

SCAN

IN THE CIRCUIT COURT OF LOGAN COUNTY WEST VIRGINIA

JOHN PERRY AND
LORI PERRY,

Plaintiffs,

v.

CIVIL ACTION NO. 11 - C - 283MME, INC., A WEST VIRGINIA
CORPORATION, AND
MICHAEL R. FERRELL

Defendants and Third-Party Plaintiffs,

v.

EDWARD DONAHUE

Third Party Defendant

ORDER

CAME the Third-Party Defendant, Edward Donahue, by counsel, William T. Forester and McBrayer, McGinnis, Leslie & Kirkland, PLLC, the Plaintiffs, John and Lori Perry, in person and by counsel, Roger Decanio, and the Defendants and Third-Party Plaintiffs, MME, Inc. and Michael R. Ferrell, by counsel, Robert B. Kuenzel, for hearing on October 16, 2015 upon the Motion of Third-Party Defendant Edward Donahue for Summary Judgment on the Third Party Claims of Defendants MME, Inc. and Michael Ferrell. The Court having heard the argument of the parties and being otherwise duly and sufficiently advised hereby makes the following findings of fact and conclusions of law:

1. In April 2008, Plaintiffs Jon and Lori Perry ("the Perrys") purchased a lot for the purposes of constructing a home in the Misty Meadow Estates subdivision in Chapmanville, West Virginia.

2. Misty Meadow Estates subdivision was developed by Defendant MME, Inc. ("MME"), which is controlled by Defendant Michal R. Ferrell ("Ferrell") (collectively, "Defendants").

3. MME and/or Ferrell, or others hired by MME and/or Ferrell, designed, constructed, and developed the sanitary and storm sewage lines and treatment system of the Misty Meadow Estates subdivision.

4. The Perrys contracted with Third-Party Defendant Edward Donahue ("Donahue") to provide contracting services in the construction of their home on the lot they owned in Misty Meadow Estate subdivision.

5. Donahue installed the plumbing in the Perrys' home, including the sewage line that connected to the main sewage line in the subdivision.

6. About one year after the Perrys moved into their home, sewage from the Misty Meadow Estates subdivision sanitary and storm sewage lines and treatment center backed up onto their property and into their home causing damage to their property.

7. After the event, the Perrys contracted with an expert, Mr. Earl Scyoc, who has reviewed the sanitary and storm sewage lines and treatment center. He expressed several opinions as to the cause of the sewage backup, but did not advance in criticisms of Donahue's work in installing the plumbing at the Perrys' home. Noticeably absent from Mr. Scyoc's report is any criticism of the fact that Donahue did not include the overflow mechanism on the plumbing system.

8. As a result of the sewage backup incident, the Perrys again contracted with Donahue to install an additional mechanism to their plumbing to account for the threat of sewage backup from the Misty Meadow Estate subdivisions sanitary and storm sewage lines and treatment center. Specifically, Donahue and Mosely installed an overflow mechanism on the

plumbing that may prevent septic backup from entering/reentering through the Perrys' plumbing in the event of another backup of the Misty Meadow Estate subdivisions sanitary and storm sewage lines and treatment center.

9. Edward Donahue is a licensed Master Plumber in the State of West Virginia and has and will maintain that installing an overflow mechanism as a matter of course is not standard practice in the trade.

10. On December 26, 2013, Ferrell and MME filed a Third Party Complaint against Donahue and Mosely, alleging that they were negligent in failing to initially install the overflow mechanism on the Perrys' sewage line. Beyond this bare allegation, however, Ferrell and MME have failed to come forward with any evidence showing that under the standard of care required of plumbers, Donahue was required to include an overflow mechanism on the Perrys' plumbing and his failure to do so constituted negligence.

11. Rule 56 of the West Virginia Rules of Civil Procedure provides that Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, 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."

12. For purposes of summary judgment, a non-moving party cannot create a genuine issue of material fact through a mere speculation or the building of one inference upon another. Chafin v. Gibson, 578 S.E.2d 361 (W.Va. 2003)

13. Summary judgment cannot be defeated on basis of factual assertions contained in brief of party opposing a motion for such judgment. City of Morgantown v. West Virginia University Medical Corp., 457 S.E.2d 637 (W.Va. 1995)

14. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden

of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary. Jividen v. Law, 461 S.E.2d 451 (W.Va. 1995); Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995; Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of West Virginia, 490 S.E.2d 772 (W.Va. 1997)

15. The non-moving party, in order to defeat a motion for summary judgment, must show that there will be sufficient competent evidence available at trial to warrant a finding favorable to the nonmoving party. Chafin v. Gibson, 578 S.E.2d 361 (W.Va. 2003)

16. To meet its burden, the non-moving party on a motion for summary judgment must offer more than a mere scintilla of evidence, and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. Chafin v. Gibson, 578 S.E.2d 361 (W.Va. 2003)

17. To preclude summary judgment, non-moving party must present evidence which contradicts showing of moving party by pointing to specific facts demonstrating that there is a trialworthy issue which is not only a genuine issue but also an issue that involves a material fact. Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va 1995).

18. In their Third Party Complaint, Ferrell and MME allege that Donahue was negligent for failing to initially install the overflow mechanism on the Perrys' sewage line. However, beyond their naked assertion, Ferrell and MME have put forth no evidence showing that under the standard of care required of plumbers, Donahue was required to include an overflow mechanism on the Perrys' plumbing and his failure to do so constituted negligence. Since Ferrell and MME have raised no genuine issue of material fact as to the elements of duty

and breach, their third party claims for negligence against Donahue and Mosely must be rejected as a matter of law.

19. The standard of care of a plumber as related to the installation of an overflow mechanism to a plumbing system is outside of the competency and common knowledge of a lay jury and to maintain its negligence claims against Donahue, Ferrell and MME must have retained an expert to educate the jury as to the standard of care in the industry. Since they have failed to do so, Ferrell and MME cannot now make out their third party claims against Donahue and summary judgment is appropriate.

20. MME and Ferrell's reliance on the doctrine of *res ipsa loquiter* is unavailing. *Res ipsa loquiter* "is based on the lessons of experience that an injury, in the usual course of every day conduct, does not occur to the person who controls an instrumentality which will likely produce injury exercises reasonable care to prevent its occurrence..." *Wright v. Valan*, 43 S.E.2d 364 (W.Va. 1947). As found herein, the Plaintiffs injury and the causes thereof are technical in nature rather than those "every day" events of which a jury would have common knowledge to make an inference. Further, the basic requirement of *res ipsa loquitor* is that the instrumentality causing the injury is "within the exclusive control of another person and the injury is such as in the ordinary course of events does not occur if the person who uses such control uses care." *Id.* But it is clear in this case that Donahue was not in exclusive control over the interconnected instrumentalities that caused the harm.

21. There is no genuine issue of material fact as to the issues presented and Donahue is entitled to judgment as a matter of law.

ACCORDINGLY, it is hereby **ADJUDGED, ORDERED AND DECREED** that the Third Party Defendant's Motion for Summary Judgment is **GRANTED** and the third-party

claims of John Ferrell and MME, Inc. are **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that the Clerk of this Court mail an attested copy of this Order to counsel of record.

ENTERED this 29th day of October, 2015.

 **COPY**
SPECIAL JUDGE, LOGAN CIRCUIT COURT

To all of which defendant objects and takes exception. JFH

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