defective polyethylene liner. App. IV at 208. More importantly, Broderick conceded that he is not an expert of the manufacture of polyethylene liners and therefore would not be able to testify to a manufacturing defect. App. IV at 209.

> B. …I've never dealt with these polyethylene liners before.
> App. IV at 209.
> Q. Do you consider yourself an expert on the manufacture of polyethylene liners?
> A. No.
> App. IV at 209.

Mr. Murphy does not provide any expert opinion regarding a manufacturing defect of the polyethylene liner. App. VI 84-87.

Further, there is no history of the polyethylene liners breaking in place. The only evidence of breaking is when the liners are removed. Luis

Martinez is a mason who does work on catch basins. He has never seen damage to the polyethylene liners except when caused by his own company in the removal process.

> Q. Have you ever encountered a polyethylene liner that has damage that you or your workers didn't impose on it as a necessary part of it?
> A. Never seen it.
> Q. Never seen it?
> A. No.
> Q. Have you ever seen a liner fall into the hole, the sump?
> A. No.
> App. V at 605.
> Q. And have you ever seen separation in that seam?
> A. The only separation that I seen is, like I said, when they – usually when they are underneath like a granite curb or something, that they don't want to come out, and we have to force them, the force that we produce makes them separate.
> Q. Okay.
> A. But it is not force by hand. It's force by either a bar, or we put, you know, we tie like chains and pull it with a machine. It's high force…
> App. V at 606.

Joshua Moss, an equipment operator for the highway department, experience with separated liners, is limited to situations where the liner was cut out. App. III at 34.

Lastly, the plaintiffs argue that they are able to satisfy the three-part test such that res ipsa loquitur should apply to this case. Plaintiffs cannot satisfy the elements of res ipsa loquitur against Continental Paving, Inc..

> 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 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, 39 at 218 (4th ed. 1971).
> App. VI at 151.

The first element of res ipsa loquiter cannot be met because a clogged grate, as indicated by the evidence, can occur in the absence of negligence on the part of Continental Paving, Inc. The grate can be blocked by the debris on top of the grate. Even plaintiff's expert Mr. Broderick concedes this point in his affidavit (it is also likely that when the DOT employees were clearing any debris that had washed down to the grate and had partially blocked it at the top of the roadway…) App. V at 188. The second element requires that the instrumentality, here the polyethylene liner, be within the exclusive control of Continental Paving, Inc. Once installed, Continental Paving, Inc. had zero control of the polyethylene liner and therefore the second element of res ipsa loquiter cannot be met. When the instrumentality is no longer in the exclusive control of the defendant and where someone else's negligence may cause or contribute to cause the accident the reason for the doctrine of *res ipsa loquitur* is no longer present. Smith v. Coca Cola Bottling Co., 97 N.H. 522, 524 (1952). The third

element cannot be met because there is at least one other cause that cannot be eliminated by the evidence – debris on the grates. Debris on the grates cannot be eliminated by the evidence. There are three eyewitnesses that conclude that the debris on the grates caused the blockage and plaintiff's expert Broderick states the debris "partially blocked it". Thus, blockage by debris on the grates cannot be eliminated by the evidence.

Conclusion

For the reasons set forth herein, the Supreme Court should affirm the lower Court's order striking of plaintiffs' experts Thomas Broderick, PE and Richard Murphy, PE. and affirm the grant of summary judgment in favor of Continental Paving, Inc.

Respectfully submitted,
CONTINENTAL PAVING, INC.

By its attorneys,
DESMARAIS LAW GROUP, PLLC

Dated: 7/1/2022

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATIONS

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned requests oral argument on behalf of Continental Paving, Inc. before the full court and designates Debra L. Mayotte, Esquire, to be heard. The undersigned estimates that oral argument will require (15) minutes.

Undersigned counsel hereby certifies that this brief is in compliance with Rule 16(11) in that it does not exceed 9,500 words.

Undersigned counsel hereby certifies that a copy of this brief has been delivered through the electronic filing system on July 1, 2022 to all registered e-filers.

Dated: 7/1/2022

Respectfully submitted,
/s/Debra L. Mayotte
Debra L. Mayotte, Esquire
N.H. Bar No. 8207