Not for Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

NORMA PICKARD-SAMUEL, ALEXANDER BURGOS, GILBERT SAMUEL, and DONNA PICKARD, Appellants/Plaintiffs,	)	**S. Ct. Civ. No. 2008-0031** Re: Super. Ct. Civ. No. 387/2000
v.	)	
GOVERNMENT OF THE VIRGIN ISLANDS and VIRGIN ISLANDS WATER AND POWER AUTHORITY, Appellees/Defendants.	)	

On Appeal from the Superior Court of the Virgin Islands
Argued: October 27, 2009
Filed: June 4, 2010

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **VERNE A. HODGE**, Designated Justice.[1]

APPEARANCES:

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OPINION OF THE COURT

PER CURIAM.

Appellants Norma Pickard-Samuel, Alexander Burgos, Gilbert Samuel, and Donna

[1] Associate Justice Maria M. Cabret has been recused from this matter. Verne A. Hodge, a retired Presiding Judge of the Superior Court, sits in her place by designation pursuant to 4 V.I.C. § 24(a).

Pickard (collectively "Appellants") appeal a January 16, 2007 Superior Court Order granting summary judgment to Appellee Virgin Islands Water and Power Authority (hereafter "WAPA"), as well as a March 1, 2007 Order denying their motion for reconsideration. For the reasons that follow, we shall reverse the Superior Court's grant of summary judgment and vacate as moot its denial of reconsideration.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the night of January 6, 1999, Appellants were injured in an automobile accident on the Melvin Evans Highway in the vicinity of Cane Carlton, St. Croix. On August 7, 2000, Appellants initiated civil proceedings against WAPA and the Government of the Virgin Islands (hereafter "Government").[2] In their complaint, Appellants alleged that WAPA had failed to provide proper lighting on the road and that the Government had failed to install highway markers and guard rails, and further contended that these negligent omissions resulted in Appellants' accident because "Pickard-Samuel could not identify the road way and lost control of her vehicle." (J.A. at 13.)

Although Appellants served interrogatories and other discovery requests on WAPA and the Government in January 2002, neither party provided a response. Accordingly, Appellants filed a motion to compel on April 24, 2002, which the trial court granted on May 29, 2002. After WAPA and the Government still failed to respond, Appellants filed a motion for sanctions on June 21, 2002, which WAPA opposed on the grounds that the discovery Appellants requested—which primarily consisted of information and documents pertaining to the maintenance and lighting of the Melvin Evans Highway--could only be provided by the Department of Public

[2] Although a defendant in the underlying lawsuit and listed as an appellee in the case caption, WAPA is the sole appellee in this matter as the January 16, 2007 and March 1, 2007 Orders solely addressed Appellants' claims with respect to WAPA.

Works (hereafter "DPW") and the Federal Department of Highway Administration. After Appellants filed a renewed motion to sanction the Government on December 4, 2002, the Superior Court granted Appellants' motion with respect to the Government on December 27, 2002, and subsequently granted Appellants' February 14, 2003 second renewed motion to sanction for continued non-compliance on April 22, 2003. However, the Superior Court never ruled on Appellants' motion to sanction WAPA.

On April 5, 2004, WAPA filed a motion for summary judgment, arguing that it did not possess a legal duty to provide lighting or repair defective lighting because title 31, sections 1 and 2 of the Virgin Islands Code imposed this duty on DPW. Appellants filed an opposition to WAPA's motion on June 2, 2004, arguing that WAPA and DPW simultaneously owed a duty, that WAPA had a statutory duty pursuant to title 30, section 105 of the Virgin Islands Code, and that section 324A of the Restatement (Second) of Torts also imposed a duty on WAPA.[3] The Superior Court granted WAPA's motion for summary judgment on January 16, 2007.

Appellants moved for reconsideration of the January 16, 2007 Order on January 29, 2007, arguing that the Superior Court prematurely ruled on WAPA's motion for summary judgment because outstanding discovery was still due from WAPA. In a March 1, 2007 Order, the Superior Court denied Appellants' motion on the grounds that Appellants never moved for a continuance pursuant to Rule 56(f) of the Federal Rules of Civil Procedure[4] or otherwise informed the Superior Court of outstanding discovery in its June 2, 2004 opposition. Proceedings in the Superior Court continued with respect to the Government until March 25,

[3] "In the absence of local laws to the contrary, 'the restatements of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply.'" *Myers v. Derr*, S.Ct. Civ No. 2007-049, 2008 WL 4586721, at *5 (V.I. 2008) (quoting 1 V.I.C. § 4).

[4] Pursuant to Superior Court Rule 7, the Federal Rules of Civil Procedure apply to Superior Court proceedings in the absence of a local rule to the contrary.

2008, when the trial court dismissed the action after receiving notice that the Government had settled its claims with the Appellants. Appellants filed their notice of appeal of the Superior Court's January 16, 2007 and March 1, 2007 Orders on April 24, 2008.

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees [and] final orders of the Superior Court . . . ." V.I. CODE. ANN. tit. 4, § 32(a). Since the Superior Court entered its order dismissing the entire litigation on March 25, 2008, and Appellants' Notice of Appeal was filed on April 24, 2008, the Notice of Appeal was timely filed.[5] *See* V.I.S.CT.R. 5(a)(1).

"This Court exercises plenary review of a Superior Court's grant of summary judgment." *Williams v. United Corp.*, S.Ct. Civ. No. 2007-0118, 2008 WL 2714211, at *2 (V.I. July 10, 2008) (citing *Maduro v. American Airlines, Inc.*, S.Ct. Civ. No. 2007-0029, 2008 WL 901525, at *2 (V.I. Feb. 28, 2008)). "On review, we apply the same test that the lower court should have utilized." *Id.* "Because summary judgment is a drastic remedy, it should be granted only when 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). "When reviewing the record, this Court must view the inferences to be drawn from the underlying facts in the light most favorable to the non-

[5] Although the Superior Court's March 1, 2007 Order denying Appellants' motion for reconsideration disposed of all claims with respect to WAPA, the time for filing a notice of appeal of that order, as well as the January 16, 2007 Order denying Appellants' motion for reconsideration, was tolled until March 25, 2008 because an order entering partial summary judgment with respect to one defendant in a multi-defendant litigation is not a final order that is immediately appealable. *See Hagley v. Hendricks*, S.Ct. Civ. No. 2007-026, 2007 WL 5060412, at *2 (V.I. Dec. 28, 2007).

moving party, and we must take the non-moving party's conflicting allegations as true if 'supported by proper proofs.'" *Id.* (quoting *Seales v. Devine*, S.Ct. Civ. No. 2007-0040, 2008 WL 901528, at *1 (V.I. Mar. 3, 2008)). "[T]o survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Id.* (internal quotations omitted). However, while "the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial," the nonmoving party is only required to make this showing after the moving party has first met its initial burden of identifying evidence indicating "that there is an absence of any issue of material fact." *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 323, 106 S.Ct. 2548, 2555-53, 91 L.Ed.2d 265 (1986) and quoting *Applied Genetics Int'l, Inc., v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990)). Consequently, "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000).

Whether a trial court prematurely granted a motion for summary judgment is reviewed for abuse of discretion. *Rivera-Mercado v. General Motors Corp.*, S.Ct. Civ. No. 2007-0026, 2009 WL 1044585, at *2 (V.I. Apr. 14, 2009). "The appropriate standard of review for denial of a motion to reconsider is generally for abuse of discretion but, if the trial court's denial was based upon the interpretation or application of a legal precept, then review is plenary." *Lucan Corp., Inc. v. Robert L. Merwin & Co., Inc.*, Civ. No. 2007-0015, 2008 WL 901492, at *2 (V.I. 2008).

B. The Superior Court Erred in Granting Summary Judgment to WAPA

Appellants argue that the trial court "erred by granting summary judgment to WAPA because WAPA failed to meet its initial summary judgment burden." (Appellants' Br. at 8.) According to Appellants, WAPA possessed an initial burden to show "(1) the apparent absence of any genuine dispute of material fact and (2) [WAPA]'s entitlement to judgment as a matter of law on the basis of the undisputed facts." (Appellants' Br. at 11) (quoting 11 James W. Moore, *Moore's Federal Practice* § 56.13[1] (2004)). Appellants contend that WAPA did not meet this initial burden because WAPA "failed to point the court to the absence of evidence that may support [Appellants'] allegation" that WAPA had a legal duty to provide street lights to the Appellants at the time of the accident. (Appellants' Br. at 13.) In particular, Appellants allege that even if WAPA correctly demonstrated that the Government had statutory responsibility for the installation and maintenance of streetlights, WAPA failed to cite to any evidence "suggest[ing] the Executive branch is the *only* entity that had any duty of care towards [Appellants] at the time of the incident and, more specifically, WAPA points to no evidence (or even the absence of evidence) that might suggest WAPA did not owe the requisite duty to [Appellants]." (Appellants' Br. at 13-14) (emphasis in original).

We agree with Appellants that WAPA failed to meet its "initial burden of identifying the evidence that demonstrates the absence of a genuine issue of material fact." *J.F. Feeser Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990). Although WAPA correctly noted that, pursuant to the version of title 31, sections 1 and 2 of the Virgin Islands Code in effect at the time, it did not possess an explicit statutory duty to maintain streetlights in the territory at the time of Appellants' accident, its motion for summary judgment and accompanying exhibits failed to identify any evidence negating Appellants' claim that WAPA had voluntarily assumed

such a duty. *See Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*, 825 F.2d 167, 174 (8th Cir. 1987) (explaining that initial burden not met when affidavit in support of motion for summary judgment does not attempt to negate existence of facts that would support plaintiff's claims). WAPA accompanied its summary judgment motion with an affidavit from Glenn Rothgeb (hereafter "Rothgeb"), a WAPA employee who served in various positions since 1977, including Assistant Executive Director and Chief Operating Officer, and who claimed in his affidavit to "have intimate knowledge of the streetlight operation before the passage of Act No. 6486 which made [WAPA] responsible for the Street Lights in the territory." (J.A. at 25.) However, despite claiming to have such knowledge, Rothgeb's affidavit only states that

> [WAPA]'s services, on many occasions prior to Hurricane Marilyn in September 1995, were used by the Department of Public Works (DPW), to install streetlights and replace blown light bulbs along the public street only. DPW would submit written requests for the work and when the work was completed, [WAPA] would submit to DPW invoices for payment. [WAPA] would maintain the streetlights it installed, only if DPW paid for the service.

(J.A. at 26.) Importantly, Rothgeb's affidavit is completely silent as to whether WAPA had installed or maintained streetlights on DPW's behalf after September 1995, and makes no reference to the highway on which Appellants' accident occurred. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1610, 26 L.Ed.2d 142 (1970) (holding that artfully drafted affidavits which implied, but did not expressly state, that policemen were not present in store were not sufficient to meet movant's initial burden for summary judgment); *Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1106 (holding affidavit which stated that defendant did not "receive" written notice from plaintiff was insufficient to satisfy movant's initial burden to

identify evidence negating plaintiff's claim that it had "dispatched" notice to defendant).[6] Accordingly, because WAPA "fail[ed] to carry its initial burden of production," the Appellants "ha[d] no obligation to produce anything" in opposition to WAPA's motion for summary judgment.[7] *Id.* at 1102-03. Consequently, the Superior Court erred in granting summary judgment to WAPA based on the record before it.[8]

III. CONCLUSION

WAPA, as the party seeking summary judgment, possessed an initial burden of showing that the record contained no evidence which would support Appellants' case. Given that this Court must, at the summary judgment stage, view the evidence and make all reasonable inferences in favor of the Appellants', this Court cannot find that the Rothgeb affidavit satisfied this initial burden with respect to the issue of whether WAPA had voluntarily assumed a duty to

[6] While it is possible to construe Rothgeb's affidavit as implying that WAPA did not enter into any installation or maintenance agreements with DPW after September 1995 or with respect to the Melvin Evans Highway, the summary judgment standard, however, requires the court to make all such inferences in favor of the *non-moving* party, *Seales*, 2008 WL 901528, at *1, and for the moving party to expressly identify evidence that demonstrates an absence of a genuine issue of material fact. *Adickes*, 398 U.S. at 160, 90 S.Ct. at 1610.

[7] Moreover, this Court notes that Rothgeb's affidavit itself may create a genuine issue of material fact for the jury to resolve since it seemingly contradicts WAPA's opposition to Appellants' June 21, 2002 motion for sanctions, in which WAPA contended that it could not respond to Appellants' requests for discovery on the grounds that only DPW and the Federal Department of Highway Administration possessed the requested information and seemingly implied that WAPA had not entered into a relationship with DPW to maintain any streetlights in the territory. (J.A. at 129-30.)

[8] Because this Court holds that WAPA failed to meet its initial burden for summary judgment and, consequently, reverses its January 16, 2007 Order, it is not necessary for this Court to consider whether the Superior Court erred in its March 1, 2007 Order denying Appellants' motion for reconsideration on the grounds that discovery from WAPA remained outstanding. Nevertheless, this Court reminds the Superior Court that, when a grant of summary judgment is reversed, it is customary for a trial court to, on remand, issue a pretrial scheduling order which allows for a reasonable period in which the parties may conduct additional discovery. *See Huberman v. Tag-It Pacific, Inc.*, 314 Fed.Appx. 59, 63 (9th Cir. Feb. 11, 2009) ("As noted, in light of our reversal of the district court's grant of summary judgment, we need not address Huberman's challenge to the district court's denial of the Rule 56(f) request. On remand, however, the district court shall modify the pretrial scheduling order to allow a reasonable period of time to enable the parties to complete discovery."); *State ex rel. Pritt v. Vickers*, 588 S.E.2d 210, 215 (W.Va. 2003) ("We believe as a matter of fundamental fairness, and so hold, that when a dispositive pre-answer motion by a defendant is . . . granted but reversed by the Supreme Court, a plaintiff must be permitted to conduct discovery after the defendant files an answer even though the parties may have previously engaged in pre-answer discovery.").

the Appellants. Consequently, this Court reverses the Superior Court's January 16, 2007 Order, vacates the Superior Court's March 1, 2007 Order as moot, and remands the matter to the Superior Court for further proceedings

Dated this 4th day of June, 2010.

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court