DOCKET NO. FBT CV19 6088107 S	:	SUPERIOR COURT
ROBIN HOHORST	OFFICE OF THE CLERK SUPERIOR COURT	J.D. OF BRIDGEPORT
VS.	2024 MAY -9 P 3:48	AT BRIDGEPORT
TOWN OF EASTON, ET AL	JUDICIAL DISTRICT OF BRIDGEPORT	MAY 9, 2024

MEMORANDUM OF DECISION
RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (#192.00)

I. PROCEDURAL HISTORY AND FACTS

This is a claim for property damage alleged to have been incurred by the Plaintiff after a significant rain event that took place on September 25, 2018. In counts one and two of the complaint, The Plaintiff has sued the Town of Easton ("Easton"), her municipal government, for damages she claims involving the design, installation, and maintenance of the municipal stormwater drainage system in Easton, Connecticut. Count One pleads a claim for negligence against the Town of Easton and Count Two pleads a claim for nuisance against the Town of Easton.

Pursuant to Conn. Rules of Practice §17-44 et seq, Easton moved for summary judgment in its favor as to Counts One and Two of the Plaintiff's Second Amended Complaint dated April 13, 2021.

Easton fairly summarizes the complaint in its motion, #192.00, and that court adopts that summary as follows:

The Complaint alleges that on September 25, 2018, Fairfield County was subject to a significant amount of rainfall over the watershed period that includes the plaintiff's property. It also alleges that the catch basins and drainage system at the intersection of Morningside Road

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and Marsh Road were overwhelmed and resulted in overland flooding onto the plaintiff's property. It further alleges that waterflow to the lower portion of the easement pipe was clogged or impeded due to various materials that traveled down the Easement Pipe from Marsh and Morningside Roads.

Count One pleads a claim for negligence against the Town of Easton. That count alleges that the Town of Easton was negligent in its design, construction, inspection, maintenance, and repair of various aspects of its water drainage system in the area of the plaintiff's property. (Compl., Count One.) It alleges that as a result, the plaintiff has suffered and continues to suffer the following damages: (a) Diminution in value of her real property; (b) Damage and loss of her personal property; (c) Damage and loss of her real property; (d) Costs of repair of her real property, notably the driveway, basement, landscaping and septic system; (e) Costs of disposing and replacing personal property, and (f) Emotional distress. (Compl., Count One.)

Count Two pleads a claim for nuisance against the Town of Easton. (Compl., Count Two.) It alleges that the diversion of water into the easements, by way of the easements pipe, and overland surface flow, on the property, which was not properly inspected or maintained, as well as Easton's failure to properly design and maintain the catch basins at the comer of Morningside Road and Marsh Road, was an affirmative act of Easton. Id. It also alleges that this was an invasion of plaintiff's interest in her private use and enjoyment of her property. Id. It further alleges that this was an unreasonable interference with plaintiff's private use and enjoyment of her property. Id. Finally, it alleges that Easton's failure to properly design and maintain the catch basins at the corner of Morningside Road and Marsh Road, interfered with plaintiff's private use and enjoyment of her property unreasonable. (Compl., Count Two.)

In support of its motion, Easton cites to discovery responses, affidavits, and testimony of the plaintiff. Easton claims that it is entitled to summary judgment as a matter of law for the following reasons:

> A. The negligence claim fails as a matter of law as the town is entitled to governmental immunity;
> B. The nuisance claim fails as a matter of law as the alleged nuisance was not created by some positive act of the municipality; and
> C. The nuisance claim fails as a matter of law as they are time-barred by the statute of limitations for intentional torts.

The plaintiff objects to this motion (See, # 194.00-197.00) and asserts that questions of material fact remain such that summary judgment is not proper. Specifically, the plaintiff claims that Easton is liable through the acts of its agents, pursuant to § 52-577n(a)(1)(A), and common law negligence, for the damages sustained by plaintiff due to Easton's negligent acts or omissions due to its failure to inspect, maintain, repair, and/or renovate the inadequately designed drainage system that it possesses on plaintiff's property by way of an easement. The plaintiff further claims that Easton, through the act of its agents, is liable pursuant to § 52-557n(a)(1)(C), and common law negligence, for the damages sustained by the plaintiff due to Easton's creation, or participation in the creation, of the nuisance on plaintiff's property. The plaintiff also asserts that its nuisance claim is not time-barred as the alleged nuisance continues to this day.

The court heard oral argument on January 22, 2024, and has considered the pleadings and arguments of counsel as well as the governing law applicable to the issues outlined by the parties. For the reasons outlined herein the motion for summary judgment is GRANTED.

II. LEGAL DISCUSSION AND ANALYSIS

Summary judgment is an appropriate remedy when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. The procedure of summary judgment is designed to expedite a litigation proceeding and eliminate delay and expense where there is no real issue to be tried. See *Wilson* v. *New Haven,* 213 Conn. 277, 567 A.2d 829 (1989). "However, since the litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard of demonstrating [its] entitlement to summary judgment." (Citations omitted; internal quotation marks omitted.) *Kakadelis* v. *DeFabritis,* 191 Conn. 276, 282, 464 A.2d. 57 (1983). Both the moving party and the party in opposition may rely on pleadings, affidavits and discovery materials, and the moving party shall, and the opposing party may, file appropriate memoranda of law. See Practice Book §§ 11-19, 17-45 and 17-46. The party seeking summary judgment has the burden of showing that no issue of material fact exists, and the party opposing the motion must substantiate its claim that a material fact issue exists. See *Home Insurance Co.* v. *Aetna Life & Casualty,* 235 Conn. 185, 663 A.2d 1001 (1995). In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation,* 330 Conn. 400, 414-15, 195 A.3d 664 (2018).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the

material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent...." *Zielinski v. Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci v. Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251, 571 A.2d 116 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

A. COUNT ONE NEGLIGENCE

In Count one of the amended complaint the plaintiff asserts a claim in negligence against Easton. The plaintiff fails to cite to a statutory basis for this direct claim against a municipality and as such is exposed to a defense of governmental immunity by Easton due to the lack of any statutory basis being cited in the complaint to overcome a defense of governmental immunity.

Connecticut law is well established that a municipality is immune from liability for arguably tortious acts unless the legislature has enacted a statute abrogating such immunity. See Williams v. City of New Haven, 243 Conn. 763, 767 (1998); Spears v. Garcia, 263 Conn. 22, 28 (2003); Martel v. Metropolitan Dist. Comm'n, 275 Conn. 38, 6 47 (2005); Heigl v. Board of Ed., 218 Conn. 1, 4 (1991); Ryszkiewicz v. New Britain, 193 Conn. 589, 593 (1994).

Here, the plaintiff has only claimed common law negligence and has cited to no specific statute which would abrogate the governmental immunity of Easton. However, both parties have focused on § 52-557n as the statute abrogating immunity. Considering the consistent arguments and briefing of counsel on this point, and in the interest of judicial economy, the court will assume that the plaintiff has cited § 52-557n in its operable complaint for purposes of this motion.

The court is persuaded by the rulings of the Appellate Court and Supreme Court on the issues of governmental immunity as they apply to this case, specifically, *Silberstein v. 54 Hillcrest Park Associates*, LLC, 135 Conn. App. 262 (2012) and *Northrup v, Witkowski*, 332 Conn. 158 (2019).

""The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Violano v. Fernandez*, supra, 280 Conn. 318.

"The tort liability of a municipality has been codified in [General Statutes] § 52-557n. Section 52-557n (a) (1) provides that '[e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within [*168] the scope of his employment or official duties . . . .' Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials [***16] to the municipalities themselves by providing that they will not be liable for damages caused by 'negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.'" Id., 320.

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting [***17] municipal officers to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) Id., 318-19." *Northrup v. Witkowski*, 332 Conn. 158, 167-168, 210 A.3d 29, 36, 2019 Conn. LEXIS 183, *15-17, 2019 WL 2720605

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that "[t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to [***18] specific conditions." *Bonington v. Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done."7 (Internal quotation marks omitted.) *Blake v. Mason*, 82 Conn. 324, 327, 73 A. 782 (1909); see also *Benedict v. Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010) (municipal acts are "deemed ministerial if a policy or rule limiting discretion in the completion of such acts exists"); *Pluhowsky v. New Haven*, 151 Conn. 337, 347, 197 A.2d 645 (1964) (describing ministerial acts in similar terms). In contrast, when an official has a general duty to perform [*170] a certain act, but there is no "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner," the duty is deemed discretionary. *Violano v. Fernandez*, supra, 280 Conn. 323.

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity." *Grignano v. Milford*, supra, 106 Conn. App. 656. This is so because there ordinarily is no legal directive mandating the specific manner in which officials must perform these tasks. Rather, "[a] municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method [***19] and extent of inspections, maintenance and repairs." Id.; see also *Bonington v. Westport*, supra, 297 Conn. 308-309 (when plaintiff claimed that defendants had improperly or inadequately inspected neighboring property for zoning violations, alleged

acts of negligence constituted discretionary acts because no legal authority mandated inspection to be performed in prescribed manner); *Martel v. Metropolitan District Commission*, 275 Conn. 38, 50-51, 881 A.2d 194 (2005) (in absence of any policy or directive requiring defendants to design, supervise, inspect and maintain trail on defendant's property, defendants "were engaged in duties that inherently required the exercise of judgment," and, therefore, those duties were discretionary in nature); *Evon v. Andrews*, supra, 211 Conn. 506-507 (defendants' acts were discretionary in nature [**38] because what constitutes reasonable, proper or adequate fire safety inspection to ensure that multifamily residence was in compliance with state and local building codes involves exercise of judgment); *Pluhowsky v. New Haven*, supra, 151 Conn. 347-48 (in absence of any legal directive requiring defendants to repair malfunctioning catch basin under specific conditions or in particular manner, duty was discretionary); *Grignano* [*171] v. Milford, supra, 656-57 (ordinance requiring owner of maritime facility to maintain physical improvements in safe condition imposed discretionary duty because ordinance did not "[prescribe] [***20] the manner in which the defendant is to perform reasonable and proper inspection and maintenance activities"); *Segreto v. Bristol*, 71 Conn. App. 844, 857-58, 804 A.2d 928 (city's allegedly negligent design and maintenance of stairwell located on premises of senior center that was owned and operated by city was discretionary because determinations of what is reasonable or proper under particular set of circumstances necessarily involve exercise of judgment), cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002).

Consistent with these principles, the Appellate Court concluded in *Silberstein v. 54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 273, that the maintenance of storm drains is discretionary in nature. See also *Brusby v. Metropolitan District*, 160 Conn. App. 638, 656, 127 A.3d 257 (2015) (in absence of legal directive prescribing manner in which sanitary

sewer system was to be maintained or repaired, duty was discretionary)." *Northrup v. Witkowski*, 332 Conn. 158, 169-171, 210 A.3d 29, 37-38, 2019 Conn. LEXIS 183, *17-20, 2019 WL 2720605

"In *Jones v. New Haven*, 34 Conn. 1, 13 (1867), this court stated that "[w]henever a [***25] public duty is *imposed* upon a town . . . without its consent, express or implied, such town . . . is not liable to an action for negligence in respect to such duty, unless a right of action is given by statute." (Emphasis added.) In contrast, "when a grant is made to a [municipality] of some special power or privilege *at its request*, out of which public duties grow; and when some special duty is imposed upon a [municipality] not belonging to it under the general law *with its consent*; in these and like cases, if the corporation is guilty of negligence in the discharge of such duty, thereby causing injury to another, it is liable to an action in favor of the party injured." (Emphasis added.) Id., 14; see also *Dyer v. Danbury*, 85 Conn. 128, 131, 81 A. 958 (1911) (same)." *Northrup v. Witkowski*, 332 Conn. 158, 175, 210 A.3d 29, 40, 2019 Conn. LEXIS 183, *24-25, 2019 WL 2720605

In this case, there is no legal directive identified before this court. There is no charter provision, ordinance, regulation, rule, policy, or any other directive that prescribes the manner in which the Town of Easton designs, constructs, inspects, maintains, and repairs storm water drainage systems in the Town. See, #192.00, Exhibit B ¶ 7. The design, construction, inspection, maintenance, and repair of storm water drainage systems within the Town of Easton is left up to the judgment and discretion of Town employees and performed on a case-by-case basis. Id., at ¶ 8. The manner in which the Town of Easton inspects and reviews storm water drainage systems of residential development in the Town, including but not limited to, residential subdivisions is left up to the judgment and discretion of Town employees and performed on a case-by-case

basis. Id., at ¶ 10. With regard to such inspections or maintenance, the plaintiff concedes in her deposition, as city in See, Exhibit C to the defendant's motion, that she has no knowledge as to the Town's practices, policies, or protocols for inspection and maintenance of the easement pipe and catch basins at the location(s) in question.

Any actions or inactions by the Town, such as those alleged in counts one and two of the amended complaint, are purely discretionary and entitled to governmental immunity. The plaintiff has not alleged that the municipal defendants performed a ministerial duty in relation to the drainage system, or that the defendant was required to perform any of the alleged negligent acts in a prescribed manner. Pursuant to *Silberstein*, the Town's duty to reasonably maintain drainage systems, including engaging in no maintenance at all, involved the exercise of discretion. To hold otherwise would ignore the analysis that the Connecticut Supreme Court has refined to assist in differentiating between ministerial and discretionary acts of maintaining roads, storm drains and sewers, and would also ignore the holding in *Silberstein* and *Northrup*.

While the plaintiff argues that this case presents a potentially distinguishing fact of the storm drainage easements that were granted to Easton and which specifically articulate maintenance as part of the easements, this court finds that the maintenance responsibility identified therein is also discretionary in nature. As stated above, absent specific directives or enabling language in the easements that articulate the manner, frequency, and specific manner of maintenance, there is no greater responsibility created for Easton. The maintenance responsibility under the easements is no different and is aligned with the general nature of discretionary maintenance for Easton with respect to all storm drainpipes. Thus, the maintenance remains a discretionary function and even assuming Easton did no maintenance, that is still within its overall discretion and not a basis for a claim of negligence. See, *Northrup*

v. Witkowski, 332 Conn. 158, 188, 210 A.3d 29, 40, 2019 Conn. LEXIS 183, *24-25, 2019 WL 2720605

As such, Easton is entitled to assert governmental immunity to the negligence count and its motion for summary judgment on count one is granted.

B. COUNT TWO NUISANCE

"A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land." 4 Restatement (Second), Torts § 821D (1979); see also *Herbert v. Smyth,* 155 Conn. 78, 81, 230 A.2d 235 (1967). The law of private nuisance springs from the general principle that "[i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor." *Nailor v. C.W. Blakeslee & Sons, Inc.,* 117 Conn. 241, 245, 167 A. 548 (1933). "The essence of a private nuisance is an interference with the use and enjoyment of land." W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 87, p. 619. *Pestey v. Cushman,* 259 Conn. 345, 352, 788 A.2d. 496 (2002).

Nuisance issues must be decided on a case-by-case basis because the duty is framed in terms of reasonableness, which necessarily implies an element of subjective judgment. See *Herbert v. Smyth,* 155 Conn. 445 (1968). The determination of reasonableness is essentially a weighing of process, involving comparative evaluation of conflicting interests. *Palmieri v. Tsolis,* 1992 Conn. Super. LEXIS 2339, 1992 WL 188851; *Carnavale v. Apicella,* 2020 Conn. Super. LEXIS 366, 2020 WL 1656205.

> On the basis of our reexamination of our case law and upon our review of private nuisance law as described by the leading authorities, we adopt the basic principles of § 822 of the Restatement (Second) of Torts and conclude that in order to recover damages in a common-law private nuisance cause of

> action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional; *Quinnett* v. *Newman*, supra, 213 Conn. at 348 (nuisance is created intentionally if defendant intends act that brings about condition found to be nuisance); or the result of the defendant's negligence. Id., at 348-49. Whether the interference is unreasonable depends upon a balancing of the interests involved under the circumstances of each individual case. In balancing the interests, the fact finder must take into consideration all relevant factors, including the nature of both the interfering use and the use and enjoyment invaded, the nature, extent and duration of the interference, the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded, whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property, and any other factors that the fact finder deems relevant to the question of whether the interference is unreasonable. No one factor should dominate this balancing of interests; all relevant factors must be considered in determining whether the interference is unreasonable.
> The determination of whether the interference is unreasonable should be made in light of the fact that some level of interference is inherent in modern society. There are few, if any, places remaining where an individual may rest assured that he will be able to use and enjoy his property free from all interference. Accordingly, the interference must be substantial to be unreasonable. See 4 Restatement (Second), supra, § 822, comment (g); W. Prosser & W. Keeton, supra, § 88, p. 626.
>
> Ultimately, the question of reasonableness is whether the interference is beyond that which the plaintiff should bear, under all of the circumstances of the particular case, without being compensated. See *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 250 Conn. at 458-59; see also 4 Restatement (Second), supra, § 822, comment (g), and § 826, comment (e); W. Prosser & W. Keeton, supra, § 88, p. 629. *Pestey v. Cushman,* 259 Conn. 345, 360-362, 788 A.2d. 496 (2002).

A municipality may be liable for a nuisance that it creates and maintains. *Lukas v. New Haven*, 184 Conn. 205, 209, 439 A.2d 949; *Wright v. Brown*, 167 Conn. 464, 470, 356 A.2d 176 (1975). However, a municipality "is not liable where its sole fault is a failure to take remedial steps." *Karnasiewicz v. New Britain*, 131 Conn. 691, 694, 42 A.2d 32 (1945). *Insurance Co. of North America v. Buccheri*, 1992 Conn. Super. LEXIS 1596, *4

The plaintiff alleges negligent nonfeasance or failure to perform maintenance, inspection, and repair acts in such a way so as to cause a nuisance. Count Two alleges that the failure of the Town to inspect and maintain the easements pipe, as well as the failure of the Town to inspect and maintain the catch basins at the comer of Morningside Road and Marsh Road, were affirmative acts on the part of Easton. It also alleges that Easton's failure to properly design and maintain the catch basins at the corner of Morningside Road and Marsh Road, interfered with plaintiff's private use and enjoyment of her property unreasonable.

Under Connecticut law, a municipality is "not liable where its sole fault is a failure to take remedial steps." *Insurance Co. of North America v. Buccheri*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV900399063 (May 28, 1992, Hennessey, J.) (6 Conn.L.Rptr. 457). The plaintiff in this case has made allegations of negligent malfeasance, whether in the construction or maintenance of the pipes in the easement area and surrounding storm drains. As such it has failed, as a matter of law, to show that there was a positive act by the municipal defendant that caused the flooding. The alleged conduct or inaction/nonfeasance of the defendant as alleged is all within its protected discretionary authority and thus reasonable.

Therefore, Easton is entitled to assert governmental immunity to the nuisance count and its motion for summary judgment on count two is granted.

C. STATUTE OF LIMITATIONS

The defendant has raised the additional claim that the nuisance claim fails as a matter of law as they are time-barred by the statute of limitations for intentional torts The plaintiff's nuisance claims are grounded in negligence. Therefore, they, like the negligence claim in count

one, are barred by the two-year statute of limitations set forth in C.G.S. § 52- 584. If the nuisance claims are assumed to allege intentional conduct, then those claims are barred under C.G.S. § 52-577 (three-year statute of limitations from the date of the act or omission complained of).

The only positive act that has been alleged by the plaintiff is that the Town diverted the water into storm water drainage systems and related easements. The alleged actions creating the easements took place in the 1980's (per the complaint), and therefore, took place more than three years before the plaintiff brought her nuisance claims. Accordingly, the nuisance claims are time-barred under C.G.S. § 52-577. Because the Town's alleged affirmative actions took place more than three years before the plaintiff brought her nuisance claims, those claims are time-barred under C.G.S. § 52-577, and the municipal defendant is entitled to summary judgment.

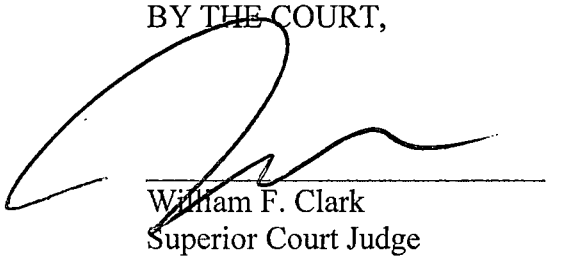
In addition, the plaintiff has not pled its claim under the continuing course of conduct doctrine in either her complaint or reply to special defenses, and therefore, cannot argue said doctrine at this time. Even assuming the doctrine were applicable, the facts of the case present an undisputed history of a lack of flooding prior to the incident in question and thus, even if it had been properly claimed and preserved, there is no course of conduct applicable and summary judgment is granted on the claimed statute of limitations grounds as well.

III. CONCLUSION

For all the reasons stated herein, the court finds that defendant Easton is entitled to summary judgment as a matter of law as to counts one and two. Therefore, the motion for summary

judgment filed by the defendants (#192.00) is GRANTED as to counts one and two and the objection thereto (#194.00) is OVERRULED.

BY THE COURT,



William F. Clark
Superior Court Judge