For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

NICKEY DAVIS, Appellant/Plaintiff, v. **UHP PROJECTS, INC.,** Appellee/Defendant.	))))))))	**S. Ct. Civ. No. 2019-0075** Re: Super. Ct. Civ. No. 333/2002 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Harold W.L. Willocks

Considered: February 9, 2021
Filed: April 7, 2021

Cite as: 2021 VI 5

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Lee J. Rohn, Esq.
Rhea R. Lawrence, Esq.
Law Offices of Lee J. Rohn and Associates, LLC
St. Croix, U.S.V.I.
Attorneys for Appellant,

J. David Crain, Esq.
Kevin L. Keller, Esq.
Willcox & Savage, P.C.
Norfolk, VA
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Nickey Davis appeals from the September 6, 2019 judgment of the Superior Court, which entered summary judgment in favor of Appellee UHP Projects, Inc. ("UHP Projects")

and denied his motion for leave to amend his complaint. For the reasons that follow, we reverse.

I. BACKGROUND

¶ 2 On May 21, 2002, Davis filed suit against UHP Projects and HOVENSA, LLC, seeking damages for an incident that occurred on January 22, 2001, in which Davis, an employee of Jacobs Industrial Maintenance Company, LLC, which was contracted to work at HOVENSA's oil refinery, was injured while using an ultra-high pressure water blaster manufactured by UHP Projects. Specifically, Davis alleged in his complaint that he got a "kick" from the water-jetting gun attached to the blaster while he was using it to hydroblast paint in his assigned area, which caused him to lose his grip and drop the gun, blasting up to 40,000 pounds per square inch of water onto his foot. Although the complaint did not identify any causes of action by name, the Superior Court construed it as pleading two causes of action against both defendants based on negligence—"a product defect claim and a negligence claim for failure to provide proper training." (J.A. 9.)

¶ 3 After numerous proceedings not related to this appeal, UHP Projects filed a motion for summary judgment on October 13, 2011, which Davis opposed on December 28, 2011. In its motion, UHP Projects alleged that Davis could not prove that his equipment malfunctioned, that he did not receive proper training, or that he did not receive proper protective equipment. The Superior Court did not immediately rule on the motion, but in an August 10, 2015 order, permitted the parties to file supplemental briefs addressing the effect, if any, of this Court's decisions in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and *Gov't of the V.I. v. Connor*, 60 V.I. 597 (V.I. 2014).

¶ 4 Ultimately, the Superior Court issued an October 28, 2015 opinion, which granted the summary judgment motion with respect to the product design defect claim but denied it with respect to the claim of failure to provide proper training. In addition, the Superior Court held that

Davis's complaint did not allege a negligence claim for failure to provide proper protective equipment and stated that Davis could not pursue such a claim until and unless he would file an amended complaint including it, after receiving leave of court permitting him to do so. Nearly a year later, on October 25, 2016, Davis filed a motion to amend his complaint to plead a negligence claim for failure to provide proper protective equipment, which UHP Projects opposed. While awaiting a ruling on the motion to amend, Davis continued to actively litigate the matter against both defendants until January 23, 2019, when the Superior Court accepted the parties' joint request to dismiss all claims against HOVENSA with prejudice.

¶ 5 On September 6, 2019, the Superior Court issued an opinion denying Davis's motion to amend his complaint, on grounds that accepting the amendment would result in undue delay and prejudice to UHP Projects. However, that same day, the Superior Court issued a judgment *sua sponte* dismissing all claims against UHP Projects. The Superior Court based its reasoning on the fact that its October 28, 2015 opinion had both granted summary judgment on the product defect claim and rejected the negligence claim because it was insufficiently pled. The Superior Court also relied on its later denial of Davis's motion to amend. Davis timely filed a notice of appeal with this Court on October 3, 2019. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 6 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's September 6, 2019 judgment resolved all of the claims between the

parties, it is a final judgment within the meaning of section 32(a), thereby conferring jurisdiction on this Court. *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 7 This Court exercises plenary review of the Superior Court's application of law. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)). Moreover, this Court reviews the denial of a motion for leave to amend the pleadings for an abuse of discretion. *See Toussaint v. Stewart*, 67 V.I. 931, 941 (V.I. 2017).

B. Failure to Train

¶ 8 In his appellate brief, Davis correctly notes that the Superior Court entered its September 6, 2019 judgment "based on its erroneous determination that it had previously disposed of all of [Davis]'s claims." (Appellant's Br. 11.) The September 6, 2019 judgment expressly states that,

> [i]n a Memorandum Opinion dated October 28, 2015; the Court granted summary judgment on the product defect claim. The Court also determined that the negligence claim had been insufficiently [pled] and rejected it. The Plaintiff sought to amend his Complaint to include negligence, but the motion to amend came more than a year after the Court put him on notice of the pleading defect. The motion to amend was denied on the basis of undue delay that would prejudice the Defendant. Accordingly, it is hereby:
>
> **ORDERED, ADJUDGED, and DECREED** that there are no further issues before the Court and this matter is resolved in favor of the Defendant, UHP Projects, Inc. The Defendant is not liable to the Plaintiff, Nickey Davis, for negligence or product defect.

(J.A. 4.) Thus, the Superior Court mistakenly conflated Davis's claim for negligence based on failure to provide proper training—which the October 28, 2015 opinion recognized was properly pled and for which summary judgment was inappropriate—with the separate claim for negligence based on failure to provide proper protective equipment, which the October 28, 2015 opinion

determined had been insufficiently pled and not properly before the court.[1]

¶ 9 Since the Superior Court entered judgment based on a misapprehension that all of plaintiff's claims had been rejected, the September 6, 2019 judgment may be vacated on that ground alone. *Rivera-Mercado v. General Motors Corp.*, 51 V.I. 307, 312 (V.I. 2009). But while we may vacate the judgment, we are not necessarily required to do so. On appeal this Court exercises plenary review over grants or denials of summary judgment, without providing any deference to the Superior Court. *Martin v. Martin*, 54 V.I. 379, 388 n.5 (V.I. 2010). Consequently, this Court may, in its discretion, look past the Superior Court's error and determine whether Davis has presented a genuine issue of material fact with respect to his failure to train claim. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 392 (V.I. 2014). If this Court were to conclude that the Superior Court erred when it denied UHP Project's motion for summary judgment on that claim in 2015, the Superior Court's error in issuing the September 6, 2019 judgment would be harmless. *See* V.I. R. APP. P. 4(i). Therefore, in the interests of judicial economy, we decline to summarily vacate the September 6, 2019 judgment, and will independently determine whether the Superior Court properly held that UHP Projects was not entitled to summary judgment.[2]

---

[1] In its appellate brief, UHP Projects correctly notes that the Superior Court is free to modify prior interlocutory orders at any time, *see Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (V.I. 2012), and briefs the dismissal of the failure to train claim as if the Superior Court had elected to grant summary judgment in its favor. However, there is absolutely no indication in the record that the Superior Court intended to substantively modify its earlier decision to deny summary judgment on the failure to train claim. Rather, all evidence—including the text of the September 6, 2019 judgment—reflects that the Superior Court simply misapprehended its earlier ruling.

[2] Davis asserts that we should not review the correctness of the Superior Court's decision to deny summary judgment on the failure to train claim because UHP Projects did not file a cross-appeal. However, since the Superior Court dismissed all claims against it, UHP Projects was the prevailing party in this matter, and a prevailing party is not required to take a cross-appeal to defend a judgment on an alternate ground. *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 427 n.12 (V.I. 2016) (citing *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015)).

¶ 10 To prevail on a negligence claim, a plaintiff must prove "(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff." *Machado*, 61 V.I. at 380. In its motion, UHP Projects argued that it was entitled to summary judgment on the negligent failure to train claim solely because "expert testimony as to plaintiff's negligent training is required" and Davis "will be unable to offer expert testimony that he was not properly trained." (J.A. 179.) In its October 28, 2015 opinion, the Superior Court determined that this argument had been insufficiently briefed, in that UHP Projects cited to no legal authority whatsoever to support its claim that lay testimony, standing alone, is insufficient to establish that a defendant negligently trained a plaintiff. (J.A. 24.) *See also Bernhardt v. Bernhardt*, 51 V.I. 341, 345-46 (V.I. 2009). And while UHP Projects argues in its appellate brief that the record contains no evidence that it owed a duty to train Davis, UHP Projects never made this argument before the Superior Court, and thus it is also waived. *See* V.I. R. APP. P. 4(m); *see also Perez v. Ritz-Carlton (V.I.) Inc.*, 59 V.I. 522, 528 (V.I. 2013). Thus, the Superior Court correctly denied summary judgment with respect to the failure to train claim. Accordingly, the entry of judgment on that claim cannot be characterized as harmless, and we therefore vacate the September 6, 2019 judgment as having been improperly entered.

C. Product Defect

¶ 11 Davis also argues that the Superior Court erred when it entered summary judgment in favor of UHP Projects on his product defect claim. Although we have previously adopted a general rule that those engaged in the business of selling or otherwise distributing products are subject to strict liability for harm caused by a defective product, *see Banks*, 55 V.I. at 983-84 (adopting the rule set forth in RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 1), we have not yet had the occasion to define when a defect occurs, and whether different standards should apply to products

liability cases based on the type of defect. Therefore, prior to considering whether the Superior Court properly granted summary judgment, we must first resolve those issues.

¶ 12 In its October 28, 2015 opinion, the Superior Court performed a thoughtful and comprehensive analysis of the three *Banks* factors, and ultimately elected to reject a "one-size-fits-all approach" to products liability in favor of "separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings" like those outlined in section 2 of the Restatement (Third) of Torts: Product Liability. (J.A. 16.) The Superior Court acknowledged that relatively few courts in the Virgin Islands had adopted separate standards, but correctly noted that most cases applying a "one-size-fits-all" approach had been decided prior to the implicit repeal of 1 V.I.C. § 4, and before adoption of the Third Restatement, which rejected the "one-size-fits-all" approach endorsed by section 402A of the Second Restatement. (J.A. 14.) The Superior Court further noted that recent years have seen a "shift in paradigm for design defect cases," in that the clear majority of jurisdictions have now rejected the "one-size-fits-all" approach in favor of separate liability standards based on the nature of the defect. (J.A. 16.) But most importantly, we agree with the Superior Court that separate standards represent the best rule for the Virgin Islands, in that this Court has already adopted the modernized general rule of products liability endorsed in section 1 of the Third Restatement. Thus, it would be highly unusual and unnecessarily confusing to adopt that rule yet nevertheless reject the corollary rules defining a defect. Therefore, this Court defines a product defect as follows:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the

> product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2.[3]

¶ 13 In his complaint, Davis alleged that the ultra-high pressure water blaster was defective in that "whenever one of the water guns on the system was depressurized it would cause a surge to the other gun and related equipment." (J.A. 184.) In its summary judgment motion, UHP Projects solely argued that Davis could only establish that the water blaster was defective by introducing expert testimony, and that lay evidence of a defect—such as his own testimony of what transpired—would be inadmissible. Yet in its October 28, 2015 opinion, the Superior Court did not grant summary judgment on this basis; in fact, it did not even consider that argument with respect to that claim.[4] Rather, it granted summary judgment in favor of UHP Projects because Davis failed to identify a reasonable alternative design – an issue which UHP Projects did not raise in its summary judgment motion.

¶ 14 It is well-established that the failure to make an argument in favor of summary judgment in a summary judgment motion results in waiver of that issue. *Perez*, 59 V.I. at 528. It is equally

[3] The Superior Court did not conduct a *Banks* analysis with respect to whether the Virgin Islands should adopt the rule summarized in section 3 of the Third Restatement, which permits circumstantial evidence to show that a product defect existed. However, the same analysis that supports adoption of the rule set forth in section 2 would also support adoption of the rule set forth in section 3.

[4] As noted earlier, the Superior Court did consider, and reject, a similar argument with respect to the failure to train claim.

well-established that because the party moving for summary judgment possesses the initial burden of identifying evidence indicating that there is an absence of an issue of material fact, *Martin*, 54 V.I. at 391, the nonmoving party is not required to anticipate or preemptively address arguments or defenses that have not been made. *Mills-Williams v. Mapp*, 67 V.I. 574, 593 (V.I. 2017). Thus, "[i]f a moving party fails to carry its initial burden of production"—which will necessarily be the case when an issue is never raised—"the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Pickard-Samuel v. Gov't of the V.I.,* S. Ct. Civ. No. 2008-0031, 2010 WL 2342424, at *2 (V.I. June 4, 2010) (unpublished) (quoting *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc*., 210 F.3d 1099, 1102-03 (9th Cir. 2000)). And even if assuming, without deciding, that the Superior Court could grant summary judgment *sua sponte* on a ground not raised, this Court has already held that it cannot do so without, "at an absolute minimum," providing the non-moving party "with an opportunity to be heard with respect to any grounds for summary judgment being raised by the Superior Court *sua sponte*." *United Corp. v. Tutu Park Ltd.*, 55 V.I. 702, 711 (V.I. 2011); *see also, e.g., Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir.1994) (observing that a *sua sponte* grant of summary judgment is proper only upon fair notice to the nonmovant and an opportunity to respond to the issues the court intends to resolve); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir.1990) (same). This conclusion derives from our prior holdings which have declared that summary judgment is "a drastic remedy and should not be used to short-circuit litigation . . . ." *Aubain v. Kazi Foods of V.I., Inc.*, 70 V.I. 943, 948 (2019) (citing *Rymer v. Kmart Corp.*, 68 V.I. 571, 575 (V.I. 2018) and *Brodhurst v. Frazier*, 57 V.I. 365, 373-74 (V.I. 2012)).

¶ 15 Here, UHP Projects did not allege in its summary judgment motion that Davis failed to

propose a reasonable alternative design; nor did the Superior Court provide Davis with any notice that it intended to consider that issue *sua sponte*. Because neither UHP Projects nor the Superior Court provided Davis with any notice that summary judgment might be granted on completely different grounds than raised in UHP Projects's motion, Davis had absolutely no obligation at the summary judgment stage to produce any evidence of a reasonable alternative design, even if he would be required to do so to prevail at trial. Consequently, the Superior Court erred when it entered summary judgment in favor of UHP Projects on the product defect claim.

¶ 16 Even if we were inclined to disregard the Superior Court's election to grant summary judgment *sua sponte* on a ground not raised by UHP Projects, the Superior Court also erred in analyzing the product liability claim as if it were solely a design defect. In its October 28, 2015 opinion, the Superior Court acknowledged that the language in Davis's complaint could be construed as alleging a design defect or a manufacturing defect, but nevertheless explained that it would construe it solely as alleging a design defect because Davis purportedly alleged the defect as being a design defect in his opposition to the summary judgment motion and other filings. Even so, while it is true that the opposition stated that the hydroblaster contained a design defect and analyzed the claim pursuant to authorities applying section 2(b) of the Third Restatement, (J.A. 211), the opposition also contained substantial discussion of how a surge would "fall outside the scope of the hydroblaster's normal or expected function," given that UHP Projects's representatives testified that a surge was not possible. (J.A. 216-17.) In other words, the opposition proceeded as if the complaint had pled alternate theories of liability – as a design defect or, in the alternative, a manufacturing defect. Importantly, a plaintiff need not propose a reasonable alternative design when alleging a manufacturing defect, since the gravamen of a manufacturing defect claim is that the product deviated from its intended design. RESTATEMENT

(THIRD) OF TORTS: PRODUCT LIABILITY § 2(a). Therefore, even if it determined that Davis could not prevail on a design defect theory, the Superior Court should have permitted the product defect claim to proceed with respect to a manufacturing defect theory, given Davis's testimony that he felt a surge which UHP Projects's representatives described as not being possible.

D. Motion to Amend

¶ 17 Finally, Davis asserts that the Superior Court erred when it denied his motion to amend his complaint to plead a cause of action for negligence based on a failure to provide proper protective equipment. Because the 21-day period for Davis to amend his pleading as a matter of course without court approval had lapsed, *see* V.I. R. CIV. P. 15(a)(1),[5] the amendment could only be accepted with leave of court. V.I. R. CIV. P. 15(a)(2). Rule 15(a) of the Virgin Islands Rules of Civil Procedure, however, cautions that "[t]he court should freely give leave when justice so requires." "Appropriate justifications [for deviating from the norm of freely granting leave to amend] include, but are not limited to, 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment[.]'" *Basic Services, Inc. v. Gov't of the V.I.*, 71 V.I. 652, 667 (V.I. 2019) (quoting *Reynolds v. Rohn*, 70 V.I. 887, 899-900 (V.I. 2019)).

¶ 18 In its September 6, 2019 opinion, the Superior Court held that the amendment would not

[5] On March 31, 2017, this Court adopted the Virgin Islands Rules of Civil Procedure, which superseded all previous civil procedure rules, including the Federal Rules of Civil Procedure that had been formerly applicable through former Superior Court Rule 7. Although Davis filed his motion to amend on October 25, 2016, the Superior Court did not rule on his motion until September 6, 2019. Since applying the Virgin Islands Rules of Civil Procedure to this matter would not be infeasible or work an injustice, this Court construes the motion to amend pursuant to Rule 15 of the Virgin Islands Rules of Civil Procedure.

be futile, but nevertheless determined that permitting it would cause undue delay and prejudice. In reaching that decision, the Superior Court determined "that an amendment would require additional discovery because the lack of prior legal notice of the negligence claim means [that UHP Projects] may not have utilized the discovery process to its full potential," and further noted that "the Motion comes one year after the Court decided to disregard the ill-formed negligence claim." (J.A. 35.)

¶ 19 We conclude that the Superior Court abused its discretion when it denied the motion to amend. This Court has characterized prejudice to the opposing party or the trial court as "the most important factor in determining whether leave to amend should be freely given," and has expressly held that "passage of time, without more, does not require that a motion to amend a complaint be denied." *Toussaint,* 67 V.I. at 949-50; *see also Stouffer v. Commonwealth*, 562 A.2d 922, 923 (Pa. Commw. Ct. 1989) ("[A] trial court's refusal to allow amendment solely on the basis of unreasonable delay and nothing more is an abuse of discretion.").

¶ 20 While the Superior Court determined that UHP Projects lacked prior notice of the claim, this is belied by the fact that UHP Projects briefed the equipment issue on the merits as part of its summary judgment briefing and has not asserted any particularized prejudice that it would suffer if the amendment were permitted. Importantly, the prejudice cannot simply be that UHP Projects may lose the case on the merits if the amended pleading is allowed; rather, "[t]o constitute prejudice, the amendment must compromise [the defendant's] ability to present [its] case." *Philadelphia v. Spencer*, 591 A.2d 5, 7 (Pa. Commw. Ct. 1991). Although the litigation had already been pending for approximately 14 years at the time the motion had been filed, Davis clearly believed that this claim had been pled in the original complaint at the start of the litigation and did not know that it was not until the Superior Court issued its October 28, 2015 opinion

holding otherwise. And while the Superior Court placed significant weight on the fact that Davis did not file the motion to amend until nearly a year after the Superior Court issued its October 28, 2015 opinion, Rule 15 permits an amendment at any time—even during trial—and as noted above, unreasonable delay, without more, is not sufficient grounds to deny leave to amend. *See Toussaint*, 67 V.I. at 949-50; *Stouffer*, 562 A.2d at 923. Moreover, though the litigation had been pending for 14 years, the parties remained engaged in motion practice and other pre-trial matters at the time the motion had been filed, with trial not imminent. *See Selcke v. Bove*, 629 N.E.2d 747, 752 (Ill. Ct. App. 1994); *Leslie v. Hymes*, 400 N.Y.S.2d 350, 351 (N.Y. App. Div. 1977). Significantly, the fact that the Superior Court did not rule on the motion to amend until nearly three years after it was filed—a period in which discovery could have occurred had the motion been granted in a timely manner—demonstrates that permitting the amendment would not have unnecessarily prolonged the proceeding. Therefore, we also reverse this aspect of the judgment under the September 6, 2019 opinion, and direct the Superior Court on remand to permit the amendment.

III. CONCLUSION

¶ 21 The Superior Court erred when it *sua sponte* entered judgment in favor of UHP Projects on all claims, apparently based on a misapprehension of its October 28, 2015 opinion partially denying summary judgment. Moreover, the Superior Court erred when it granted summary judgment on the product defect claim, in that summary judgment was granted *sua sponte* on an issue not raised by the parties, without providing them notice and an opportunity to be heard on that issue. Finally, the Superior Court erred when it denied Davis's motion to amend his complaint to plead a claim for negligence based on a failure to provide proper protective equipment. Accordingly, we reverse the September 6, 2019 judgment and vacate those portions of the October 28, 2015 and September 6, 2019 Superior Court opinions inconsistent with the present decision of

this Court and remand the case for further proceedings on remand not inconsistent with this Opinion.

Dated this 7th day of April, 2021.

BY THE COURT:

/s/ Rhys S. Hodge_____
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court