TWENTY-EIGHTH JUDICIAL CIRCUIT OF VIRGINIA

C. RANDALL LOWE, JUDGE
SAGE B. JOHNSON, JUDGE
DEANIS L. SIMMONS, JUDGE
FREDRICK A. ROWLETT, JUDGE

CHARLES H. SMITH, JR., RETIRED
CHARLES B. FLANNAGAN, II, RETIRED
LARRY B. KIRKSEY, RETIRED
ISAAC ST. C. FREEMAN, RETIRED

COMMONWEALTH OF VIRGINIA

WASHINGTON COUNTY
189 E. MAIN STREET
ABINGDON, VIRGINIA 24210
(276) 676-6260

CITY OF BRISTOL
497 CUMBERLAND STREET
BRISTOL, VIRGINIA 24201
(276) 645-7351

SMYTH COUNTY
109 W. MAIN STREET
MARION, VIRGINIA 24354
(276) 782-4050

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D. Adam McKelvey, Esq.
Crandall & Katt
366 Elm Avenue, SW
Roanoke, VA 24016

Christopher D. Owens, Esq.
Hunter, Smith & Davis, LLP
100 Med Tech Parkway, Suite 110
Johnson City, TN 37604

Melissa W. Robinson, Esq.
Glenn Robinson Cathey Memmer & Skaff, PLC
400 Salem Avenue
Roanoke, VA 24016

Wm. Tyler Shands, Esq.
Carter & Shands, PC
9030 Stony Point Parkway, Suite 530
Richmond, VA 23235

Camilla E. Shora, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
8444 Westpark Drive, Suite 510
McLean, VA 22102

Michael J. Smith, Esq.
Bonner Kiernan Trebach & Crociata, LLP
1233 20th Street, NW | Eighth Floor
Washington, DC 20036

In Re: Mark Sanders, et al. v. Alan Wayne, Jr., et al.
Case No.: CL19-269, 19-310 & 19-312

Dear Counsel:

These consolidated cases are before the Court for consideration of the following challenges to the third amended complaints of Mark Sanders, Gregory Dean Roberts and Larissa Roberts (collectively "plaintiffs"): (i) plea in bar of defendants Joshua Mathis ("Mathis") and Lakeside Ready Mix, LLC ("Lakeside"); (ii) plea in bar and demurrer of defendant Orders Construction Company, Inc. ("Orders"); and (iii) plea in bar and demurrer of defendant LMC Safety Barricade Corporation ("LMC"). The Court reviewed defendants' briefs supporting their respective pleas in bar and demurrers, and plaintiffs' motion to quash and briefs in opposition. Except for LMC's plea in bar, the Court also heard oral argument on these pleadings and took the matters under advisement, with no evidence at the hearing having been presented.

For the reasons stated herein, the Court: (i) overrules Mathis' and Lakeside's plea in bar; (ii) sustains, in part, and overrules, in part, Orders' plea in bar; (iii) holds that the first part of

Orders' demurrer is moot; (iv) overrules the other part of Orders' demurrer; (v) overrules the demurrer of LMC; and (vi) takes under advisement both LMC's plea in bar on the issue of sovereign immunity and plaintiffs' motion to quash it.

I. Standards of Review

Familiar principles govern the Court's review and adjudication of the demurrers and pleas in bar variously filed by Mathis, Lakeside, Orders and LMC. "The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted." *RECP IV WG Land Inv'rs LLC v. Capital One Bank (USA), N.A.*, 295 Va. 268, 279 (2018) (quoting *Collett v. Cordovana*, 290 Va. 139, 144 (2015)); *see also* Code § 8.01-273. In making such an assessment, a court "accept[s] as true all factual allegations expressly pleaded in the complaint and interpret[s] those allegations in the light most favorable to the plaintiff." *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 370-71 (2018) (quoting *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358 (2018)). Those factual allegations, however, "must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613 (2019) (quoting *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514 (2014)). Furthermore, while the plaintiff may rely upon inferences "fairly drawn" from the "well-pleaded facts," *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 133 (2018) (citation omitted), such inferences are only those that "are *reasonable*." *A.H.*, 297 Va. at 613 (quoting *Coward*, 295 Va. at 358-59) (emphasis in original).

As to a plea in bar, this defensive pleading "asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery." *Massenburg v. City of Petersburg*, ___ Va. ___, ___, 836 S.E.2d 391, 394 (2019) (quoting *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010)). A plea in bar can be sustained even if "it presents a bar to recovery to only some, but not all, of the plaintiff's claims." *Smith v. McLaughlin*, 289 Va. 241, 252 (2015). It does so, however, without addressing the merits of the issues raised in the complaint. *Nelms v. Nelms*, 236 Va. 281, 289 (1988); *see also Hughes v. Doe*, 273 Va. 45, 48-49 (2007); *Sea Bay Hotel, LLC v. Gosnell*, 97 Va. Cir. 250, 2017 WL 10901028, *4 (Va. Cir. December 7, 2017). Where, as here, no evidence is offered in support of the plea in bar, a court "consider[s] solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's [complaint] are deemed true." *Id.* (quoting *Lostrangio v. Laingford*, 261 Va. 495, 497 (2001)); *see Lee v. City of Norfolk*, 281 Va. 423, 427 (2011). The standards of review for such a plea in bar and a demurrer are thus "substantially similar." *Station #2, LLC v. Lynch*, 280 Va. 166, 175 (2010) (quoting *Sullivan v. Jones*, 42 Va. App. 794, 802 (2004)).

II. Allegations of Third Amended Complaints

As alleged, in relevant part, in plaintiffs' third amended complaints, these consolidated cases arise from a multi-vehicular collision at a construction zone on Interstate 81 in Abingdon, Virginia. The lead vehicle, which was not struck, was being used for the business benefit of Lakeside and operated by defendant Mathis in the course of his employment for Lakeside. The second vehicle was being operated by plaintiff Gregory Roberts, accompanied by plaintiffs Larissa Roberts and Mark Sanders as passengers. The other two vehicles, which collided with plaintiffs' vehicle and with each other, were being operated by defendants Alan Smith ("Smith")

and Guillermo Sanchez-Rivera ("Rivera"). Smith was then in the course of his employment for defendant Pittman Transfer, Inc. ("Pittman") while operating Pitman's vehicle. Rivera was then in the course of his employment for defendant WCL, Inc. ("WCL") while operating WCL's vehicle.

The collision occurred, according to plaintiffs' allegations, when plaintiffs' vehicle "was slowing to avoid striking Mathis" after Mathis, in operating the vehicle in front of plaintiffs' vehicle, "negligently slowed to turn left into a work zone without signaling." Compl. at ¶¶ 7 & 8. At that time, the "vehicles operated by Rivera and Smith collided with the plaintiff[s'] vehicle, collided with each other causing a collision with the plaintiff[s'] vehicle, and /or collided with the plaintiff[s'] vehicle and each other causing a further collision with the plaintiff[s'] vehicle." *Id.* at ¶ 8. Plaintiffs also allege that Mathis, Rivera and Smith then and there violated their duty of reasonable care owned to plaintiffs for their safety on the highway. Specifically, these three defendants allegedly operated their respective vehicles "in a negligent, reckless and careless manner" by "follow[ing] plaintiff[s] too closely, fail[ing] to keep a proper lookout, fail[ing] to signal when turning, and stop[ing] abruptly." *Id.* at ¶¶ 9 & 10.

At the same time, plaintiffs further allege, defendant Orders was under contract with the Virginia Department of Transportation (VDOT) as the general contractor for the construction project underway at the construction zone where the collision occurred. As such, Orders hired Lakeside to deliver materials to this construction site and hired LMC to provide safety barriers and markings for the construction site. *Id.* at ¶¶ 5 & 11.

With regard to traffic warnings at the construction zone, plaintiffs allege that (i) "[a]t the time and place [of the collision], LMC and Orders each had a contractually assumed duty and a common law duty to use reasonable care in the design, layout and marking of the construction zone so as to put the motoring public on notice both of the construction and of the presence of slow and turning vehicles on the interstate highway"; and (ii) "[a]t the time and place [of the collision], LMC and Orders negligently failed to design, layout and mark the construction zone, including, among other things, that they failed to adequately warn of slow moving and turning vehicles." *Id.* at ¶¶ 11 & 12.

Plaintiffs further allege as to Orders' liability that "[a]t all relevant times hereto, Orders was in a joint venture with LMC, and in a joint venture with Lakeside, due to the fact that Orders was contracted to complete the work that LMC and Lakeside were doing, and had subcontracted that work to LMC and Lakeside, as [previously] outlined herein." *Id.* at ¶ 13. Therefore, plaintiffs allege, "Orders remained ultimately responsible for the final product with [VDOT] and is thus liable. Orders [sic] also vicariously liable for the negligent conduct of LMC, Lakeside, Mathis, and their unknown employees whose acts and omissions are complained of herein." *Id.*

Finally, plaintiffs allege that "Orders is likewise directly liable for the ultrahazardous condition of the road construction zone, due to the fact they had a nondelegable duty to make the construction zone safe." *Id.* at ¶ 14.

III. Plea in Bar of Defendants' Mathis and Lakeside

Mathis and Lakeside argue in support of their plea in bar that, because no vehicle involved in the subject collision is alleged to have struck the vehicle driven by Mathis, Mathis and Lakeside have no liability to plaintiffs—despite allegations that: (a) Mathis negligently slowed to turn left into the work zone without signaling when in front of plaintiffs' vehicle, (b) Mathis' negligence caused the driver of plaintiffs' vehicle to slowdown abruptly in order to avoid striking Mathis' vehicle, which (c) lead in turn to the collision with the vehicles being operated by defendants Smith and Rivera. The alleged negligence of Smith and Rivera in following too closely and failing to keep a proper lookout, as Mathis and Lakeside argue on brief, was therefore "the 'but for' or cause in fact of the collision rather than any act or omission of [Mathis or Lakeside]." Mathis and Lakeside further argue that the negligent acts of Smith and Rivera "constitute an intervening/superseding cause of the collision."

Thus, Mathis and Lakeside ultimately assert that Smith's and Rivera's alleged breach of their duty to keep a proper lookout and not to follow plaintiffs' vehicle more closely than was reasonable and prudent (citing *Garnot v. Johnson*, 239 Va. 81 (1990)) creates a bar to plaintiffs' claims against Mathis and Lakeside.

In response, plaintiffs assert that the subject of Mathis' and Lakeside's plea in bar consists of facts plaintiffs will be obligated to prove as part of their prima facie case—that is to say, the plea challenges the actual merits of the case. Therefore, plaintiffs contend, the plea amounts to a plea of the general issue (citing Martin P. Burks, Common Law and Statutory Pleading and Practice § 216, at 369-72 (T. Munford Boyd ed., 4th ed. 1952)), which, of course, has been abolished in Virginia. Rule 3:8(a); *Howard v. Ball*, 289 Va. 470. 474 (2015). *See Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 617-18 (2005) (explaining that "a plea of the general issue was a traverse, a general denial of the plaintiff's whole declaration or an attack upon some fact the plaintiff would be required to prove in order to prevail on the merits"). Plaintiffs further contend that even if the Court treats this defensive pleading as a demurrer, it still fails because the third amended complaints present issues of fact to be decided by a jury on a viable cause of action as to whether Mathis and Lakeside are liable in tort for injuries to plaintiffs arising from the collision for which these defendants were allegedly a proximate cause. The Court agrees with plaintiffs as to both contentions.

Under Virginia law, issues of negligence and proximate cause are generally questions of fact for a jury's determination. *Dorman v. State Indus., Inc.*, 292 Va. 111, 122 (2016). "A court decides these issues only when reasonable persons could not differ." *Id.* (quoting *Atkinson v. Scheer*, 256 Va. 44, 453-54 (1998)). As this Court construes the present allegations, but for Mathis' negligence in the first instance as the driver of the lead vehicle, which caused the driver of plaintiffs' vehicle to slowdown abruptly in order to avoid striking Mathis' vehicle, the subject collision would not have occurred. The issue then becomes whether Mathis' negligence was a proximate cause of the collision in light of the additional alleged negligent acts of Smith and Rivera.

"The proximate cause of an event is that act or omission which, in natural and continuing sequence, unbroken by an efficient intervening cause, produces the event, and without which that

event would not have occurred," *id.* (quoting *Kellermann v. McDonough*, 278 Va. 478, 493 (2009)); and, of course, there may be "more than one proximate cause of an event." *Rascher v. Friend*, 279 Va. 370, 376 (2010); *Kellermann*, 278 Va. at 493; *Williams v. Le*, 276 Va. 161, 167 (2008). Accordingly, "[a] subsequent proximate cause may or may not relieve a defendant of liability for his negligence." *Kellermann*, 278 Va. at 493 (quoting *Williams*, 276 Va. at 167). As the Supreme Court of Virginia went on to explain in *Kellermann*:

> [N]ot every intervening cause is a superseding cause. In order to relieve a defendant of liability for his negligence, negligence intervening between the defendant's negligence and the injury "must so entirely supersede the operation of the defendant's negligence that it alone, without the defendant's [negligence contributing] thereto in the slightest degree, produces the injury." *Richmond v. Gay,* 103 Va. 320, 324, 49 S.E. 482, 483 (1905). Furthermore, an intervening cause is not a superseding cause if it was "put into operation by the defendant's wrongful act or omission." *Jefferson Hospital, Inc. v. Van Lear,* 186 Va. 74, 81, 41 S.E.2d 441, 444 (1947).

Kellermann, 278 Va. at 494 (quoting *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 131 (1980)); *see Williams*, 276 Va. at 167-68 (reversing trial court in giving instruction on "superseding intervening causation" where uncontradicted evidence showed that defendant doctor's negligent acts "put into motion" subsequent negligent acts of another doctor, leading to patient's death).

Here, upon the allegations of plaintiffs' third amended complaints, the Court concludes that these issues of negligence, proximate cause and superseding intervening causation as relates to the alleged liability of Mathis and Lakeside are all issues of fact for the jury to decide in this case, rather than issues of law for this Court to decide. The Court therefore overrules Mathis' and Lakeside's plea in bar upon viewing this defensive pleading on its face as a plea in bar and, alternatively, as a demurrer.

IV. Plea in Bar and Demurrer of Defendant Orders

(i) Orders' Plea in Bar

A.

Defendant Orders makes two separate arguments in support of its plea in bar (hereinafter referred to as "Part A" and "Part B" of Orders' plea in bar). In Part A, Orders argues that it is not vicariously liable to plaintiffs for the alleged negligence of defendants Mathis, Smith and Rivera because Orders did not "direct, employ, hire and/or control" any of these defendants at the time of the collision and did not own the vehicles they were operating. Only Orders' alleged vicarious liability for Mathis' alleged negligence is in fact at issue here, however, as plaintiffs claim no vicarious liability on the part of Orders for the alleged negligence of Smith or Rivera. As to Mathis, plaintiffs claim that Orders is vicariously liable for Mathis' alleged negligence purportedly based on Orders' contractual relationship with Lakeside, Mathis' employer.

Upon a careful review of the third amended complaints, the Court concludes that plaintiffs' allegations are insufficient to establish a relationship between Orders and Lakeside such that Orders could be found vicariously liable for Mathis' alleged negligence.

The alleged relationship between Orders and Lakeside is addressed in its entirety in two paragraphs of the third amended complaints as follows. First, in paragraph 5, it is alleged that, as the general contractor for the construction project underway at the construction zone where the collision occurred, Orders "hired Lakeside to deliver materials to the construction site." Second, in paragraph 13, it is alleged that Orders was "in a joint venture with Lakeside, due to the fact that Orders was contracted to complete the work that . . . Lakeside was doing, . . . as outlined herein."

A mere agreement between a subcontractor and a general contractor for the delivery of materials to a construction site does not constitute a joint venture. "A joint venture is established by contract, express or implied, where two or more persons jointly undertake a specific business enterprise for profit, with each to share in the profits or losses and each to have a voice in the control and management." *Ortiz v. Barrett*, 222 Va. 118, 131 (1981) (citing *Smith, Adm'r v. Grenadier*, 203 Va. 740, 744 (1962)). Thus, absent allegations that Lakeside, under a contract with Orders, was to share in the profits or losses of the subject construction project and that Lakeside had a voice in the control and management of it, plaintiffs' contention that Orders and Lakeside were joint venturers is "untenable." *Id.* In turn, absent a joint venture between Orders and Lake, there are no allegations in the third amended complaints to establish vicarious liability of Orders for the alleged negligence of Mathis. *See Smith*, 203 Va. at 747 ("The general rule is that an employer of an independent contractor is not liable for injuries to third persons caused by the negligence of the independent contractor or his servants.").

In opposing Orders' plea in bar to its alleged vicarious liability for Mathis' negligence, plaintiffs argue that the nature of the contractual relationship between Orders and Lakeside is a disputed issue of fact for which they demand a trial by jury; but that this issue is not ready to be tried to a jury on this plea in bar because discovery in this matter is still ongoing. For the above-stated reasons, the Court disagrees. With plaintiffs having failed to set forth sufficient factual allegations in the third amended complaints for the existence of a joint venture between Orders and Lakeside, there is no cognizable dispute of fact regarding the same to be tried by a jury. Furthermore, viewing this portion of Orders' plea in bar as the equivalent of a demurrer to the third amended complaints, the Court reaches the same conclusion. Accordingly, the Court sustains Part A of Orders' plea in bar.

B.

Part B of Orders' plea in bar is directed at paragraph 14 of the third amended complaints, which states in its entirety: "Orders is likewise directly liable for the ultrahazardous condition of the road construction zone, due to the fact they had a nondelegable duty to make the construction zone safe." Orders construes this allegation as an alternative basis for plaintiffs to claim vicarious liability of Orders for the alleged negligence of Mathis as Lakeside's employee. Lakeside's contract with Orders for the mere deliver of materials to the construction site, Orders

argues, was not a contract to perform any "inherently dangerous activity," and thus the inherently dangerous activity doctrine under Virginia law does not apply here.

In response, plaintiffs disavow any claim against Orders on such a theory as relates to the alleged negligence of Mathis. Instead, plaintiffs assert that their theory of Orders' liability under the inherently dangerous activity doctrine relates entirely to Orders' contract with LMC in the context of Orders' alleged nondelegable duty to make the construction zone safe through the "use of construction zone markings to avoid injury." Therefore, based on this representation of plaintiffs, the Court overrules Part B of Orders' plea in bar.

(ii) Orders' Demurrer

A.

Like its plea in bar, Orders makes two separate arguments in support of its demurrer (hereinafter referred to as "Part A" and "Part B" of Orders' demurrer). In Part A, Orders again challenges plaintiffs' claim of Orders' alleged vicarious liability for Mathis' negligence as Lakeside's employee. More specifically, Orders demurrers to the third amended complaints on the same grounds set forth in Mathis' and Lakeside's plea in bar, as addressed above and rejected by this Court. However, given the Court's ruling sustaining Part A of Orders' plea in bar to Orders' alleged vicarious liability for Mathis' negligence, the substance of Part A of Orders' demurrer is rendered moot.

B.

Part B of Orders' demurrer challenges plaintiffs' claim that Orders, by virtue of its subcontract with LMC, is vicariously liability for LMC's alleged negligence. LMC's alleged negligence, once again, arose from its design, layout and marking of the construction zone so as to put the motoring public on notice both of the construction and of the presence of slow and turning vehicles on the interstate highway, which negligence was allegedly a proximate cause of the collision.

Here, Orders rests its challenge solely upon the argument that LMC's alleged negligence could not have been a proximate cause of plaintiffs' injuries because it was only the negligence of defendants Rivera and Smith that was the proximate cause of the collision. The Court rejects this argument for the same reasons it has rejected this argument by Mathis and Lakeside in support of their plea in bar. That is, based on the allegations in the third amended complaint, issues of negligence and proximate cause, and any superseding intervening causation, as relates to LMC's alleged liability—as with Mathis' and Lakeside's alleged liability—are issues of fact for the jury (subject to consideration of LMC's plea in bar, as addressed *infra*). *See Maroulis v. Elliott*, 207 Va. 503, 510 (1966) ("In determining the liability of either of several persons whose concurrent negligence results in injury, the comparative degrees of negligence are not to be considered, each being liable for the whole even though the other was equally culpable, or contributed in a greater degree to the injury.") (citing *Von Roy v. Whitescarver*, 197 Va. 384, 393 (1955); *Cola Bottling Works, Inc. v. Andrews*, 173 Va. 240, 250-51 (1939); *Norfolk &*

Portsmouth Belt Line R.R. Co. v. Parkers, 152 Va. 484, 504 (1929))). Accordingly, the Court overrules Part B of Orders' demurrer.

V. Demurrer and Plea in Bar of Defendant LMC

(i) LMC's Demurrer

For its demurrer, LMC incorporates by reference and thereby relies upon Orders' arguments in support of Part B of Orders' demurrer. Accordingly, for the above-stated reasons, the Court overrules LMC's demurrer.

(ii) LMC's Plea in Bar

For its plea in bar, LMC asserts the defense of sovereign immunity. However, LMC did not schedule oral argument or an evidentiary hearing on this defense on the date these other matters were argued orally, opting instead to address its plea in bar with the Court on a later date. The Court thus takes LMC's plea in bar under advisement. Accordingly, the Court will also take under advisement plaintiffs' motion to quash the same.

VI. Conclusion

For the reasons stated herein, the Court: (i) overrules Mathis' and Lakeside's plea in bar; (ii) sustains Part A and overrules Part B of Orders' plea in bar; (iii) holds that Part A of Orders' demurrer is moot; (iv) overrules Part B of Orders' demurrer; (v) overrules LMC's demurrer; and (vi) takes under advisement both LMC's plea in bar on the issue of sovereign immunity and plaintiffs' related motion to quash.

The Court directs Mr. McKelvey to prepare an order consistent with this letter opinion. Plaintiffs shall have 21 days from the entry of said order to file an amended complaint should they be so advised.

Sincerely,

Fredrick A. Rowlett, Judge

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