The Turbulent Teen Years of Apportionment in Civil Cases
Daniel Webster-Batchelder American Inn of Court—Table 2
Written Materials for November 3, 2021 CLE

I. Background

In the late 1980s, the legislature enacted a comprehensive statute to create a unified approach to comparative fault, apportionment of damages, and contribution between joint tortfeasors. See RSA 507:7-d through 507:7-i. RSA 507:7-e, which governs the apportionment of damages between the claimant and multiple tortfeasors, codified the concept of the joint and several liability of defendants for situations where defendants were found to be equally at fault or jointly engaged in a common plan or design. RSA 507:7-e, I (b) and (c). Joint liability was eliminated, however, for those situations where a defendant was found to be less than 50% at fault (severally liable) for a plaintiff's injuries. In such a case, that defendant is only liable for his or her proportional share of the damages. RSA 507:7-e, I (b).

Under the current statute, the jury is instructed in all cases to apportion fault between the parties and award damages to the claimant to be paid in proportional share to each defendant's fault. RSA 507:7-e, I (a). After trial, if the defendants are found to be equally at fault, they remain jointly liable for the verdict and if one defendant pays more than its proportional share of the verdict, then that defendant can bring a suit for contribution against the other defendant. RSA 507:7-f and -g. If the plaintiff settles his or her claims prior to trial with one of two or more defendants, the remaining defendant is entitled to a dollar-for-dollar reduction in the verdict, or a pro tanto credit, for the amount of the prior settlement. RSA 507:7-h and -i. Evidence of the settlement with the released defendant is not admissible at trial for the jury to consider in its assessment of fault. RSA 507:7-i.

II. Supreme Court Decisions

a. Nilsson v. Bierman, 150 N.H. 393 (2003).

In 2003, the New Hampshire Supreme Court ruled in Nilsson v. Bierman that for the purposes of apportionment under RSA 507:7-e, I(b), the term "party" refers to "parties to an action, including…settling parties." Id. at 396 (citation omitted). In other words, the court found that a jury can apportion fault between settling and non-settling tortfeasors, even if the settling defendant was not present at trial to defend itself. 150 N.H. 393, 396. (2003). The court, however, declined to address whether nonparties such as an unnamed tortfeasor or a tortfeasor immune from liability constitutes a "party" under RSA 507:7-e.

The Nilsson court also held that the pro tanto credit available under sections 7-h and section 7-i only applies to defendants who are both jointly and severally liable. If a non-settling defendant, therefore, is found to be 50% or more at fault, that defendant is jointly and severally liable for the entire damage award less a credit for the amount paid by the settling defendant. On the other hand, if a non-settling defendant is found to be less than 50% at fault, that defendant is only liable for its proportionate share of the damage award without any credit for the amount paid by the settling defendant.

b. DeBenedetto v. CLD Consulting Eng'rs, Inc., 153 N.H. 793 (2006).

In 2006, the New Hampshire Supreme Court expanded on its decision in Nilsson, finding that the term "party" as used in RSA 507:7-e "refers to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." DeBenedetto v. CLD Consulting Eng'rs, Inc., 153 N.H. 793, 804 (2006). Importantly, the court noted that defendants "may not easily shift fault under RSA 507:7-e." A defendant who seeks to shift fault to a non-litigant tortfeasor must support any allegations of fault with adequate evidence before the jury or court can consider the non-litigant's fault for apportionment. See id.

c. Everitt v. General Electric Co., 156 N.H. 202 (2007).

In Everitt v. General Electric Co., the court clarified that a defendant seeking to apportion fault to a non-litigant bears the burden of proving the legal fault of that non-party tortfeasor. 156 N.H. 202, 207 (2007).

d. Tiberghein v. B.R. Jones Roofing Co., 156 N.H. 931 (2007).

In Tiberghein v. B.R. Jones Roofing Co., the New Hampshire Supreme Court found that RSA 507:7-e apportionment and pro tanto credit available to jointly and severally liable non-settling defendants under 507:7-h and 507:7-i apply to arbitration awards. 156 N.H. 931 (2007).

e. Goudreault v. Kleeman, 158 N.H. 236 (2009).

In Goudreault v. Kleeman, the court explained that a "civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense." 158 N.H. 236, 256 (2009). More specifically, a defendant seeking a non-litigant apportionment "becomes another plaintiff" and bears the burden of proof as outlined in RSA 507-E:2, which requires expert testimony of the standard of care and proximate cause. Id.

f. State v. Exxon Mobil Corp., 168 N.H. 211 (2015).

In State v. Exxon Mobil Corp., the court addressed the specificity required of DeBenedetto disclosures. 168 N.H. 211 (2015). The court found that DeBenedetto disclosures mut be sufficiently detailed to explain the theory of liability of the non-litigant parties and the allegations upon which that liability is based. See id. at 256-60.

g. Virgin v. Fireworks of Tilton, LLC, 172 N.H. 484 (2019).

In Virgin v. Fireworks of Tilton, LLC, the court held that RSA 507:7-e only applied to tort actions. 172 N.H. 484, 487 (2019).

III. DeBenedetto Disclosure

In the wake of the New Hampshire Supreme Court's decision in DeBenedetto, a disclosure deadline was added to the Superior Court's standard Structuring Conference Order form, which provides:

> If defendant claims that unnamed parties are at fault (see DeBenedetto v. CLD Consulting Engineers Inc., 153 N.H. 793 (2006)), defendant shall disclose the identity of every such party and the basis of the allegation of fault no later than_____. Plaintiff shall then have 30 days from the date of disclosure to amend the initiating pleading.

IV. Ethical Considerations

In June 2018, the New Hampshire Bar Association Ethics Committee issued an advisory opinion regarding conflicts of interest arising from DeBenedetto disclosures. See New Hampshire Bar Association Ethics Committee Advisory Opinion #2017-18/2 (June 28, 2018), Conflicts Arising from DeBenedetto Disclosures. Below are the major takeaways from the opinion:

a. A defendant in a civil action and a potential DeBenedetto party in that action are directly adverse to one another, so that the representation of both these parties by one lawyer gives rise to a concurrent conflict of interest.

b. The representation of a defendant in a civil action and a potential DeBenedetto party in that action by the same lawyer creates a significant risk that the lawyer's responsibilities to one client will materially limit the lawyer's representation of the other client, giving rise to a concurrent conflict of interest.

c. Because the pursuit of a DeBenedetto apportionment defense against a current client creates a concurrent conflict of interest, the informed written consent of both clients is necessary before the dual representation may proceed.

d. Where a lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client affected by a concurrent conflict of interest, the lawyer may not seek a written waiver of the conflict.

e. A lawyer's subjective belief that he or she can provide competent, diligent representation to both clients is a necessary, but not sufficient, condition of seeking written waiver of a concurrent conflict of interest; rather, the test for waivability is one of objective reasonableness.

f. Even if a lawyer can form the objectively reasonable belief that he or she can provide competent, diligent representation to both clients affected by a concurrent conflict of interest, the lawyer must ensure that the other requirements for a waiver of the conflict are present before proceeding with the dual representation.

g. What is necessary for a client to provide informed consent to the waiver of a concurrent conflict of interest is a fact-specific, case-by-case inquiry that hinges on a number of factors, including but not limited to the breadth and specificity of the waiver, the quality of the conflicts discussion between the lawyer and the client, the nature of the conflict, the sophistication of the client, and the interests of justice.

V. Superior Court Orders

a. Sevigny v. Quesada, No. 07-C-0422, (Hillsborough County Superior Court, Northern District, Aug. 26, 2009) (Mangones, J.).

In Sevigny v. Quesada, Judge Mangones barred the non-settling defendant from offering evidence of a settling defendant's fault because the non-settling defendant failed to disclose the settling co-defendant in its DeBenedetto disclosure. No. 07-C-0422, (Hillsborough County Superior Court, Northern District, Aug. 26, 2009) (Mangones, J.).

The plaintiff in Sevigny had amended the standard structuring conference order form at the structuring conference to include the following language: "Pursuant to DeBenedetto v. CLD case, defendants shall disclose by 7.15.08 the identity of every person or party alleged to be at fault and the basis therefor.". The DeBenedetto deadline passed without any of the defendants disclosing an intent to blame anyone else. Accordingly, the plaintiff agreed to settle with one of defendants withdrew the medical experts that the plaintiff had disclosed to testify against the settling defendant. As the trial date approached, counsel for the non-settling defendant sought to videotape the trial testimony of the plaintiff's withdrawn experts in an attempt to create evidence to support a DeBenedetto apportionment of fault to the settling defendant. The plaintiff refused to produce the withdrawn experts and the non-settling defendant filed a motion to compel their videotaped testimony. The plaintiff objected, asked the Court to enforce the DeBenedetto disclosure deadline, and emphasized she would not have settled with the settling defendant if the non-settling defendant had complied with the deadline and stated an intent to blame his co-defendant.

Judge Mangones noted that the Structuring Conference Order signed by Judge McGuire "required that [the non-settling defendant] identify 'every individual' alleged to be at fault for the plaintiffs' injuries, even if such individuals were parties to the litigation." Id. at 9. He then wrote that the non-settling defendant did not identify any such individuals prior to the disclosure deadline and had not alleged sufficient cause for not doing so. Id. Lastly, he recognized that the plaintiffs would be prejudiced by allowing the non-settling party to seek a DeBenedetto apportionment against the settling defendant because the plaintiffs had relied on the absence of a DeBenedetto disclosure when they decided to resolve their claims against the settling doctor. Id. at 9-10. Accordingly, he not only denied the non-settling defendant's motion to compel testimony from our withdrawn experts, he also held that the non-settling defendant was barred from presenting evidence of fault relative to any other person or party at trial. Id. at 10.

b. Rallis v. Gladstone, No. 09-C-0598, (Rockingham County Superior Court, May 11, 2010) (McHugh, J).

In Rallis v. Gladstone, Judge McHugh granted the plaintiff's motion for reconsideration to include the phrase "named parties" as well as "unnamed parties" to the DeBenedetto language in

the Structuring Conference Order. No. 09-C-0598, (Rockingham County Superior Court, May 11, 2010) (McHugh, J).

The plaintiff in Rallis argued that in multi-defendant cases it is necessary for the plaintiffs to know which named defendants are being blamed by another named defendant and the bases for such allegations of fault. That is so because settlement agreements are often reached with some but not all defendants and the non-settling defendants may ask the jury to apportion fault to the defendants who settled and were released before trial. Requiring defendants to identify their co-defendants in the DeBenedetto disclosure would allow the plaintiff to make an educated decision about whether to settle with a defendant and it would prevent defendants from making eleventh hour allegations of fault and waiting for co-defendants to settle out of the case before attempting to cast blame.

Judge McHugh acknowledged that the plaintiff would be substantially prejudiced by the defendants' failure to disclose a co-defendant in their DeBenedetto disclosure because the plaintiff would be unable to "assess the reasonableness of electing to settle with that co-defendant." Id. at 3. In light of this potential prejudice, Judge McHugh explained:

> If the remaining defendant is going to argue that a settling co-defendant was negligent, then that remaining defendant should be required to specify its reasons for that claimed negligence at the time of the DeBenedetto disclosure to that the plaintiff can assess any such claim and make the determination as to whether it is in her best interest to settle with any defendant prior to trial.

Id. at 3-4. Moreover, Judge McHugh found that requiring defendants to disclose co-defendants in their DeBenedetto disclosures is consistent with the Superior Court's discovery rules which aim to "assure openness and prevent trial ambush." Id. at 3.

c. Omanovic v. Pariser, No. 218-2017-CV-00229, (Rockingham County Superior Court, Aug. 6, 2018) (Wageling, J).

In Omanovic v. Pariser, the court granted the plaintiff's motion to strike the defendants' DeBenedetto disclosures because the court could not "glean from these disclosures who Defendants [sought] to shift liability to, and on what legal basis they may shift the same." No. 218-2017-CV-00229, (Rockingham County, Aug. 6, 2018) (Wageling, J) at 4. The two disclosures at issue in Omanovic provided:

> For our DeBenedetto disclosure, we list any and all defendants ever sued by the Plaintiff in this action.
>
> [T]hese defendants reserve the right to submit evidence as to any parties to this litigation and any unnamed parties who may yet be identified by current and future disclosed experts in this case as negligent….the basis of the allegation of fault is set forth in Plaintiffs' [sic] complaint. It is expected that the DeBenedetto claims will be supported b the plaintiff's experts in this matter. Further, [defendants] will rely on the plaintiffs' [sic] experts to

> maintain DeBenedetto claims against any settling or nonsuited defendants in this action.

Id. at 3. The court found that these disclosures were insufficient because they failed to "specifically identify the individuals at fault, the legal basis for shifting civil liability to them, or to meaningfully connect their fault to any of Plaintiff's claims." Id.

d. Coskren v. Watt, No. 2016-CV-00407 (Merrimack County Superior Court, Jan. 8, 2018) (McNamara, J.).

In Coskren v. Watt, Judge McNamara granted the plaintiff's motion to strike, finding that the defendant's DeBenedetto disclosure was inadequate. No. 2016-CV-00407 (Merrimack County Superior Court, Jan. 8, 2018) (McNamara, J.). The court explained that since the New Hampshire's Supreme Court decision in State v. Exxon Mobil Corp., 168 N.H. 211 (2015), the Superior Court has "taken the position that a defendant must set forth the basis for his or her third-party claim with a level of specificity to explain the theory of liability to the non-negligent parties and the allegations upon which that liability is based." Id. at 2. The disclosure at issue stated:

> This notice is to alert the court that the defendant will seek a jury instruction for apportionment of fault of the Bow Police Department for its failure to properly organize the Bow Police Association 5k ("Turkle Trot") so as to prevent runners from being in the way of traffic.

Id. The court found that the DeBenedetto disclosure had to be struck because the defendant failed to allege facts showing how the Bow Police department failed to properly organize the race. See id.

e. Reynolds v. Raslavicus, No. 218-2016-CV-457, (Rockingham County Superior Court, May 25, 2017) (Anderson, J).

In Reynolds v. Raslavicus, Judge Anderson granted the plaintiff's motion to strike the defendants' DeBenedetto disclosure because the disclosure identified a potential category of people rather than identify anyone in particular. No. 218-2016-CV-457, (Rockingham County Superior Court, May 25, 2017) (Anderson, J). The disclosure at issue in Reynolds did not include any names and listed "unnamed parties who may yet be identified by disclosed experts in this case as negligent." Id. at 2. The court found that the disclosures were insufficient because they "neither identified particular non-parties at fault nor provided a basis for their alleged fault." Id. at 3. In defense of their inadequate disclosures, the defendants claimed the disclosures were simply placeholders in the event the plaintiff's experts "point a finger at a non-party." Id. Judge Anderson was unpersuaded, however, noting that the defendants could seek leave from the court to file a late disclosure should the plaintiff's expert's blame a non-party for the plaintiff's injury. See id.

f. Shepard v. Keskinen, No. 226-2016-CV-00567, (Hillsborough County Superior Court, Southern District, May 9, 2017) (Colburn, J.).

In Shepard v. Keskinen, the court found that a civil defendant was not entitled to seek a DeBenedetto apportionment because the defendant was already liable as a matter of law for harm caused by the non-party. No. 226-2016-CV-00567, (Hillsborough County Superior Court, Southern District, May 9, 2017) (Colburn, J.).

In Shepard, the plaintiff was injured when she slipped and fell on ice outside a hair salon in Milford. She sued the owner of the premises alleging that he negligently failed to clear the ice from the walkway. The defendant responded by filing a DeBenedetto disclosure seeking an apportionment of fault to a non-party snow removal contractor. Before trial, the plaintiff moved *in limine* to strike the defendant's DeBenedetto disclosure because New Hampshire common law imposes a nondelegable duty on a commercial premises owner, like the defendant, to maintain safe premises. Id., Order at 2 (citing Valenti v. NET Props. Mgmt., 142 N.H. 633 (1998)).

Judge Colburn granted the plaintiff's motion to strike the defendant's DeBenedetto disclosure, agreeing with the plaintiff that an apportionment of fault was unnecessary since, pursuant to Valenti, the defendant was liable for any fault that may be apportioned to the nonparty contractor. She explained her reasoning as follows:

> [I]f the jury finds [the non-party contractor] to be 100% at fault, the defendant would *still* be held liable for all of the plaintiff's damages – not under the rules of joint and several liability as discussed in DeBenedetto, but, rather, under the doctrine of vicarious liability as discussed in Valenti. Therefore, it is hard to discern what possible benefit the defendant could gain by apportioning fault to [the non-party contractor] on a jury verdict form in this case. [The non-party contractor] is not a party to this action and there are no claims against it. If anything, it seems that attributing fault to [the non-party contractor] would only prolong the trial, confuse the jury, and require unnecessary litigation…

Id. at 3-4 (emphasis in original).

g. McEneny v. Brady Sullivan Properties, No. 216-2016-CV-00113, (Hillsborough County Superior Court, Northern District, March 16, 2017) (Brown, J.).

In McEneny v. Brady Sullivan Properties, Judge Brown ruled that a defendant could not seek to shift fault to a party that had been dismissed from the case because the court had already found that the dismissed party did not owe the plaintiff a duty of care. No. 216-2016-CV-00113, (Hillsborough County Superior Court, Northern District, March 16, 2017) (Brown, J).

In McEneny, the plaintiff sustained injuries in a slip-and-fall on ice and brought suit against the property owner and a paving company, among others. See id. at 1. During the course of the litigation, the court granted the paving company's motion to dismiss, finding that it did not owe the plaintiff a duty of care. See id. The remaining defendants then identified the paving company in their DeBendetto disclosures but failed to raise new allegations that were not addressed in the plaintiff's complaint. Accordingly, the court agreed with the plaintiff that "because her complaint

was insufficient as a matter of law to hold [the paving company] liable, defendants' disclosures fail for the same reason." Id. at 3. The court was unpersuaded by the defendants' argument that the dismissed party was analogous to an unnamed party or a party immune to liability because:

> Regardless of how one categorizes a non-party—dismissed, immune, or not before the Court—the proper inquiry is whether defendant has alleged sufficient facts to establish that non-party was liable to the plaintiff, as even a party immune from liability can only be added for apportionment purposes if the defendant can allege the non-party would otherwise be liable to the plaintiff.

Id. at 4.

h. Joselow v. MNH Mall, LLC, No. 216-2016-CV-00575 (Hillsborough County Superior Court, Northern District, May 1, 2017) (Abramson, J.).

In Joselow v. MNH Mall, LLC, Judge Abramson granted the plaintiff's motion to strike the defendants' DeBenedetto disclosure because the disclosure failed to sufficiently explain the theory of liability of the non-litigant and the allegations upon which that liability was based.

In Joselow, the defendant sought a DeBenedetto apportionment against a non-litigant maintenance company, arguing that the maintenance company undertook to perform the duty to inspect and remedy accumulations of water pursuant to Section 324A(b) of the Restatement Second of Torts. See id. at 4. In New Hampshire, the court explained, claims under section 324A(b) require a showing that the party that undertook another's duty completely assumed that duty. The defendants' disclosure, however, failed "to set forth a sufficient basis to establish [non-litigant] 'completely assumed' the asserted duty" to the plaintiff under Section 324A(b)." Id. at 6. Thus, the court found that the defendants' disclosure lacked the sufficient allegations necessary to establish the non-litigant's liability for apportionment purposes. See id. at 8.

i. Adolfini v. Lakeview Neurorehabilitation Center, No. 212-2014-CV-00043, 00044, and 00045, (Carroll County Superior Court, March 18, 2015) (Temple, J.).

In Adolfini v. Lakeview Neurorehabilitation Center, the court granted the plaintiff's motion to strike the defendants' DeBenedetto disclosure because the disclosure "completely fail[ed] to identify the factual and legal basis of the non-litigants' civil fault as it relate[d] to the underlying causes of action." No. 212-2014-CV-00043, 00044, and 00045, (Carroll County Superior Court, March 18, 2015) (Temple, J.) at 4.

In the disclosure at issue in Adolfini, the defendant identified two people and claimed that they "aided and abetted" the plaintiff in conduct that resulted in the termination of the plaintiff's employment Id. at 3. In granting the motion to strike, Judge Temple explained:

> This disclosure fails to identify the legal basis for civil liability as it relates to the non-litigants. It does not in any meaningful way provide adequate notice under DeBenedetto and Goudreault. At its core, the DeBenedetto disclosure is a bald allegation which claims to connect the alleged facts with the elements of the plaintiffs' wrongful termination claims…The DeBenedetto disclosure relies

> on a vague theory of accomplice liability surrounding the employment terminations at issue in this case. This conclusory assertion of accomplice liability, which is actually criminal in nature, completely fails to identify the factual and legal basis of the non-litigants' civil fault…"

Id. at 3-4.

j. Cummings v. MMG Insurance Company, No. 220-2014-CV-48 (Sullivan County Superior Court, Sept. 23, 2016) (Tucker, J.).

In Cummings v. MMG Insurance Company, the court granted the plaintiff's motion *in limine* to bar the defendant from proving a non-party's comparative fault because the defendant failed to make a DeBenedetto disclosure identifying the non-party. No. 220-2014-CV-48 (Sullivan County Superior Court, Sept. 23, 2016) (Tucker, J.). In reaching its decision, the court rejected the defendants' arguments that the non-party's fault was apparent from the investigation reports obtained by the plaintiff and that it was well-known through discovery that the non-party was accused of bearing some of the responsibility for the injuries sustained by the plaintiff. See id. at 3.