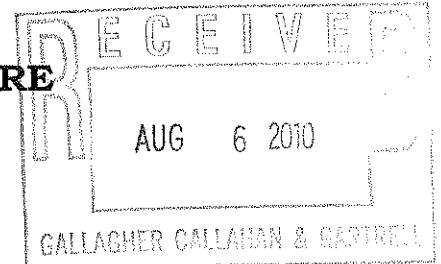


THE STATE OF NEW HAMPSHIRE

SUPREME COURT



In Case No. 2009-0690, Tarbell Administrator, Inc., Trustee of the Tarbell Family Revocable Trust of 2003 v. City of Concord, the court on August 5, 2010, issued the following order:

Having considered the parties' briefs and the appellate record, we conclude that oral argument is unnecessary for the disposition of this appeal. See Sup. Ct. R. 18(1). The plaintiff, Tarbell Administrator, Inc., Trustee of the Tarbell Family Revocable Trust of 2003 (Tarbell), appeals an order of the superior court following our remand of Tarbell Adm'r, Inc. v. City of Concord, 157 N.H. 678 (2008), granting summary judgment in favor of the defendant, the City of Concord (city). Tarbell argues that the trial court erred by: (1) finding that it could not consider the city's alleged failure to manage its water supply in analyzing Tarbell's trespass and nuisance claims; (2) concluding that Tarbell's claim for negligent maintenance of Rattlesnake Brook required expert testimony; and (3) not ruling that Tarbell had established an unconstitutional taking of its property. Finding no error, we affirm.

"In reviewing a trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Tarbell, 157 N.H. at 682. If the summary judgment record does not establish the existence of a genuine issue of material fact for trial, and if the moving party is entitled to judgment as a matter of law, we will affirm. See id. A defendant is entitled to summary judgment to the extent the record establishes that the plaintiff will be unable to carry its burden of proof at trial. See Long v. Long, 136 N.H. 25, 32 (1992).

We first address Tarbell's argument that its claim for negligent maintenance of Rattlesnake Brook did not require expert testimony. Expert testimony is generally required where the resolution of a disputed factual issue requires scientific knowledge beyond the capacity of persons of common experience. See Whitaker v. L.A. Drew, 149 N.H. 55, 57 (2003). To the extent expert testimony is necessary to establish the plaintiff's case, the failure of the plaintiff to timely disclose an expert warrants the granting of summary judgment. See Estate of Joshua T. v. State, 150 N.H. 405, 409 (2003).

To prove its claim of negligent maintenance of Rattlesnake Brook, Tarbell was required to establish that the city's negligent conduct was a substantial factor in bringing about the flooding of Tarbell's property, and that absent the city's negligence, the flooding would not have occurred. See *id.* at 407-08. The record reflects, however, that the flood occurred during a four-day period in which the city received more than eight inches of rain, leading to the closure of at least 35 streets within the city and a presidential declaration that the region was a federal disaster area. The record also reflects that the city had a deeded right to cause water from Penacook Lake to flow into Rattlesnake Brook.

R. { To prove causation under these circumstances, Tarbell was required to establish whether the brook and its associated culverts could have accommodated the amount of water introduced by the rain absent the city's negligence, and how much of the flooding was attributable to the city's alleged negligence. These are matters beyond the common experience of the average lay person. Accordingly, the trial court did not err by granting summary judgment as to Tarbell's claim for negligent maintenance of Rattlesnake Brook.

Key * ✓ Turning to the trespass and nuisance claims, we agree with the city that, even if the trial court should have considered the city's alleged failure to regulate the water, Tarbell's failure to disclose an expert also compelled summary judgment as to those claims. See *Tarbell*, 157 N.H. at 687 (upholding summary judgment if alternative grounds support it). To establish trespass, ✓ Tarbell had to prove that the city knew its conduct was substantially certain to result in an invasion of Tarbell's property beyond what it was allowed to do by deed. See *Moulton v. Groveton Papers Co.*, 112 N.H. 50, 54 (1972); *Thompson v. Forest*, 136 N.H. 215, 220 (1992). To establish nuisance, ✓ Tarbell was required to prove that the city "substantially and unreasonably interfere[d] with [its] use and enjoyment of [its] property" - that is, that the city "cause[d] harm that exceed[ed] the customary interferences with land that a land user suffers in an organized society." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003) (quotation omitted). Absent expert testimony establishing the volume that the brook could otherwise have accommodated under the conditions that existed, we conclude that Tarbell could not have met its burden as to these claims.

Finally, to the extent Tarbell argues that "the trial court deprived [it] of any remedy against the City for its unlawful use of [its] property for a governmental purpose" in violation of the takings clauses of the state and federal constitutions, we agree with the city that Tarbell has not properly pleaded a takings claim. Although Tarbell, in alleging its claim for intentional trespass, asserted that the city's actions "amount to a deliberate invasion of [its] Property and property rights, tantamount to a physical taking of the

damaged portion of [its] Property,” we conclude that this statement, alone, was not sufficient to put the city on notice of a constitutional takings claim. See Morancy v. Morancy, 134 N.H. 493, 497 (1991) (a defendant is entitled to have the case decided only upon those grounds alleged in the plaintiff’s writ).

Affirmed.

Broderick, C.J., and Dalianis, Duggan and Hicks, JJ., concurred.

**Eileen Fox,
Clerk**

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