Nilsson v. Bierman

Supreme Court of New Hampshire

October 9, 2003, Argued ; December 29, 2003, Opinion Issued

No. 2003-028

Reporter
150 N.H. 393 *; 839 A.2d 25 **; 2003 N.H. LEXIS 203 ***

LEIF NILSSON v. JOSEPH A. BIERMAN

Subsequent History: [***1] Released for Publication January 23, 2004.

Prior History: Hillsborough-northern judicial district.

Disposition: Affirmed.

Core Terms

fault, speed, damages, instructions, apportioning, apportionment, tortfeasor, pro tanto, proportionate share, severally liable, speed limit, trial court, nonsettling, settlement, parties, prudent, contributory negligence, joint tort feasor, instruct a jury, driver's, argues, facie, jury instructions, fifty percent, approaches, provisions, settling, traffic, dollar

Case Summary

Procedural Posture
Plaintiff injured party sued defendant driver of the vehicle in which the injured party was a passenger and defendant motorist, whose vehicle was hit by the driver, in the Hillsborough Superior Court, northern judicial district (New Hampshire), settled with the driver, and obtained a verdict against the motorist, which apportioned fault between the driver and the motorist. The injured party appealed, and the motorist cross-appealed.

Overview

The jury found the driver 99 per cent at fault and the motorist one per cent at fault, causing the injured party, given the amount of his settlement with the driver, not to receive his full damages. The supreme court held the driver was a party, for apportionment purposes under *N.H. Rev. Stat. Ann. § 507:7-e(I)(b)* (1997). Under *§ 507:7-e*, the apportionment applied despite the injured party's lack of fault. *N.H. Rev. Stat. Ann. §§ 507:7-h* (1997) and 507:7-i (1997), giving a nonsettling tortfeasor a credit for an injured party's settlement with a joint tortfeasor, did not apply to the motorist because, under *N.H. Rev. Stat. Ann. § 507:7-e(I)(b)* (1997), the motorist was only severally liable, as he was less than 50 per cent at fault. The trial court's instructions, viewed as a whole, adequately apprised the jury of the injured party's burden to prove the motorist's negligence as a proximate cause of the accident, as required by *N.H. Rev. Stat. Ann. § 265:67(II)* (1993). The jury was correctly instructed to decide if the motorist's speed was reasonable and prudent under the circumstances. The trial court's failure to define "prima facie evidence" did not mislead the jury.

Outcome
The trial court's judgment was affirmed.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1 **Legislation, Interpretation**

In matters of statutory interpretation, the New Hampshire Supreme Court is the final arbiter of the legislature's intent.

Governments > Legislation > Interpretation

HN2 **Legislation, Interpretation**

In matters of statutory interpretation, the New Hampshire Supreme Court begins by examining the

language of the statute and ascribing the plain and ordinary meanings to the words the legislature used. It does not construe statutes in isolation; instead, it attempts to do so in harmony with the overall statutory scheme.

Governments > Legislation > Interpretation

HN3 **Legislation, Interpretation**

When interpreting two statutes which deal with a similar subject matter, the New Hampshire Supreme Court construes them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Torts > ... > Comparative Fault > Multiple Parties > Contribution

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN4 **Types of Contracts, Covenants**

N.H. Rev. Stat. Ann. § 507:7-e (1997) is part of a comprehensive statutory framework for apportionment of liability and contribution. The other provisions in this statutory scheme are: *N.H. Rev. Stat. Ann. § 507:7-d* (1997) (comparative fault); *N.H. Rev. Stat. Ann. § 507:7-f* (1997) (contribution among tortfeasors); *N.H. Rev. Stat. Ann. § 507:7-g* (1997) (enforcement of contribution); *N.H. Rev. Stat. Ann. § 507:7-h* (1997) (effect of release or covenant not to sue); and *N.H. Rev. Stat. Ann. § 507:7-i* (1997) (inadmissible evidence and post-verdict procedure). The legislature intended these provisions to function as a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN5 **Jury Trials, Jury Instructions**

See *N.H. Rev. Stat. Ann. § 507:7-e(I)(a), (b)* (1997).

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN6 **Multiple Defendants, Distinct & Divisible Harms**

A "party" is one who takes part in a transaction or one by or against whom a lawsuit is brought. The term "party" may mean persons involved in an accident, defendants in a lawsuit, or all litigants in a lawsuit. For apportionment purposes under *N.H. Rev. Stat. Ann. § 507:7-e(I)(b)* (1997), the word "party" refers to parties to an action, including settling parties.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Defenses > Contributory Negligence > General Overview

HN7 **Multiple Defendants, Distinct & Divisible Harms**

The legislature has separated the concepts of apportionment and contributory negligence. It enacted N.H. Rev. Stat. Ann. § 507:7-d (1997) to address contributory negligence and N.H. Rev. Stat. Ann. § 507:7-e (1997) to address apportionment. This altered the prior rule under former N.H. Rev. Stat. Ann. § 507:7-a (1983) (repealed) that a jury need not apportion damages unless a plaintiff was contributorily negligent. As enacted in 1986, N.H. Rev. Stat. Ann. § 507:7-e (1997) provides for apportionment of damages in all actions, not only those involving contributorily negligent plaintiffs.

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN8[] Multiple Party Settlements, Partial Settlements

Both N.H. Rev. Stat. Ann. §§ 507:7-h (1997) and 507:7-i (1997) provide that when a plaintiff settles in good faith with one of two or more tortfeasors, the nonsettling tortfeasor is entitled to a dollar for dollar reduction in the amount of the verdict equal to the consideration the plaintiff received from the settling tortfeasor.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Torts > Procedural Matters > Settlements > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Torts > Procedural Matters > Multiple Defendants > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

HN9[] Types of Contracts, Covenants

N.H. Rev. Stat. Ann. § 507:7-h (1997) provides that when a plaintiff has released one of two or more joint tortfeasors, any claim he or she may have against other tortfeasors is reduced by the amount of the consideration paid for the release. N.H. Rev. Stat. Ann. § 507:7-i (1997) similarly provides that when a plaintiff has settled with one or more joint tortfeasors, upon return of a plaintiff's verdict, the court shall inquire of counsel the amount of consideration paid for any such settlement, release, or covenant not to sue, and shall reduce the plaintiff's verdict by that amount.

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN10[] Settlements, Multiple Party Settlements

The dollar for dollar reduction in a plaintiff's verdict in a personal injury case for the amount of a settlement with a joint tortfeasor is referred to as a "pro tanto credit." The pro tanto credit is premised and rooted in joint-and-several liability. Its purpose is to prevent a plaintiff from recovering twice from the same assessment of liability.

Torts > Remedies > Damages > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

HN11[] Remedies, Damages

The majority rule is that the pro tanto credit applied against a plaintiff's verdict in a personal injury case for the amount of a settlement with a joint tortfeasor does not apply when a defendant is only severally liable for his proportionate share of damages. Where liability is not joint-and-several, and each defendant instead bears liability for damages only proportionate to his own fault, there is no assessment of liability for damages common

to the settling and non-settling defendants. Thus, there is no need for a pro tanto credit.

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN12 **Settlements, Multiple Party Settlements**

Under several only liability, a defendant is liable only for the amount of the plaintiff's damages that is proportional to the defendant's percentage of fault. Thus, offsetting a plaintiff's damages by the amount of a non-party's settlement is unnecessary because the defendant pays only his share of the damages.

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN13 **Settlements, Multiple Party Settlements**

N.H. Rev. Stat. Ann. §§ 507:7-h (1997) and 507:7-i (1997), providing for a reduction in a personal injury plaintiff's judgment for the amount of a settlement with a joint tortfeasor, apply only to defendants who are both jointly and severally liable, not to defendants who are only severally liable.

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN14 **Multiple Defendants, Joint & Several Liability**

When *N.H. Rev. Stat. Ann. §§ 507:7-h* (1997) and 507:7-i (1997) were first enacted, all defendants were subject to joint and several liability. In 1989, the legislature amended *N.H. Rev. Stat. Ann. § 507:7-e(I)(b)* (1997) to protect minimally liable defendants. The amendment limited the liability of a defendant found to be less than 50 percent at fault to several liability. Requiring such a defendant to be jointly and severally liable for all of the plaintiff's damages, less a pro tanto credit, would reintroduce joint liability for defendants who are less than 50 percent liable, which was the very liability the 1989 amendment to the statute intended to eliminate.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > Procedural Matters > Multiple Defendants > General Overview

HN15 **Multiple Defendants, Distinct & Divisible Harms**

How best to apportion liability among a plaintiff, a settling joint tortfeasor and a nonsettling joint tortfeasor is a matter of public policy for the legislature.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN16 **Multiple Defendants, Distinct & Divisible Harms**

There are three basic alternatives to apportioning liability when a plaintiff has settled with fewer than all joint tortfeasors: the pro tanto credit rule, *N.H. Rev. Stat. Ann. §§ 507:7-h* (1997), 507:7-i (1997); the "proportional share approach," *N.H. Rev. Stat. Ann. § 507:7-e* (1997); and the "pro rata" approach.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN17 **Jury Trials, Jury Instructions**

The New Hampshire legislature has elected to apportion liability among tortfeasors under both the pro tanto credit rule and the proportional share approach, using the pro tanto approach for jointly and severally liable defendants, *N.H. Rev. Stat. Ann. §§ 507:7-h* (1997), 507:7-i (1997), and the proportional share approach for severally liable defendants, *N.H. Rev. Stat. Ann. § 507:7-e(I)(b)* (1997). The comprehensive scheme of

N.H. Rev. Stat. Ann. ch. 507 reflects the legislature's careful balance of the rights of defendants and plaintiffs. It is not a court's place to upset this balance.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN18 **Jury Trials, Jury Instructions**

The purpose of jury instructions is to identify issues of material fact, and to inform the jury of the appropriate standards of law by which it is to resolve them.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN19 **Jury Trials, Jury Instructions**

The New Hampshire Supreme Court reviews jury instructions in context and will not reverse unless the charge, taken in its entirety, fails to adequately explain the law applicable to the case in such a way that the jury is misled.

Torts > Transportation Torts > Motor Vehicles

HN20 **Transportation Torts, Motor Vehicles**

Generally speaking, speed must be reduced appropriately whenever a driver approaches or crosses an intersection or railway grade crossing, or approaches or goes around a curve, or approaches a hillcrest, or is on a narrow or winding roadway. Speed must be reduced appropriately whenever a special hazard exists with respect to pedestrians, other traffic, weather or highway conditions.

Torts > Transportation Torts > Motor Vehicles

Transportation Law > ... > Traffic Regulation > Speed Limits > Maximum Speeds

HN21 **Transportation Torts, Motor Vehicles**

No person shall drive a vehicle on a way at a speed greater than is reasonable and prudent under the circumstances and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the way in compliance with legal requirements and the duty of all persons to use due care.

Torts > Transportation Torts > Motor Vehicles

Transportation Law > ... > Traffic Regulation > Speed Limits > Maximum Speeds

HN22 **Transportation Torts, Motor Vehicles**

Where no hazard exists that requires lower speed for compliance with *N.H. Rev. Stat. Ann. § 265:60(I)*, the speed of any vehicle not in excess of the limit specified in *§ 265:60* or established as authorized shall be prima facie lawful, but any speed in excess of the limit specified in *§ 265:60*, or established as authorized shall be prima facie evidence that the speed is not reasonable or prudent, and that it is unlawful.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Transportation Torts > Motor Vehicles

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Pretrial Matters > Conferences > General Overview

Civil Procedure > Pretrial Matters > Conferences > Pretrial Conferences

HN23 **Jury Trials, Jury Instructions**

See N.H. Super. Ct. R. 63(H).

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN24 **Jury Instructions, Objections**

A contemporaneous objection is necessary to preserve a jury instruction issue for appellate review. Without a contemporaneous objection, a trial court is not afforded the opportunity to correct an error it may have made.

Torts > ... > Elements > Causation > General Overview

Transportation Law > ... > Traffic Regulation > Speed Limits > Maximum Speeds

Torts > ... > Causation > Proximate Cause > General Overview

Torts > Transportation Torts > Motor Vehicles

HN25 **Elements, Causation**

N.H. Rev. Stat. Ann. § 265:67(II) (1993) states that prima facie speed limits shall not be construed to relieve a plaintiff in any action from the burden of proving negligence on the part of a defendant as the proximate cause of an accident.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN26 **Jury Trials, Jury Instructions**

The New Hampshire Supreme Court presumes that jurors follow a court's instructions.

Counsel: McDowell & Osburn, P.A., of Manchester (Jeffrey B. Osburn and David S.V. Shirley on the brief, and Mr. Osburn orally), for the plaintiff.

Desmarais, Ewing & Johnston, PLLC, of Manchester (Fred J. Desmarais and Heather G. Silverstein on the brief, and Ms. Silverstein orally), for the defendant.

McNeill, Taylor & Gallo, P.A., of Dover (R. Peter Taylor on the brief), for the New Hampshire Trial Lawyers Association, as amicus curiae.

Judges: BRODERICK, J. BROCK, C.J., and NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Opinion by: BRODERICK

Opinion

[27]** **[*394]** BRODERICK, J. The plaintiff, Leif Nilsson, appeals from a jury verdict in Superior Court (*Barry*, J.) that apportioned fault on his negligence claim between the defendant, Joseph A. Bierman, and Eric Robert Knight, a joint tortfeasor who settled before trial. *See* RSA 507:7-e (1997). The defendant cross-appeals, arguing that the court's jury instructions regarding speed were misleading. We affirm.

[*2]** *I. Appeal*

A. Facts

The plaintiff was a passenger in Knight's car when Knight failed to stop at a stop sign and collided with the defendant's car. The plaintiff sued both the defendant and Knight for his injuries. Shortly before trial, he settled his claim against Knight for $ 25,000.

Over the plaintiff's objection, the trial court instructed the jury about proportional fault and, in special verdict questions, asked it to assess the percentage of fault, if any, that was attributable to Knight and the defendant. The jury awarded damages in the amount of $ 170,000. The jury found both the defendant and Knight legally at fault for the plaintiff's injuries. The jury apportioned ninety-nine percent of this fault to Knight and one percent to the defendant.

[*395] The plaintiff moved to amend the verdict to make the defendant responsible for the entire damage award less the $ 25,000 settlement from Knight. The court denied the motion.

B. Discussion

1. RSA 507:7-e

On appeal, the plaintiff argues that the court committed legal error by requiring the jury to apportion fault between the defendant and Knight. **[***3]** He asserts that **[**28]** the statute governing apportionment, RSA 507:7-e, mandates apportioning fault among parties, not between a nonsettling and a settling tortfeasor. He contends also that the statute applies only when the plaintiff was comparatively negligent, not, as here, when the plaintiff was not negligent.

Resolution of this appeal requires us to reconcile

conflicting portions of RSA chapter 507. HN1[↑] In matters of statutory interpretation, this court is the final arbiter of the legislature's intent. Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 585, 825 A.2d 480 (2003). HN2[↑] We begin by examining the language of the statute and ascribing the plain and ordinary meanings to the words the legislature used. *Id.* We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. Big League Entm't v. Brox Indus., 149 N.H. 480, 483, 821 A.2d 1054 (2003). HN3[↑] "When interpreting two statutes which deal with a similar subject matter, we . . . construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of **[***4]** the statute." Pennelli v. Town of Pelham, 148 N.H. 365, 366, 807 A.2d 1256 (2002) (quotation omitted).

HN4[↑] Section 7-e is part of a "comprehensive statutory framework for apportionment of liability and contribution." 8 R. McNamara, *New Hampshire Practice, Personal Injury - Tort and Insurance Practice* § 4.63, at 4-98 (3d ed. 2003). The other provisions in this statutory scheme are: RSA 507:7-d (1997) (comparative fault); RSA 507:7-f (1997) (contribution among tortfeasors); RSA 507:7-g (1997) (enforcement of contribution); RSA 507:7-h (1997) (effect of release or covenant not to sue); and RSA 507:7-i (1997) (inadmissible evidence and post-verdict procedure). The legislature intended these provisions to function as "a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution." Jaswell Drill Corp. v. General Motors Corp., 129 N.H. 341, 344-45, 529 A.2d 875 (1987).

Section 7-e provides, in pertinent part:

> HN5[↑] **[*396]** I. In all actions, the court shall:
>
> (a) **[***5]** Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and
>
> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

RSA 507:7-e, I(a), (b).

The plaintiff argues that the plain and ordinary meaning of the word "party" does not include a defendant who, like Knight, settled with the plaintiff before trial. We disagree. HN6[↑] A "party" is "one who takes part in a transaction" or "one by or against whom a lawsuit is brought." *Black's Law Dictionary* 1144 (7th ed. 1999). As other courts have noted when construing similar statutes, the term "party" may mean persons involved in an accident, defendants in a lawsuit, or all litigants in a lawsuit. Benner v. Wichman, 874 P.2d 949, 956 (Alaska 1994). We hold that for apportionment purposes under section 7-e, I(b), **[***6]** the word "party" refers to "parties to an action, including . . . settling parties." Id. at 958.

This construction is consistent with our decision in Rodgers v. Colby's Ol' Place, 148 N.H. 41, 802 A.2d 1159 (2002). In that case, we applied section 7-e, I, to the defendants even though they settled with **[**29]** the plaintiff before trial. Id. at 41-44. The settlement agreement had provided that one defendant was liable for fifty percent of the plaintiffs' damages, while the other was liable for less than fifty percent. Id. at 42. The parties further agreed that the defendant who was liable for more than fifty percent of the plaintiffs' damages was judgment proof. *Id.* The plaintiff sought to reallocate the judgment proof defendant's liability to the less negligent defendant. *Id.* We ruled that under section 7-e, I(b), the less negligent defendant was only liable for his portion of damages. Id. at 42-43.

Our construction is also in accord with decisions from other jurisdictions. Most jurisdictions permit juries to allocate fault among settling and nonsettling tortfeasors. *See* Carroll v. Whitney, 29 S.W.3d 14, 17 n.5 (Tenn. 2000) **[***7]** (noting that a minority of jurisdictions permit apportionment of fault only to parties before court). Many jurisdictions even permit a jury to consider *nonparties* when apportioning fault. *See* 1 **[*397]** *Comp. Negl. Manual* (CBC) § 14.9 (3d ed. 1995). We need not, in this decision, reach the issue of whether a tortfeasor, such as one who is immune from liability or otherwise not before the court, constitutes a "party" under section 7-e. *See* 2 *Comp. Negl.* (MB) § 13.20[4] (2002).

The plaintiff further contends that section 7-e, I, does not apply when the plaintiff is not negligent. The plaintiff bases his argument upon Lavoie v. Hollinracke, 127 N.H. 764, 513 A.2d 316 (1986). In that case, we held that apportionment applied only when the plaintiff was contributorily negligent; when the plaintiff was not negligent, the rules of joint and several liability applied. *See* id. at 768-70. Our holding was based upon the

language of the predecessor to section 7-e, RSA 507:7-a (1983) (repealed 1986).

Former section 7-a provided, in relevant part:

> Contributory negligence shall not bar recovery in an **[***8]** action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; provided that where recovery is allowed against more than one defendant, each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

Section 7-a thus linked apportionment and contributory negligence.

By contrast, in 1986, ***HN7***[↑] the legislature separated the two concepts. It enacted section 7-d to address contributory negligence and section 7-e to address apportionment. RSA 507:7-d, 7-e. This altered the prior rule under former section 7-a that the jury need not apportion damages unless the plaintiff was contributorily negligent. *See* Jaswell Drill Corp., 129 N.H. at 344. As enacted in 1986, **[***9]** section 7-e "provided for apportionment of damages in all actions," not only those involving contributorily negligent plaintiffs. *Id.*; *see also* 8 R. McNamara, *supra* § 12.03, at 12-4 to 12-5.

We decline to address the plaintiff's arguments that apportioning fault between the defendant and Knight violated his constitutional rights because he has not preserved these arguments for our review. *See* Weldy v. Town of Kingston, 128 N.H. 325, 334-35, 514 A.2d 1257 (1986). Like **[**30]** the plaintiff in *Weldy*, the plaintiff failed to raise these claims before the trial court **[*398]** instructed the jury, raising them for the first time in a post-verdict motion. *Id. at 334*. Although the plaintiff objected to the trial court's comparative fault instructions and special verdict form, he failed to inform the court that his objections were constitutionally based. Like the plaintiff in *Weldy*, the plaintiff was obligated to bring his constitutional claims to the trial court's attention before the court instructed the jury, and he may not now raise these issues on appeal. *Id. at 334-35*.

2. Sections 7-h and 7-i

The plaintiff argues that **[***10]** instead of apportioning fault under section 7-e, I(b), the trial court should have followed sections 7-h and 7-i. *See* RSA 507:7-e, 7-h, 7-i. Under sections 7-h and 7-i, he asserts, he was entitled to a verdict for his entire damages less the $ 25,000 settlement with Knight. *See* RSA 507:7-h, 7-i. We disagree.

HN8[↑] Both section 7-h and section 7-i provide that when a plaintiff settles in good faith with one of two or more tortfeasors, the nonsettling tortfeasor is entitled to a dollar for dollar reduction in the amount of the verdict equal to the consideration the plaintiff received from the settling tortfeasor. *See* RSA 507:7-h, 7-i.

HN9[↑] Section 7-h provides, in pertinent part, that when a plaintiff has released one of two or more joint tortfeasors, any claim he or she may have against other tortfeasors is reduced "by the amount of the consideration paid for the release." RSA 507:7-h. Section 7-i similarly provides, in pertinent part, that when a plaintiff has settled with one or more joint tortfeasors, upon return of a plaintiff's verdict, "the court shall inquire of counsel **[***11]** the amount of consideration paid for any such settlement, release, or covenant not to sue, and shall reduce the plaintiff's verdict by that amount." RSA 507:7-i.

HN10[↑] This dollar for dollar reduction in the verdict is referred to as a "pro tanto credit." *See* Hager, *What's (Not!) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 Conn. L. Rev. 77, 80 (2000). The pro tanto credit "is premised and rooted in joint-and-several liability." Krieser v. Hobbs, 166 F.3d 736, 742 (5th Cir. 1999). Its purpose is to prevent a plaintiff "from recovering twice from the same assessment of liability." *Id. at 743*.

HN11[↑] The majority rule is that the pro tanto credit does not apply when a defendant is only severally liable for his proportionate share of damages. *See id. at 744*. "Where liability is not joint-and-several, and each defendant instead bears liability for damages *only proportionate* to his own fault, there *is no* assessment of liability for damages common to the settling and non-settling defendants." *Id. at 743*. Thus, there is no need for **[*399]** a pro tanto credit. *See* **[***12]** Waite v. Morisette, 68 Wn. App. 521, 843 P.2d 1121, 1124 (Wash. Ct. App.), *amended by* 851 P.2d 1241 (1993). As one court has explained:

> ***HN12***[↑] Under several only liability, the defendant is liable only for the amount of the plaintiff's

damages that is proportional to the defendant's percentage of fault. Thus, offsetting a plaintiff's damages by the amount of a non-party's settlement is unnecessary because the defendant pays only his share of the damages.

Gemstar Ltd. v. Ernst & Young, 185 Ariz. 493, 917 P.2d 222, 237 (Ariz. 1996) (citation omitted).

Following this majority rule, we hold that the pro tanto credit set forth in sections 7-h and 7-i does not apply to the defendant because, under section 7-e, I(b), **[**31]** he is only severally liable for his proportionate share of damages. ***HN13***[↑] Sections 7-h and 7-i apply only to defendants who are both jointly and severally liable, not to defendants who are only severally liable.

Applying sections 7-h and 7-i to the defendant would contravene the legislature's purpose in amending section 7-e, I(b). *See Rodgers, 148 N.H. at 44*. ***HN14***[↑] When these provisions were first enacted, *all* **[***13]** defendants were subject to joint and several liability. *See id. at 43*. In 1989, the legislature amended section 7-e, I(b) "to protect minimally liable defendants." *Id. at 44*. "The amendment limited the liability of a defendant found to be less than fifty percent at fault to several liability." *Id.* Requiring such a defendant to be jointly and severally liable for all of the plaintiff's damages, less a pro tanto credit, "would reintroduce joint liability for defendants who are less than fifty percent liable, which was the very liability the 1989 amendment to the statute intended to eliminate." *Id.*

The plaintiff argues that apportioning liability in this case is unfair because it means that he will not recover his entire damages, even though he is without fault. While we are not unsympathetic, we are constrained by the statutory scheme our legislature has enacted. ***HN15***[↑] How best to apportion liability among a plaintiff, a settling joint tortfeasor and a nonsettling joint tortfeasor is a matter of public policy for the legislature. *See Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 641-42, 795 A.2d 833 (2002)*.

HN16[↑] There are three basic **[***14]** alternatives to apportioning liability when a plaintiff has settled with fewer than all joint tortfeasors: the pro tanto credit rule, *see* RSA 507:7-h, 7-i; the "proportional share approach," *see* RSA 507:7-e; and the "pro rata" approach. The "pro rata" approach involves giving a nonsettling tortfeasor a credit against the judgment equal to the settling tortfeasor's share of damages, which is determined by **[*400]** dividing the recoverable damages by the number of liable parties. *Restatement (Third) of Torts: Apportionment of Liability* Reporter's Notes *§ 16 comment c* at 139-40 (2000). This approach is not at issue.

Theorists and courts differ as to whether it is preferable to give a nonsettling tortfeasor a pro tanto credit, as set forth in sections 7-h and 7-i, or to use the proportional share approach, as set forth in section 7-e, I(b). *See McDermott, Inc. v. AmClyde, 511 U.S. 202, 211-17, 128 L. Ed. 2d 148, 114 S. Ct. 1461 (1994)*.

The American Law Institute favors the proportional share approach. *See Restatement (Third) of Torts § 16 comment c* at 133-36, 139-44. So does the United States Supreme Court. *McDermott, 511 U.S. at 217.* **[***15]** On the other hand, the "overwhelming majority" of States reject the proportional share approach in favor of some version of the pro tanto approach. *Hager, supra* at 109 n.90; *see also* Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions, 73 Tex. L. Rev. 1701, 1709 (1995)*. Valid public policy arguments support both approaches. *See McDermott, 511 U.S. at 211-17*; *see* Eggen, *supra* at 1740-50.

HN17[↑] The New Hampshire legislature has elected to apportion liability under both approaches, using the pro tanto approach for jointly and severally liable defendants, *see* RSA 507:7-h, 7 -i, and the proportional share approach for severally liable defendants, *see* RSA 507:7-e, I(b). As the defendant correctly observes, the comprehensive scheme of *RSA chapter 507* reflects the legislature's careful balance of **[**32]** the rights of defendants and plaintiffs. It is not our place to upset this balance.

II. Cross Appeal

In his cross-appeal, the defendant challenges the court's jury instructions regarding his speed. ***HN18***[↑] The purpose of jury instructions is to **[***16]** identify issues of material fact, and to inform the jury of the appropriate standards of law by which it is to resolve them. *Transmedia Restaurant Co. v. Devereaux, 149 N.H. 454, 457, 821 A.2d 983 (2003)*. ***HN19***[↑] We review jury instructions in context and will not reverse unless the charge, taken in its entirety, fails to adequately explain the law applicable to the case in such a way that the jury is misled. *Id.*

A. Challenged Instructions

The trial court's instructions on speed were as

follows:

> While paying attention to all road conditions and to any actual and potential hazards to safe driving, everyone must drive at a **[*401]** reasonable and prudent speed. All drivers must control their speed so that they are able to avoid striking pedestrians and other vehicles which are already on, or just entering the roadway. . . .

HN20[↑] Generally speaking, speed must be reduced appropriately whenever a driver approaches or crosses an intersection or railway grade crossing, or approaches or goes around a curve, or approaches a hillcrest, or is on a narrow or winding roadway. Speed must be reduced appropriately whenever a special hazard exists with respect **[***17]** to pedestrians, other traffic, weather or highway conditions.

HN21[↑] No person shall drive a vehicle on a way at a speed greater than is reasonable and prudent under the circumstances and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the way in compliance with legal requirements and the duty of all persons to use due care.

HN22[↑] Where no hazard exists that requires lower speed for compliance with Revised Statutes Annotated, Chapter 265, Section 60, Subsection I, the speed of any vehicle not in excess of the limit specified in this section or established as hereinafter authorized shall be prima facie lawful, but any speed in excess of the limit specified in this section, or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent, and that it is unlawful.

The court also instructed the jury that "if you find that the violation [of the provisions of a motor vehicle statute] caused or contributed to cause the injury or damage suffered by the plaintiff, [it] amounts to legal fault. **[***18]** "

B. Superior Court Rule 63(H)

The defendant first argues that these instructions violated Superior Court Rule 63(H), which provides:

> *HN23*[↑] The issue of speed of a motor vehicle on a public highway, if material, will be submitted on the grounds of reasonableness without regard to statutory provisions relative to rates of speed that are *prima facie* reasonable, unless counsel objects thereto at the pretrial settlement conference, or files written objection thereto at least seven days before the trial.

[*402] *Super. Ct. R.* 63(H). The plaintiff counters that defendant did not make this argument before the trial court, and, thus, did not preserve it for appeal. *See Transmedia Restaurant, 149 N.H. at 457*. We agree.

HN24[↑] **[**33]** "A contemporaneous objection is necessary to preserve a jury instruction issue for appellate review." *Id.* (quotation omitted). Without a contemporaneous objection, the trial court is not afforded the opportunity to correct an error it may have made. *Id.* The defendant did not alert the trial court that its instruction violated Superior Court Rule 63(H). He "may not, on appeal, ask this court to address issues that, for tactical **[***19]** reasons or otherwise, [he] failed to raise before the trial judge." *Id. at 458*.

C. RSA 265:67, II

The defendant next contends that the court's instructions conflict with *HN25*[↑] *RSA 265:67, II* (1993), which states that *prima facie* speed limits "shall not be construed to relieve the plaintiff in any action from the burden of proving negligence on the part of the defendant as the proximate cause of an accident." Viewing the court's instructions as a whole, we agree with the plaintiff that they adequately explained the law under *RSA 265:67*. *See Transmedia Restaurant, 149 N.H. at 457*.

The court's jury instructions included the following:

> Negligence is the failure to use reasonable care. . . . Failure to exercise due care amounts to legal fault if you find it caused or contributed to cause the injury or damage suffered by the plaintiff.
>
> . . . .
>
> With respect to the plaintiff's claim of legal fault against the defendant, the plaintiff has the burden of proof.
>
> . . . .
>
> In order to recover, **[***20]** the plaintiff[] must prove that the defendant is legally at fault for the injury. To do this, the plaintiff must prove that the defendant was negligent, and that such liability was a legal cause of the accident and injury.
>
> Negligence amounts to legal fault if you find that the negligence was a legal cause of the injury. When

are they a legal cause of harm? When the negligence is a substantial factor in bringing about the harm, and if the harm would not have occurred without that conduct. On the other hand, if negligent conduct is not a substantial factor in bringing about the harm, it cannot be the basis for a finding of legal harm.

[*403] In determining whether the defendant's conduct was a legal cause of the plaintiff's injury, you need not find that the defendant's conduct was the sole cause of the injury. You need only find that it was a contributing factor in causing the accident, although other factors may have contributed to cause the accident.

. . . .

If you decide that defendant was legally at fault, you will then decide whether plaintiff has proved any of the items of loss or harm that I shall talk about in a couple of minutes.

. **[***21]** . . .

For each item of loss or harm that plaintiff claims, plaintiff must prove that it is more probable than not, that (1) plaintiff has (or will have) such a loss or harm and (2) the loss or harm was caused by the legal fault of defendant.

These instructions adequately apprised the jury that the plaintiff had the burden of proving the defendant's negligence as the proximate cause of the accident, as required by *RSA 265:67*.

The defendant contends that the court's instructions on burden of proof, negligence and proximate cause were "lost on the jury." ***HN26***[↑] We presume that jurors follow the court's instructions, however. *See State v. Fortier, 146 N.H. 784, 793, 780 A.2d 1243 (2001)*.

[**34]** D. Chellman v. Saab-Scania

The defendant mistakenly relies upon *Chellman v. Saab-Scania AB, 138 N.H. 73, 81, 637 A.2d 148 (1993)*. *Chellman* was a products liability case in which the manufacturer had asserted, as an affirmative defense, that the driver's misconduct caused his car accident. *Id. at 76, 81*. The plaintiffs admitted that the driver's speed exceeded the speed limit. *Id. at 81.* **[***22]** The trial court instructed the jurors that if they found that the driver "violated the statutory speed limit and that his speed caused or contributed to cause the accident, then his speed was misconduct as a matter of law and they should determine the extent of his misconduct." *Id.* We held that these instructions took the question of whether the driver's speed was reasonable and prudent away from the jury. *Id.*

By contrast, in this case, whether the defendant exceeded the speed limit was disputed. Further, the court's instructions made clear that the jury was to determine whether the defendant's speed was reasonable and prudent under the circumstances. In making this determination, the court instructed the **[*404]** jury to examine a number of factors, including traffic, weather and highway conditions.

Consistent with the court's instructions, the jury could have found the defendant's speed reasonable, under the circumstances, even if it violated the statutory speed limit of thirty miles per hour. *See RSA 265:60, II(b)* (1993); *RSA 259:118* (1993). For instance, the jury could have believed the testimony of a former State trooper **[***23]** who testified that, in his opinion, traveling at thirty-five to forty miles per hour would not have been unreasonable given the traffic, weather and highway conditions that existed at the time of the accident. He explained that, in his experience, "on a Sunday afternoon in the middle of the summer, very light traffic, very light if any pedestrian traffic, I certainly don't think 40 was unreasonable if that was indeed the speed."

These instructions, unlike those in *Chellman*, did not remove the question of whether the defendant's speed was reasonable and prudent from the jury's consideration. Viewed as a whole, these instructions, unlike the *Chellman* instructions, permitted the jury to find that even though the defendant's speed exceeded the speed limit, his speed was reasonable under the circumstances.

E. Failure to Define "Prima Facie"

The defendant argues that the trial court's instructions were particularly misleading because they did not define the phrase "prima facie evidence." While we agree with the defendant that it would have been preferable for the court to have defined the phrase, *see id.*, when viewing the instructions as a whole, we cannot **[***24]** say that its failure to do so failed to adequately explain the law so as to mislead the jury. *Transmedia Restaurant, 149 N.H. at 457*. Viewed as a whole, the instructions adequately informed the jury that whether the

defendant's speed was reasonable and prudent was more than just a function of whether it complied with the statutory speed limits.

Affirmed.

BROCK, C.J., and NADEAU, DALIANIS and DUGGAN, JJ., concurred.

End of Document

DeBenedetto v. CLD Consulting Eng'rs, Inc.

Supreme Court of New Hampshire

March 9, 2006, Argued ; July 27, 2006, Opinion Issued

No. 2005-262

Reporter
153 N.H. 793 *; 903 A.2d 969 **; 2006 N.H. LEXIS 107 ***

JANET DEBENEDETTO, ADMINISTRATRIX OF THE ESTATE OF DAVID DEBENEDETTO v. CLD CONSULTING ENGINEERS, INC.

Subsequent History: [*1]** Released for Publication July 26, 2006.

Prior History: Rockingham.

Debenedetto v. Cld Consulting Eng'Rs, 2005 N.H. Super. LEXIS 62 (2005)

Disposition: Affirmed.

Core Terms

fault, parties, trial court, damages, apportionment, tortfeasors, joint and several liability, apportioning, injuries, comparative negligence, lawsuit, immune, apportionment of fault, remittitur, claimant, percentage of fault, entities, comparative fault, several liability, instruct a jury, award damages, deep pocket, occurrence, nonparty, purposes, argues, proportional fault, amount of damages, jury verdict, intersection

Case Summary

Procedural Posture
The Rockingham Superior Court (New Hampshire) entered a judgment that permitted the jury in plaintiff estate administrator's wrongful death case before the trial court to apportion fault among various entities, including defendant engineering company. The estate administrator appealed and the engineering company cross-appealed.

Overview

The estate administrator's husband was killed when his vehicle, traveling through an intersection on a green light, was struck by a car crossing through it on a red light. The alleged tortfeasor's vehicle that struck the husband's vehicle after the alleged tortfeasor's vehicle was stopped at a red light while exiting a store's parking lot for five minutes. She then drove her car forward against the red light, which caused the crash and resulting death. She settled and was not named as a defendant in the subsequent litigation. The estate administrator also sued several other parties. The state transportation agency was dismissed on immunity grounds. The engineering company was left as the sole defendant at trial. The jury assessed liability against the engineering company, and non-parties such as the alleged tortfeasor, the state transportation agency, and another entity, and also determined a damage award. On appeal, the state supreme court found that *N.H Rev. Stat. Ann. § 507:7-e* permitted the liability of non-parties to be considered, a reduction in the damage award was proper, and no error occurred in denying the engineering company's motion for directed verdict.

Outcome
The trial court's judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Procedural Matters > Multiple Defendants > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN1 **Jury Trials, Jury Instructions**

See N.H. Rev. Stat. Ann. § 507:7-e (1997).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2[] Standards of Review, De Novo Review

A reviewing court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. When a statute's language is plain and unambiguous, it need not look beyond it for further indication of legislative intent, and it will not consider what the legislature might have said or add language that the legislature did not see fit to include. If a statute is ambiguous, however, it may consider legislative history to aid in our analysis. It interprets statutes in the context of the overall statutory scheme and not in isolation. It reviews a trial court's interpretation of a statute de novo.

Torts > ... > Defenses > Comparative Fault > General Overview

HN3[] Defenses, Comparative Fault

New Hampshire is a comparative fault jurisdiction. N.H. Rev. Stat. Ann. § 507:7-d (1997).

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN4[] Defenses, Comparative Fault

The term "party" includes all parties to the transaction or occurrence giving rise to a plaintiff's injuries. A rule of law limiting a jury or court to consideration of the fault of only the parties to an action would directly undermine the New Hampshire legislature's decision to assign only several liability to those parties who are less than 50 percent at fault. N.H. Rev. Stat. Ann. § 507:7-e, I(b) (1997).

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN5[] Defenses, Comparative Fault

For apportionment purposes under N.H. Rev. Stat. Ann. § 507:7-e (1997), the word "party" refers not only to parties to an action, including settling parties, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court.

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN6[] Defenses, Comparative Fault

A defendant may not easily shift fault under N.H. Rev. Stat. Ann. § 507:7-e (1997); allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes.

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > General Overview

Torts > Remedies > Damages > General Overview

HN7[] Remedies, Damages

See N.H. Const. pt. I, art. 14.

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > General Overview

Torts > Remedies > Damages > General Overview

HN8[] Remedies, Damages

N.H. Const. pt. I, art. 14 makes civil remedies readily available, and guards against arbitrary and discriminatory infringements upon access to courts.

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > General Overview

Torts > Remedies > Damages > General Overview

HN9 **Remedies, Damages**

N.H. Const. pt. I, art. 14 does not guarantee that all injured persons will receive full compensation for their injuries. It stipulates only that a plaintiff is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN10 **Reviewability of Lower Court Decisions, Preservation for Review**

An appellant must fulfill two preconditions before triggering a State constitutional analysis: first, the appellant must raise the State constitutional issue in the trial court, and second, the appellant's brief must specifically invoke a provision of the state constitution.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN11 **Reviewability of Lower Court Decisions, Preservation for Review**

New Hampshire reviewing courts have never held that a party's failure to include a citation to a specific provision of the Federal Constitution precludes appellate review.

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN12 **Constitutional Law, Equal Protection**

The *Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution* commands that no State shall deny to any person within its jurisdiction the equal protection of the laws. That provision creates no substantive rights; rather, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. If a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, federal equal protection analysis applies rational basis scrutiny, under which the classification will stand so long as it bears a rational relation to some legitimate governmental end.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN13 **Judicial Review, Standards of Review**

Applying rational basis scrutiny, the classification created by *N.H. Rev. Stat. Ann. § 507:7-e*, I(b) bears a rational relationship to the furtherance of a legitimate governmental purpose. The legislative history of *N.H. Rev. Stat. Ann. § 507:7-e* plainly demonstrates that an underlying purpose of the 1989 amendment was to relieve defendants involved in personal injury lawsuits from damages liability exceeding their percentage of actual fault.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Appeals > Standards of Review > General Overview

HN14 **Standards of Review, Abuse of Discretion**

Direct review of a damages award is the responsibility of

the trial judge, who may disturb a verdict as excessive if its amount is conclusively against the weight of the evidence and if the verdict is manifestly exorbitant. The proper standard for the trial court's review of a jury award is whether the verdict is fair. Whether remittitur is appropriate rests with the trial court's sound discretion. Absent an unsustainable exercise of discretion, a reviewing court will not reverse the trial court's decision.

Civil Procedure > Trials > Jury Trials > General Overview

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > ... > Comparative Fault > Multiple Parties > Release & Settlement

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN15 **Trials, Jury Trials**

A court should instruct a jury to consider settling parties when apportioning fault pursuant to *N.H. Rev. Stat. Ann. § 507:7-e*, I(b).

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Appeals > Record on Appeal

HN16 **Standards of Review, Questions of Fact & Law**

Reviewing courts are bound by a trial court's findings of fact unless they are unsupported by the evidence or erroneous as a matter of law. The burden of presenting a record sufficient to allow a reviewing court to decide an issue presented on appeal falls upon the moving party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Appeals > Record on Appeal

HN17 **Standards of Review, Abuse of Discretion**

A party is entitled to a directed verdict only when the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand. A reviewing court's review of a trial court's denial of a motion for directed verdict is extremely narrow. It will uphold a denial of the motion where sufficient evidence in the record supports the ruling. Thus, absent an unsustainable exercise of discretion, it will not reverse a trial court's ruling on a motion for directed verdict.

Counsel: Turgeon & Associates, of Amesbury, Massachusetts (Roger D. Turgeon on the brief and orally), for the plaintiff.

Devine, Millimet & Branch, P.A., of Manchester (Andrew D. Dunn and Donald L. Smithon the brief, and Mr. Dunn orally), for the defendant.

Abramson, Brown & Dugan, of Manchester (Kenneth C. Brown and Jared R. Greenon the brief) and Borofsky, Amodeo-Vickery & Bandazian, P.A., of Manchester (Stephen E. Borofsky and Erica Bodwell, on the brief) for New Hampshire Trial Lawyers Association, as amicus curiae.

Judges: DUGGAN, J. BRODERICK, C.J., and DALIANIS, J., concurred.

Opinion by: DUGGAN

Opinion

[*795] [974]** DUGGAN, J. The plaintiff, Janet DeBenedetto, appeals an order of the Superior Court (*McHugh*, J.) permitting the jury in a wrongful death case to apportion fault among various entities, including defendant CLD Consulting Engineers, Inc. (CLD). The defendant cross-appeals. We affirm.

The record supports the following facts. On May 31, 1999, the plaintiff's husband, David DeBenedetto, was killed **[***2]** in a two-car automobile collision on Route 28 in Derry. The other driver, Doris Christous, was waiting at a red light to cross Route 28 from a Wal-Mart store. After approximately five minutes passed, Christous apparently concluded that the traffic light was broken and attempted to cross Route 28 while the light was still red. Christous' vehicle struck the rear quarter of

the vehicle operated by DeBenedetto, who was passing through the intersection on a green light. The collision caused DeBenedetto's vehicle to roll over, resulting in his death.

Christous had a motor vehicle liability insurance policy, and her insurance carrier paid the $ 100,000 limit upon demand. Christous was not named as a defendant in the subsequent litigation.

In June 2003, the plaintiff brought a wrongful death action against seven entities: CLD; East Coast Signals, Inc. (ECS); MHF Design Consultants, Inc. (MHF); Yvon Cormier Construction Corp. (Cormier); RayCor Development, Inc. (RayCor); Leo Roy (Roy); and the New Hampshire Department of Transportation (NHDOT). The suit alleged that each named defendant was involved in the design, selection, installation, or authorization of the traffic control system.

[*3]** Prior to trial, the plaintiff settled her claims against ECS, MHF, Cormier, RayCor, and Roy, and the trial court granted NHDOT's motion to dismiss on grounds of immunity. Thus, CLD was the sole defendant remaining at the time of the trial.

At trial, the plaintiff claimed that when the exit from Wal-Mart was redesigned in 1999 to accommodate through traffic to the newly opened **[*796]** plaza of shops across the street, a new "loop detector" should have been installed to detect cars in the center lane. A "loop detector" is a piece of equipment installed under the asphalt at an intersection that detects approaching vehicles and signals the computer regulating the traffic control system, producing a green light during the next traffic cycle. The plaintiff alleged that because there was no loop detector to detect cars in the center lane of the Wal-Mart exit, and because CLD knew or should have known that motorists would use the center lane, it was foreseeable that one or more drivers would become stuck at an interminable red **[**975]** light and elect to proceed against it, thereby exposing all motorists lawfully passing through the intersection to an unreasonable risk of injury.

Before trial, CLD requested **[***4]** a jury instruction that included the following language regarding apportionment of fault:

> There are a number of parties in this case, including those that are absent from this trial. It is your duty to determine the proportionate fault of each party. That is, you should decide what percentage of fault lies with each of the alleged tortfeasors, whether they are here or not. You may consider evidence that another party may be responsible for the accident, or any part thereof. In doing so, you may attribute liability to an absent party.

At the conclusion of the trial, the trial court did not give the instruction as requested. Instead, the trial court instructed the jury to determine the percentage of fault, if any, of only the remaining named defendant, CLD, as well as Christous, ECS, and NHDOT. The instruction omitted MHF, Cormier, RayCor and Roy. The jury returned a verdict awarding $ 5.3 million in damages and apportioned forty-nine percent of fault to CLD, forty-nine percent of fault to Christous, and two percent of fault to NHDOT. Approximately $ 3 million of the damages awarded were attributable to "non-economic" damages. The jury did not find ECS negligent to any **[***5]** degree.

CLD submitted a post-trial motion for remittitur, requesting that the damage award be reduced to $ 2.5 million, and that its apportionment of fault be reduced to twenty percent. CLD also submitted motions to set aside the verdict and for judgment notwithstanding the verdict. The trial court denied the latter motions, but partially granted the motion for remittitur, leaving apportionment of fault at forty-nine percent but reducing the damages award to $ 3.8 million.

The plaintiff also sought post-trial relief, submitting a motion to reform the verdict requesting that 100% of fault be apportioned to CLD. The trial court denied this motion.

[*797] On appeal, the plaintiff asserts that: (1) the trial court erred by instructing the jury to consider Christous and NHDOT when assigning fault percentages; (2) the trial court's interpretation of *RSA 507:7-e* (1997), which governs apportionment of damages, was unconstitutional; and (3) the trial court erred in granting remittitur. CLD cross-appeals, claiming that: (1) the trial court erred by failing to instruct the jury that it could apportion fault to RayCor and Cormier; (2) the jury verdict apportioning no fault **[***6]** to ECS and two percent fault to NHDOT was against the weight of the evidence; and (3) the trial court erred in denying CLD's motion for directed verdict. We address each issue in turn.

I. Christous and NHDOT

The plaintiff first contends that, in light of the plain language of *RSA 507:7-e, I(a)*, the trial court erred when

it instructed the jury to consider apportioning fault to "non-parties" Christous and NHDOT. RSA 507:7-e provides, in relevant part:

> HN1[↑] I. In all actions, the court shall:
> (a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and
>
> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall **[**976]** be liable only for the damages attributable to him.

HN2[↑] This court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered **[***7]** as a whole. DeLucca v. DeLucca, 152 N.H. 100, 103, 871 A.2d 72 (2005). When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include. Carlisle v. Frisbie Mem. Hosp., 152 N.H. 762, 773, 888 A.2d 405 (2005). If a statute is ambiguous, however, we may consider legislative history to aid in our analysis. *Id.* We interpret statutes in the context of the overall statutory scheme and not in isolation. DeLucca, 152 N.H. at 103. We review a trial court's interpretation of a statute *de novo*. State v. Fischer, 152 N.H. 205, 211, 876 A.2d 232 (2005).

The plaintiff argues that the "plain and ordinary meaning" of the word "party" or "parties," in the context of RSA 507:7-e, I, is "claimant" and **[*798]** "defendant." The defendant, however, argues that we must construe "party" to include all parties who causally contribute to an accident, "including immune parties and parties who settle prior **[***8]** to suit," in order to effectuate the purpose of RSA 507:7-e. Reading RSA 507:7-e, I(a) in isolation, the phrase "amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties" could be read to favor the plaintiff's interpretation. However, reading RSA 507:7-e as a whole, the word is employed in an arguably broader sense. *See, e.g.*, RSA 507:7-e, I(b)--(c), II ; *see also* Estate of Hunter v. General Motors Corp., 729 So. 2d 1264, 1273 (Miss. 1999) ("If the Legislature had intended to refer to 'parties to a lawsuit' then it could have easily used this language or a similar term such as 'litigant,' but it did not do so."). Because we find that the use of the word "party" throughout RSA 507:7-e creates an ambiguity, we look to the legislative history of the statute to aid in our analysis.

RSA 507:7-e was enacted as part of a comprehensive statutory framework for apportionment of liability and contribution. Nilsson v. Bierman, 150 N.H. 393, 395, 839 A.2d 25 (2003) **[***9]** (framework includes RSA 507:7-d (1997) through RSA 507:7-i (1997)). The "Act Relative to Tort Reform and Insurance," Laws 1986, 227:2, closely modeled the Uniform Comparative Fault Act, 12 U.L.A. 38-49 (Supp. 1987), in its treatment of comparative fault and apportionment of damages. Jaswell Drill Corp. v. General Motors Corp., 129 N.H. 341, 343-44, 529 A.2d 875 (1987). Indeed, when the legislature enacted this framework, "it clearly intended these provisions to function as a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution." *Id.* at 344-45.

As originally enacted in 1986, RSA 507:7-e required that judgment be entered against "each party liable" on the basis of joint and several liability. Laws 1986, 227:2; *see also* Jaswell, 129 N.H. at 344. Under the rule of joint and several liability, a defendant who is only partly responsible for a plaintiff's injuries may be held responsible for the entire amount of recoverable damages. *See* Restatement (Third) of Torts: Apportionment of Liability § 10 **[***10]** , at 99 (2000). This allows a plaintiff to sue any one of several tortfeasors and collect the full amount of recoverable damages. The burden of joining other potentially liable tortfeasors to share in the apportionment of damages falls upon the defendant. *See id.* comment b. at 101-02. Thus, pursuant to joint and several liability, the risk that **[**977]** other nonparty tortfeasors cannot be joined in a suit for reasons of immunity, insolvency, or jurisdiction must also be borne by the defendant. *See id.*

The joint and several liability rule has the ancillary effect of enabling injured plaintiffs to seek out and sue only "deep pocket" defendants -- **[*799]** tortfeasors with significant assets but a potentially low degree of fault who by virtue of joint and several liability may be responsible for the entire amount of recoverable damages. *See, e.g.*, Alvarez v. New Haven Register, Inc., 249 Conn. 709, 735 A.2d 306, 312 (Conn. 1999). As a result, numerous jurisdictions have enacted legislation seeking to ameliorate the "inequities" suffered by low fault, "deep pocket" defendants as a

result of joint and several liability. *See, e.g.*, McCoy v. Monroe Park West Associates, 44 F. Supp. 2d 910, 913 (E.D. Mich. 1999); **[***11]** Chianese v. Meier, 98 N.Y.2d 270, 774 N.E.2d 722, 724, 746 N.Y.S.2d 657 (N.Y. 2002); Alvarez, 735 A.2d at 313-14. Indeed, "[t]he clear trend over the past several decades has been a move away from joint and several liability." Restatement (Third) of Torts: Apportionment of Liability, § 17 Reporters' Note at 149 (2000). A majority of jurisdictions have adopted, in lieu of joint and several liability, pure several liability, whereby an injured plaintiff may only recover a defendant's comparative-responsibility share of damages, *see id.* § 11, at 108, or a hybrid system that employs both rules. *See id.* § 17 Reporters' Note at 149.

In 1989, the New Hampshire Legislature, recognizing that "manufacturers, professionals and public agencies . . . become targets for damage recoveries because of their potential money resources rather than their fault," sought to amend RSA 507:7-e "to treat fairly those entities which may be unfairly treated" under the rule of joint and several liability. *N.H.S. Jour.* 286 (1989). The bill, as introduced, would have revised **[***12]** RSA 507:7-e , I(b) to require that judgment be entered *severally* against "each party liable," *see* Senate Bill No. 110 (1989), thereby providing "that defendants involved in personal injury lawsuit [*sic*] could only be held liable for their percentage of the damages." *N.H.S. Jour.* 286 (1989). The legislature rejected this pure several liability approach and instead passed a compromise measure adopting several liability only for those parties "less than 50 percent at fault." *See* RSA 507:7-e, I(b). The resulting legislation made New Hampshire a hybrid jurisdiction.

In *Nilsson*, we considered whether a trial court may, consistent with RSA 507:7-e, instruct a jury to assess the percentage of fault attributable to settling, as well as non-settling, tortfeasors. Nilsson, 150 N.H. at 395. The plaintiff argued that the plain and ordinary meaning of the word "party," as employed in the context of RSA 507:7-e, did not include a defendant who settled with the plaintiff before trial. Id. at 396. We disagreed, noting first that *Black's Law Dictionary* defined "party" as **[***13]** "[one] who takes part in a transaction" or "[o]ne by or against whom a lawsuit is brought." Nilsson, 150 N.H. at 396 (quotations omitted). We then recognized that other courts "construing similar statutes" defined "party" to encompass "persons involved in an accident, defendants in a lawsuit, or all litigants in a lawsuit." *Id.* Ultimately, we held that, for the **[*800]** purposes of apportionment pursuant to RSA 507:7-e, I(b), the term "party" refers to "parties to an action, including settling parties," and affirmed the trial court's verdict apportioning ninety-nine percent of fault to the settling defendant and one percent of fault to the non-settling defendant. Id. at 394, 396. We expressly declined, however, to reach the issue of whether a tortfeasor who is immune from liability (such as NHDOT) or otherwise **[**978]** not before the court (such as Christous) constitutes a "party" for apportionment purposes under RSA 507:7-e, I(b). Id. at 397.

Many jurisdictions permit a jury to consider "nonparties" such as unknown or immune tortfeasors when apportioning fault. 1 *Comparative Negligence* **[***14]** *Manual* § 14.9, at 14-12 (3d ed., Clark Boardman Callaghan 1995); *see also* Nilsson, 150 N.H. at 396-97. The underlying rationale for such a rule is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question, whether or not they are named parties to the case. *See* Lasselle v. Special Products Comp., 106 Idaho 170, 677 P.2d 483, 485 (Idaho 1984); *see also Comparative Negligence Manual*, *supra*. "It would be patently unfair in many cases to require a defendant to be 'dragged into court' for the malfeasance of another and to thereupon forbid the defendant from establishing that fault should properly lie elsewhere." Estate of Hunter, 729 So. 2d at 1273. "There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss." Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 874 (Kan. 1978).

Apportionment of fault to nonparties is, moreover, recognized in many jurisdictions **[***15]** as being compatible with the doctrine of comparative fault. *See* Carroll v. Whitney, 29 S.W.3d 14, 21 (Tenn. 2000). "[T]he policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit." Estate of Hunter, 729 So. 2d at 1273; *cf.* Northland Ins. Co. v. Truckstops Corp. of America, 914 F. Supp. 216, 220 (N.D. Ill. 1995) (failure to include immune employers in apportionment process violates main purpose of comparative fault by improperly subjecting defendants to liability in excess of their proportion of fault). ***HN3***[↑] New Hampshire is a comparative fault jurisdiction. *See* RSA 507:7-d (1997).

The plaintiff contends, however, that the term "parties," as used in the context of RSA 507:7-e, I(a), should be

strictly construed to include only "actual parties to the action," *i.e.*, "all plaintiffs, defendants and third-party defendants *actually involved in the case* whose actions have contributed to the loss." We disagree.

[*801] As we noted **[***16]** in *Nilsson*, other jurisdictions construing statutes similar to RSA 507:7-e have defined the term "party" to include persons involved in an occurrence giving rise to a plaintiff's injuries. *See* Nilsson, 150 N.H. at 396. For example, Idaho's apportionment statute stipulates that a trial court must, "when requested by any *party* . . ., direct the jury to find . . . the amount of damages and the percentage of negligence or comparative responsibility attributable to each *party* . . . ." IDAHO CODE § 6-802 (2004) (emphases added); *compare* RSA 507:7-e, I(a). The Supreme Court of Idaho has interpreted the statute to encompass "parties to the transaction which resulted in the injury whether or not they are parties to the lawsuit." Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621, 627 (Idaho 2001) (*citing* Pocatello Ind. Park Co. v. Steel West, Inc., 101 Idaho 783, 621 P.2d 399 (Idaho 1980)). In so doing, the court recognized that "'[i]t is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the **[***17]** negligence of all parties to the transaction, . . . whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release.'" Pocatello [**979] Ind. Park Co., 621 P.2d at 403 (*quoting* Connar v. West Shore Equipment of Milwaukee Inc., 68 Wis. 2d 42, 227 N.W.2d 660, 662 (Wis. 1975)). Idaho, like New Hampshire, is a comparative negligence jurisdiction. *See* IDAHO CODE § 6-801 (2004).

The Supreme Court of Mississippi, interpreting statutory fault apportionment language similar to New Hampshire's, has also determined that the term "party" is to be applied broadly. Construing MISS. CODE ANN. § 85-5-7(7) (1991), which provided that "[i]n actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault," the court held that the term "party" referred to "any participant to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial." Estate of Hunter, 729 So. 2d at 1276. Thus, the term "party," in the context **[***18]** of MISS. CODE ANN. § 85-5-7(7), "swept broadly enough to bring in entities which would not or could not have been 'parties to a lawsuit,' thus including immune parties." Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107, 1113 (Miss. 2003) (*citing* Estate of Hunter, 729 So. 2d at 1273). The court noted that limiting a jury to a consideration of the fault of the parties at trial would infringe upon a defendant's right to present his or her version of a case to a jury, and recognized that its holding was "based upon sound considerations of judicial fairness." Estate of Hunter, 729 So. 2d at 1272, 1275; *see also* Mack Trucks, Inc., 841 So. 2d at 1113. Mississippi is a comparative negligence jurisdiction. *See* MISS. CODE. ANN. § 11-7-15 (2004).

In Kansas, "[w]here the comparative negligence of the parties in [a civil] action is an issue," the trier of fact must "determin[e] the percentage of **[*802]** negligence attributable to each of the parties, and determin[e] the total amount of damages sustained by each of the claimants . . . ." KAN. STAT. ANN. § 60-258a(b) (2005); **[***19]** *compare* RSA 507:7-e, I(a). The Supreme Court of Kansas, tasked with determining whether the percentage of fault of one who cannot formally be joined as a party under the statute could be considered to "arrive at the proportionate liability of [a] defendant," concluded that "the intent and purpose of the legislature in adopting [KAN. STAT. ANN. § 60-258a] was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault." Brown, 580 P.2d at 876. The court included in its analysis those parties possessing governmental immunity: "[Although] one of the parties at fault happens to be a . . . governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the . . . agency, there is no compelling social policy which requires [a] codefendant to pay more than his fair share of the loss." Id. at 874.

The plaintiff asserts **[***20]** that at least four jurisdictions "have interpreted statutes that are similar to ours" and concluded that apportionment of fault among non-litigants is not permitted. The Supreme Court of Connecticut, for instance, has defined "party," for fault apportionment purposes, as active litigants or those litigants who have settled and received releases. Donner v. Kearse, 234 Conn. 660, 662 A.2d 1269, 1275-76 (Conn. 1995). Thus, if a defendant wishes to "broaden the universe of negligence to be considered," that defendant must implead any allegedly negligent non-party. Eskin v. Castiglia, 253 Conn. 516, 753 A.2d 927, 933 (Conn. 2000). However, Connecticut's comparative negligence statute, CONN. GEN. STAT. § 52-572h (2005), is far **[**980]** more specific on the topic of fault apportionment than RSA 507:7-e:

> In a negligence action to recover damages resulting from . . . wrongful death . . ., if the damages are determined to be proximately caused by the negligence of more than one party, *each party against whom recovery is allowed* shall be liable to the claimant only for such party's proportionate **[***21]** share of the recoverable [economic and non-economic] damages.

CONN. GEN. STAT. § 52-572h(c) (emphasis added). Thus, unlike RSA 507:7-e, the plain language of the Connecticut statute expresses a legislative intent to limit the scope of the term "party" for purposes of fault apportionment.

[*803] Similarly, the Iowa legislature explicitly defined "party" for purposes of the State's comparative fault and apportionment statutes, thereby limiting fault apportionment to claimants, defendants, third-party defendants, and those persons who have entered into a release, covenant not to sue, or "similar agreement" with the claimant. IOWA CODE. ANN. §§ 668.2, 668.3, 668.7 (1998); *see also* Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 862 (Iowa 1994) (Iowa comparative fault regime precludes fault sharing unless plaintiff has viable claim against a party).

The plaintiff also cites Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399, 609 A.2d 1299 (N.J. Super. Ct. App. Div. 1992), as support for her position that similar statutes have been interpreted to preclude apportionment among non-litigants. **[***22]** Indeed, *Bencivenga* states that the plain language of N.J. STAT. ANN. §§ 2A:15-5.1 and 2A:15-5.2 makes "the negligence of the person or persons against whom recovery is sought and the negligence of each party or parties to the suit the prerequisites to apportioning fault." *Id. at 1303* (emphasis omitted); *see also* Straley v. United States, 887 F. Supp. 728, 742 (D.N.J. 1995) (under New Jersey Comparative Negligence Act, assessment of liability limited to those who are party to suit). However, unlike RSA 507:7-e, New Jersey's apportionment statute, N.J. STAT. ANN. § 2A:15-5.2, explicitly requires the trier of fact to find "[t]he percentage of negligence or fault of *each party*" with the "total of all percentages of negligence or fault of all the *parties to a suit*" totaling 100%. N.J. STAT. ANN. § 2A:15-5.2 (2000) (emphases added); *see also* Bencivenga, 609 A.2d at 1303. Similarly, in *Eberly v. A-P Controls, Inc.*, also cited by the plaintiff, the Supreme Court of Ohio construed analogous statutory language requiring a **[***23]** trier of fact to find "[t]he percentage of negligence . . . in relation to one hundred per cent, that is attributable to each party to the action," to reach a similar result. Eberly v. A-P Controls, Inc., 61 Ohio St. 3d 27, 572 N.E.2d 633, 638 (Ohio 1991). Because the statutes interpreted, respectively, by the New Jersey and Ohio courts expressly limit apportionment to parties to a lawsuit, we find these cases inapposite to the instant dispute.

We find persuasive the reasoning of those jurisdictions with comparative fault schemes and apportionment statutes similar to New Hampshire's that have interpreted ***HN4***[↑] the term to include all parties to the transaction or occurrence giving rise to a plaintiff's injuries. We believe that a rule of law limiting a jury or court to consideration of the fault of only the parties to an action would directly undermine the New Hampshire legislature's decision to assign only several liability to those parties who are "less than 50 percent at fault." RSA 507:7-e, I(b).

Finally, we note that the legislature recently rejected a proposed amendment to RSA 507:7-e that would have added a paragraph **[***24]** defining **[*804]** the terms "party" and "parties" as "only those individuals or entities **[**981]** who are plaintiffs or defendants in the action." Senate Bill 47 (2005); *see also N.H.S. Jour.* 197 (2005). We hold, therefore, that ***HN5***[↑] for apportionment purposes under RSA 507:7-e, the word "party" refers not only to "parties to an action, including . . . settling parties," Nilsson, 150 N.H. at 396, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court. We are mindful that at least one jurisdiction does not permit the apportionment of fault to entities enjoying "absolute immunity," and has articulated sound policy reasons for declining to do so. *See* Lexington-Fayette Urb. Cty. Gov. v. Smolcic, 142 S.W.3d 128, 135-36 (Ky. 2004) ("Even though free from financial liability, the possessor [of immunity] still would be subject to process; to the burdens of discovery, including the giving of depositions; and to testifying at trial even if he or she chose not to actively defend his or her actions at trial."). Nonetheless, we believe that fairness precludes **[***25]** a defendant from bearing the entire weight of a damages verdict where, for example, that defendant is ten percent at fault and another party possessing absolute immunity from liability is ninety percent at fault.

We note that ***HN6***[↑] a defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault

apportionment purposes. *See Gust v. Jones, 162 F.3d 587, 593 (10th Cir. 1998)* (interpreting Kansas law); *see also Carroll, 29 S.W.3d at 21* (jury can apportion fault to nonparty only after it is convinced that defendant has met burden of establishing that nonparty caused or contributed to plaintiff's injury).

On appeal, the plaintiff does not dispute that Christous and NHDOT were at fault. In light of our holding, we conclude that the trial court did not err by instructing the jury to consider the percentage of fault attributable to them.

II. Constitutionality of RSA 507:7-e

The plaintiff advances two arguments that *RSA 507:7-e, I(a)* is unconstitutional. **[***26]** First, she contends that *RSA 507:7-e, I(a)*, as interpreted by the trial court, violates Part I, Article 14 of the New Hampshire Constitution, which provides:

> ***HN7***[↑] Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

[*805] N.H. CONST. pt. I, art. 14. The purpose of this provision is to ***HN8***[↑] make civil remedies readily available, and to guard against arbitrary and discriminatory infringements upon access to courts. *Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 640, 795 A.2d 833 (2002)*.

The plaintiff, citing *Panagoulis v. Company, 95 N.H. 524, 68 A.2d 672 (1949)*, contends that an "innocent plaintiff" is "entitled to recover his *full damages* from *any negligent person* who was a concurrent and proximate or legal cause of his injuries." (Emphases added.) Thus, she argues that a plaintiff without fault is entitled to recover full damages from any negligent **[***27]** tortfeasor pursuant to the principles of joint and several liability. *See Restatement (Third) of Torts: Apportionment of Liability § 10*, at 99. Citing *Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980)*, the plaintiff further asserts that "[t]his common law right is an important substantive right that is protected by the New Hampshire Constitution." In the plaintiff's analysis, the trial court's interpretation **[**982]** of *RSA 507:7-e* will have the effect of depriving "innocent plaintiffs . . . of the right to seek full compensation from one of two or more negligent persons" without a compensatory *quid pro quo*.

We find the plaintiff's argument in this regard unpersuasive. First, and foremost, *Carson* does not establish a common law right to recover for one's injuries pursuant to the principles of joint and several liability. *Carson* stands only for the proposition that the "right to recover for personal injuries," though not a fundamental right, is nevertheless an important substantive one. *Carson*, 120 N.H. at 931-32. Furthermore, *RSA 507:7-e* does **[***28]** not infringe upon the rights of an "innocent plaintiff," or any plaintiff for that matter, to seek and obtain redress in the courts of New Hampshire for personal injuries. Rather, it simply establishes standards for the apportionment of fault among parties once an action has been brought and tried. *See RSA 507:7-e*. That another statute, such as *RSA 541-B:19* (1997) (retaining sovereign immunity for State or State actors in various actions, including those arising from the performance of a discretionary function), may limit an injured plaintiff's ability to acquire financial recompense from certain entities is of no consequence in our analysis of *RSA 507:7-e*. *RSA 507:7-e* itself does not, by its language, restrict a plaintiff's right to seek a remedy for personal injuries, limit a plaintiff's ability to bring an action against any party, or cap the amount of damages that a plaintiff may seek.

HN9[↑] Part I, Article 14 does not guarantee that all injured persons will receive full compensation for their injuries. *Welzenbach v. Powers, 139 N.H. 688, 691, 660 A.2d 1133 (1995)*. **[***29]** It stipulates only that a plaintiff "is entitled to a certain remedy, by having recourse to the laws, for all injuries he may **[*806]** receive . . . ." N.H. CONST. pt. I, art. 14. Because we believe that *RSA 507:7-e* does not infringe upon this entitlement, we conclude that it does not violate Part I, Article 14 of the New Hampshire Constitution.

The plaintiff's second constitutional challenge is that *RSA 507:7-e*, as interpreted by the trial court, violates the "*Equal Protection Clause*," though she neglects to identify any specific provision of the State or Federal Constitutions in support of this challenge. ***HN10***[↑] An appellant must fulfill two preconditions before triggering a State constitutional analysis: first, the appellant must raise the State constitutional issue in the trial court; second, the appellant's brief must specifically invoke a provision of the State Constitution. *State v. Dellorfano, 128 N.H. 628, 632, 517 A.2d 1163 (1986)*. In the instant case, the plaintiff did not unambiguously and specifically raise equal protection issues grounded in Part I, Articles

2, 12 or 14 of the State Constitution in her brief. We will [***30] not, therefore, undertake a State constitutional analysis of the plaintiff's equal protection argument. *See id. at 633*. However, ***HN11***[↑] we have never held that a party's failure to include a citation to a specific provision of the Federal Constitution precludes appellate review. *State v. Burke, 153 N.H. , , 153 N.H. 361, 897 A.2d 996 (2006)*. Therefore, we address the plaintiff's equal protection claim under the *Equal Protection Clause of the Federal Constitution* only. *See id. at 999*.

HN12[↑] The *Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution* commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*. This provision creates no substantive rights; rather, it embodies a general rule that States must treat like [**983] cases alike but may treat unlike cases accordingly. *Vacco v. Quill, 521 U.S. 793, 799, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997)*. If a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, federal [***31] equal protection analysis applies rational basis scrutiny, under which the classification will stand so long as it bears a rational relation to some legitimate governmental end. *See id.*; *see also Gary S. v. Manchester School Dist., 374 F.3d 15, 22 (1st Cir. 2004)*.

We do not agree that *RSA 507:7-e, I(a)* creates any such classifications among plaintiffs. *RSA 507:7-e, I(a)* requires only that a jury or court determine "the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties." Thus, *subsection I(a)* treats all claimants and defendants equally; an amount of damages must be affixed, and a percentage of fault must be calculated for each tortfeasor. Though the result will inevitably differ from case to case, depending upon the number and availability of claimants and defendants, the standard for determining [*807] damages and apportioning fault is uniform and non-discriminatory. Given our interpretation of *RSA 507:7-e, I(a)*, it is irrelevant that certain claimants, such as the plaintiff in the instant case, [***32] may elect not to name a culpable tortfeasor in a suit. Moreover, *RSA 507:7-e, I(a)* does not make exceptions for defendants made immune by statute or common law. We conclude, therefore, that *RSA 507:7-e, I(a)* does not treat similarly situated persons differently.

RSA 507:7-e, I(b), however, treats plaintiffs differently depending upon the percentage of fault attributable to each party contributing to the underlying occurrence. For example, if a plaintiff suffers injuries caused by four separate actors, and each is attributed twenty-five percent of the fault, then the plaintiff may only receive twenty-five percent of the damages from any one tortfeasor. If another plaintiff suffers the same injuries, but one of four tortfeasors is at least fifty percent at fault, then the plaintiff may receive 100% of the damage award from that tortfeasor. Therefore, *RSA 507:7-e, I(b)*, by its terms, allows for the disparate treatment of similarly situated persons.

HN13[↑] Applying rational basis scrutiny, we conclude that the classification created by *RSA 507:7-e, I(b)* bears a rational [***33] relationship to the furtherance of a legitimate governmental purpose. *Cf. Gary S., 374 F.3d at 22*. As we noted above, the legislative history of *RSA 507:7-e* plainly demonstrates that an underlying purpose of the 1989 amendment was to relieve defendants involved in personal injury lawsuits from damages liability exceeding their percentage of actual fault. *See N.H.S. Jour.* 286 (1989). Specifically, the legislature sought to alleviate the burden imposed by joint and several liability upon "deep pocket" defendants targeted because of their potential financial resources rather than their degree of culpability. *See id.* Rather than adopt pure several liability, however, the legislature reserved the joint and several liability rule for application to tortfeasors fifty percent or more at fault, reflecting an intention to balance the interests of injured plaintiffs with those of defendants bearing relatively low fault percentages.

The problem of "deep pocket" suits is one that jurisdictions throughout the United States have recognized. *See, e.g., Estate of Hunter, 729 So. 2d at 1273*. Many jurisdictions have supplanted [***34] the joint and several liability doctrine with pure several liability or a hybrid rule that employs a percentage threshold, much like *RSA 507:7-e*. *See Restatement (Third) of Torts: Apportionment of Liability § 17* [**984] Reporters' Note at 149. Legislatures in a number of such jurisdictions have noted the inequity of "deep pocket" suits as a factor underlying the amendment of their respective states' tort liability regimes. *See, e.g., Smiley v. Corrigan, 248 Mich. App. 51, 638 N.W.2d 151, 152 n.3 (Mich. Ct. App. 2002)* (bill abolishing joint and several [*808] liability in favor of several liability intended as a means of providing fair treatment for defendants, including unjustly burdened "deep pockets"); *Erny v. Estate of Merola, 171 N.J. 86, 792*

A.2d 1208, 1219 (N.J. 2002) (amendment limiting joint and several liability to only those tortfeasors found to be more than sixty percent responsible intended to reduce cost of general liability insurance by eliminating "deep pocket" sought by defense attorneys in lawsuits with multiple defendants). We hold, therefore, that the New Hampshire **[***35]** legislature enacted RSA 507:7-e, I(b) in pursuit of a legitimate end.

Furthermore, we believe that the distinction created by RSA 507:7-e, I(b) is rationally related to the object of the legislation. The New Hampshire legislature first enacted a comparative negligence statute in 1969, motivated by "a deep conviction that the contributory negligence rule was so basically unfair and illogical that it should have no further place in [the State's] law." Nixon, *The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute*, 12 N.H.B.J. 17, 17-18 (1969). By doing away with the doctrine of contributory negligence, the legislature bestowed a considerable benefit upon injured plaintiffs. However, the statute abolished not only contributory negligence, but joint and several liability as well. *See* Laws 1969, 225:1; *see also Nixon, supra* ("New Hampshire's comparative negligence statute was . . . intended to limit the damages responsibility of each defendant against whom recovery is allowed to his proportionate amount of fault . . . . [There was a] clearly intended abolition of joint **[***36]** and several liability . . . ."). Thus, the 1969 comparative negligence statute clearly demonstrates a legislative objective to balance the interests of plaintiffs and defendants.

With the 1986 passage of the "Act Relative to Tort Reform and Insurance," the legislature established a system for contribution among tortfeasors and reinstituted joint and several liability. *See* Laws 1986, 227:2. Three years later, the legislature, concerned with the unfair treatment of certain entities under the revived joint and several liability rule, reenacted 507:7-e, I(b) in its present form. *See N.H.S. Jour.* 286 (1989).

From the inception of comparative negligence in New Hampshire, the legislature has sought to balance the interests of injured plaintiffs and the interests of defendants. It plainly believed that contribution among tortfeasors did not effectively protect the interests of defendants bearing less than fifty percent of fault for a plaintiff's injuries, and that those defendants were unfairly prejudiced by the comparative negligence regime enacted in 1986. Though the plaintiff argues that the legislature was required to establish certain "procedural safeguards" within **[***37]** RSA 507:7-e, I, we need not hypothesize alternative measures that the **[*809]** legislature could have taken to better establish the desired balance of interests, as we believe that the introduction of several liability for tortfeasors less than fifty percent at fault was rationally related to that object. *Boulders at Strafford v. Town of Strafford*, 153 N.H. 633, 903 A.2d 1021, 2006 N.H. LEXIS 82, 153 N.H. , (decided June 15, 2006) (least restrictive means analysis not part of rational basis test).

In light of our analysis, we conclude that, to the extent it differentiates between two classes of plaintiffs, RSA 507:7-e, I(b) does not violate the equal protection provisions of the Federal Constitution.

[**985]** III. Remittitur

Finally, the plaintiff contends that the trial court erred by granting remittitur as to the damages award. **HN14**[↑] Direct review of a damages award is the responsibility of the trial judge, who may disturb a verdict as excessive if its amount is conclusively against the weight of the evidence and if the verdict is manifestly exorbitant. *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 838, 891 A.2d 477 (2005). The proper standard for the trial court's **[***38]** review of a jury award is whether the verdict is fair. *Id.* Whether remittitur is appropriate rests with the trial court's sound discretion. *Id.* Absent an unsustainable exercise of discretion, we will not reverse the trial court's decision. *Id.*

In reducing the damages award from $ 5.3 million to $ 3.8 million, the trial court concluded that "awarding three million dollars for pain and suffering and loss of enjoyment of life [was] excessive," and that "the evidence would support a maximum damage finding for pain and suffering of $ 500,000, and a maximum damage finding for loss of enjoyment of life of one million dollars." The plaintiff does not contest the trial court's ruling limiting "pain and suffering" damages to $ 500,000. Rather, the plaintiff asserts that it was impossible to conclude, based upon the evidence, that no reasonable jury could have awarded approximately $ 2.5 million for "loss of enjoyment of life" damages.

The plaintiff argues that the trial court "misconstrued the legal standard for considering remittitur, i.e., whether, considering the evidence in the light most favorable to the plaintiff, *no reasonable jury* could possibly award the amount in **[***39]** question." (Emphasis added.) While we have said that we will not overrule a trial court's discretionary refusal to grant remittitur unless a verdict is "so manifestly exorbitant that *no reasonable person* could conclude that the jury was not influenced by

partiality or prejudice, or misled by some mistaken view of the merits of the case," *Bennett v. Lembo, 145 N.H. 276, 282, 761 A.2d 494 (2000)* (emphasis added), that is merely an articulation of the unsustainable exercise of discretion standard **[*810]** that we apply upon appellate review. We have never said that the trial court's initial discretionary review of a jury verdict is confined to a "no reasonable person" standard.

The plaintiff offers various studies and law review articles purporting to "objectively assign a value to the enjoyment of life" consistent with the original jury verdict. These materials were not offered as evidence at trial, and do not influence our review of the trial court's decision to grant remittitur. Having reviewed the record, we conclude that the trial court could reasonably have determined that the jury's damages award was punitive, rather than compensatory, in nature, and therefore both manifestly exorbitant **[***40]** and conclusively against the weight of the evidence. As such, we find no unsustainable exercise of discretion in the trial court's grant of remittitur.

IV. RayCor and Cormier

CLD, on cross-appeal, argues that the trial court erred when it did not instruct the jury that it could apportion fault to settling defendants RayCor and Cormier. We agree with CLD that *HN15*[↑] a court should instruct a jury to consider settling parties when apportioning fault pursuant to *RSA 507:7-e, I(b)*. *See Nilsson, 150 N.H. at 394, 396*. Prior to trial, CLD submitted a proposed jury instruction concerning apportionment:

> There are a number of parties in this case, including those that are absent from this trial . . . . [Y]ou should decide what percentage of fault lies with each of the alleged tortfeasors, whether they **[**986]** are here or not. . . . [Y]ou may attribute liability to an absent party.

However, in its order on apportionment on fault, the trial court noted:

> CLD agreed that there was not enough evidence produced to show that named but settling defendants Ray Cor Development, Yvon Cormier Construction, MHF Design Consultants and Leo **[***41]** Roy were negligent to any degree and thus CLD did not ask to have the jury apportion their legal fault. CLD wanted the jury to apportion the legal fault of . . . Doris Christous, . . . East Coast Signals, Inc., and . . . the State of New Hampshire, . . . as well as CLD itself. The Court adopted CLD's position and the jury was instructed to apportion any legal fault found among these four entities.

Thus, the trial court characterized the final jury instruction as one of CLD's own design. CLD, however, now asserts that it "never agreed" that RayCor and Cormier should be omitted from the jury verdict.

[*811] *HN16*[↑] We are bound by a trial court's findings of fact unless they are unsupported by the evidence or erroneous as a matter of law. *See Prof'l Firefighters of N.H. v. HealthTrust, 151 N.H. 501, 507, 861 A.2d 789 (2004)*; *see also Beaudoin v. Beaudoin, 118 N.H. 325, 327-28, 386 A.2d 1261 (1978)*. The burden of presenting a record sufficient to allow this court to decide an issue presented on appeal falls upon the moving party. *Brown v. Cathay Island, Inc., 125 N.H. 112, 115, 480 A.2d 43 (1984)* (*citing Sup. Ct. R. 13, 15*). CLD **[***42]** is unable to point to any evidence in the record that contradicts the trial court's specific finding in its order on apportionment of fault as to CLD's position on the jury instruction regarding apportionment. As such, we cannot disturb the trial court's finding that CLD agreed to the omission of RayCor and Cormier from the trial court's instruction to the jury on apportionment of fault.

We note, moreover, that if CLD believed that the trial court's jury instruction was erroneous, and that the trial court misrepresented its position in the order on apportionment of fault, CLD could have raised the issue in a motion for reconsideration. CLD failed to do so. Because this issue was never presented to the trial court, we cannot review it on appeal. *See N.H. Dep't of Corr. v. Butland, 147 N.H. 676, 679, 797 A.2d 860 (2002)*.

V. Apportionment of Fault to ECS and NHDOT

CLD next argues that the jury verdict, insofar as it apportioned only two percent of the fault to NHDOT and no fault at all to ECS, was against the weight of the evidence. Following the jury verdict, CLD submitted post-trial motions to set aside the verdict, for judgment notwithstanding **[***43]** the verdict, and for remittitur, as well as a memorandum of law in support of those motions. In its memorandum, CLD took the position that the jury's finding that CLD was forty nine percent at fault was "decidedly against the weight of the evidence" and should be set aside. However, CLD did not, in any of its post-trial motions or its memorandum of law, raise for the trial court the issue of the jury's findings as to

NHDOT and ECS. Thus, we cannot review it on appeal. *See id.*

VI. Motion for Directed Verdict

At the end of the plaintiff's case, CLD moved for a directed verdict on the grounds that the State, as the owner of the intersection, had knowledge of the defect and the dangers it posed. In support of its motion, CLD relied upon *Russell v. Whitcomb, 100 N.H. 171, 121 A.2d 781 (1956)*, which adopted a rule holding **[**987]** independent contractors to a "general standard of reasonable care for the protection of third parties who may be foreseeably endangered by the contractor's negligence" following an employer's acceptance of the work, but exempting the contractor from liability when **[*812]** that employer "discovers the danger, or it is obvious to him." *Id. at 173.* **[***44]** In such instances, we said, the responsibility of the employer would supersede that of the contractor. *Id.* The trial court, noting that there was "a question . . . as to what the State knew and when," concluded that the issue was not as "clear-cut" as the defense contended, and as such was appropriate for consideration by the jury. The trial court accordingly denied CLD's motion for a directed verdict. CLD now contends that it was error for the trial court to do so.

HN17[↑] A party is entitled to a directed verdict only when the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand. *Carignan v. N.H. Int'l Speedway, 151 N.H. 409, 413, 858 A.2d 536 (2004)*. Our review of a trial court's denial of a motion for directed verdict is extremely narrow. *Id.* We will uphold a denial of the motion where sufficient evidence in the record supports the ruling. *Id.* Thus, absent an unsustainable exercise of discretion, we will not reverse a trial court's ruling on a motion for directed verdict.

The only evidence **[***45]** offered by CLD in support of its contention is testimony elicited from a NHDOT employee regarding a "trouble call" received by NHDOT on May 3, 1999. According to the employee, he was asked to check the timing at the Wal-Mart exit because "[s]omeone felt there was a problem with it." He further testified that, upon arriving at the scene, he discovered that "[e]verything seemed to be working just fine," that he searched for equipment problems and found none, and that the loops were operating properly. Summing up his visit to the intersection following the "trouble call," the NHDOT employee stated:

> I looked for all the physical problems. I didn't find anything. The intersection was operating. No one was backed up. No one was waiting. Everything seemed to work.

Rather than support CLD's contention that a directed verdict was proper, the proffered testimony tends to seriously undermine it. We conclude that the State's alleged superseding responsibility was plainly a jury issue, and that the record supports the trial court's determination. Therefore, we conclude that the trial court did not unsustainably exercise its discretion by denying the plaintiff's motion for directed **[***46]** verdict.

Affirmed.

BRODERICK, C.J., and DALIANIS, J., concurred.

End of Document

Everitt v. GE

Supreme Court of New Hampshire

April 5, 2007, Argued; September 21, 2007, Opinion Issued

No. 2006-481

Reporter
156 N.H. 202 *; 932 A.2d 831 **; 2007 N.H. LEXIS 164 ***

SARAH EVERITT v. GENERAL ELECTRIC COMPANY & a.

Subsequent History: [***1] Released for Publication on September 21, 2007.

On remand at, Summary judgment granted by *Everitt v. GE, 2008 N.H. Super. LEXIS 124 (2008)*

Prior History: Hillsborough-northern judicial district.

Everitt v. GE, 2006 N.H. Super. LEXIS 85 (2006)

Disposition: Affirmed in part; reversed in part; and remanded.

Core Terms

immunity, municipal, discretionary function, decisions, fault, employees, omissions, personal liability, discretionary, public official, trial court, tortfeasors, ministerial, quotation, qualified immunity, police officer, planning, settling tortfeasor, common law immunity, functions, interlocutory appeal, common law, parties, detain, summary judgment, official duty, apportionment, vicarious, lawsuits, protects

Case Summary

Procedural Posture
Plaintiff accident victim sued defendants, the town and the police officers, in the Hillsborough Superior Court (New Hampshire), for negligence. The trial court denied a motion for summary judgment by the town and the officers. After the town and the officers filed third-party claims against defendant vehicle driver, the trial court denied the driver's motion to dismiss the claims. The trial court certified questions for interlocutory appeal.

Overview

The police officers talked to the driver and conducted field sobriety tests. The officers, under *RSA 135-C:28(III)* (2005) and *RSA 172-B:3* (2002), then decided to release the driver. The driver subsequently was involved in an auto accident with the victim. The victim and the driver settled prior to the victim's suit. The victim asserted that the officers negligently failed to detain the driver. On appeal, the court found that the trial court erred under *RSA 507:7-e(I)* (1997) in denying the driver's motion to dismiss him as an active litigant because the town and the officers were not permitted to bring the driver, who was a settling tortfeasor, into the case as an active litigant. Further, the decision of the officers not to detain the driver was not the type of discretionary function protected under the discretionary function immunity exception. Moreover, the town was not able to rely upon discretionary function immunity to protect it from liability for the alleged negligence of the officers. Finally, the case had to be remanded for the trial court to determine whether the officers were entitled to official immunity, and whether the town was thereby entitled to vicarious immunity.

Outcome
The denial of the driver's motion to dismiss him from the lawsuit was reversed, and the denial of the town's motion for summary judgment was affirmed. The case was remanded for the trial court to determine whether the police officers were entitled to official immunity for their decision not to detain the driver, and whether the town was entitled to vicarious immunity.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of

Review > De Novo Review

HN1[] **Standards of Review, De Novo Review**

An inquiry that constitutes a question of law will be reviewed de novo.

Torts > ... > Defenses > Comparative Fault > Apportionment of Fault

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > ... > Comparative Fault > Multiple Parties > Contribution

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN2[] **Comparative Fault, Apportionment of Fault**

The New Hampshire Legislature has enacted a comprehensive statutory framework for apportionment of liability and contribution in tort actions, designing several provisions of *RSA ch. 507* to work in concert to create a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution.

Civil Procedure > Trials > Bench Trials

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Civil Procedure > ... > Jury Trials > Jury Instructions > Standard Instructions

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN3[] **Trials, Bench Trials**

See *RSA 507:7-e(I)* (1997).

Torts > ... > Defenses > Comparative Fault > Apportionment of Fault

Torts > ... > Comparative Fault > Multiple Parties > Contribution

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN4[] **Comparative Fault, Apportionment of Fault**

For the purposes of apportionment under *RSA 507:7-e(I)(b)* (1997), the term "party" refers to parties to an action, including settling parties.

Torts > ... > Defenses > Comparative Fault > Apportionment of Fault

Torts > ... > Comparative Fault > Multiple Parties > Contribution

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN5[] **Comparative Fault, Apportionment of Fault**

For apportionment purposes under *RSA 507:7-e* (1997), the word "party" refers not only to parties to an action, including settling parties, but incorporates all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise never sued.

Torts > ... > Comparative Fault > Multiple Parties > Absent Defendants

Torts > ... > Comparative Fault > Multiple Parties > Contribution

Torts > ... > Defenses > Comparative Fault > Apportionment of Fault

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN6[] Multiple Parties, Absent Defendants

A defendant may not easily shift fault under RSA 507:7-e (1997); allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Torts > ... > Comparative Fault > Multiple Parties > Absent Defendants

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Torts > ... > Defenses > Comparative Fault > Apportionment of Fault

Torts > ... > Multiple Defendants > Contribution > General Overview

HN7[] Compulsory Joinder, Indispensable Parties

A defendant is not permitted under New Hampshire case law to bring a settling tortfeasor into a case as an active litigant, requiring him to participate in and incur the cost of the litigation itself.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN8[] Appellate Jurisdiction, Interlocutory Orders

The Supreme Court of New Hampshire will decline to address arguments raised by appellants that were not preserved for appellate review where they exceed the scope of the interlocutory question presented.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN9[] Summary Judgment, Evidentiary Considerations

When reviewing the denial of a motion for summary judgment, an appellate court will consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. If no genuine issue of material fact existed, and the moving party was entitled to judgment as a matter of law, then summary judgment should have been granted. The appellate court will review the trial court's application of the law to the facts de novo.

Governments > Local Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > General Overview

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN10[] Local Governments, Claims By & Against

Various concepts of immunity exist under both common law and statutory law to protect governmental entities and public officials from liability for injury allegedly caused by official conduct. Sovereign and municipal immunity are distinct doctrines, both designed to protect particular government entities and both rooted in the common law at their inception. Sovereign immunity

protects the State of New Hampshire itself from suit in its own courts without its consent, and shields it from liability for torts committed by its officers and employees. The New Hampshire Legislature has adopted the doctrine of sovereign immunity by statute, RSA 99-D:1 (2001), and has waived immunity for certain circumscribed acts. The doctrine of municipal immunity has historically protected local governments from tort liability. However, the Supreme Court of New Hampshire has abrogated the common law doctrine of municipal immunity with limited exception. Consequently, municipalities are subject in most instances to the same rules of liability as private corporations.

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Torts > Public Entity
Liability > Immunities > Sovereign Immunity

HN11[] State & Territorial Governments, Claims By & Against

With respect to personal liability for public officials and employees, the doctrines of qualified immunity and official immunity provide immunity for wrongful acts committed within the scope of their government employment. The doctrines are distinct, however, in that the former shields against lawsuits alleging constitutional violations, whereas the latter shields against lawsuits alleging common law torts, such as negligence. When it adopted sovereign immunity as the law of the State of New Hampshire, the New Hampshire Legislature also adopted official immunity for state and state agency officers, trustees, officials, and employees. RSA 99-D:1 (2001).

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Sovereign Immunity

Governments > State & Territorial
Governments > Employees & Officials

HN12[] State & Territorial Governments, Claims By & Against

See RSA 99-D:1 (2001).

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > General Overview

Governments > Local Governments > Employees & Officials

HN13[] Local Governments, Claims By & Against

While the New Hampshire Legislature has adopted isolated provisions affording immunity to certain municipal officials, it has not enacted a provision corollary to RSA 99-D:1 (2001) extending official immunity to all municipal officers, trustees, officials, and employees. Thus, other than those instances in which the Legislature has spoken, the scope of official immunity for municipal employees sued in their individual capacities remains a common law question.

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN14[] Immunities, Absolute Immunity

The Supreme Court of New Hampshire has recognized that certain essential, fundamental activities of government must remain immune from tort liability so that the government can govern, and thus the court has preserved the discretionary function immunity exception primarily to limit judicial interference with legislative and executive decisionmaking. To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered

and passed on the matter would be to obstruct normal governmental operations. To that end, the court has defined the exception to provide immunity protection only for acts and omissions constituting (1) the exercise of a legislative or judicial function, and (2) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN15 **Immunities, Qualified Immunity**

In assessing whether the discretionary function immunity exception applies in any given case, the Supreme Court of New Hampshire distinguishes between planning or discretionary functions and functions that are purely ministerial. The court has refused to adopt a bright line rule to determine whether conduct constitutes discretionary planning or merely the ministerial implementation of a plan. Rather, recognizing that the distinction is sometimes blurred, the court has adopted the following test to discriminate between the different functions: When the particular conduct which has caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN16 **Immunities, Qualified Immunity**

It is not simply the exercise of a high degree of discretion and judgment that distinguishes immune acts or omissions from those that are not; the discretion or judgment must attach to decisions requiring consideration of public policy or planning to be protected. In particular, the Supreme Court of New Hampshire has distinguished between policy decisions involving the consideration of competing economic, social, and political factors and operational or ministerial decisions required to implement the policy decisions. Immunity extends only to decisions, acts, and omissions for which attaching liability would permit judicial second-guessing of the governing functions of another branch of government.

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN17 **Immunities, Qualified Immunity**

Immunity for discretionary functions involves acts or omissions constituting the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.

Governments > Local Governments > Duties & Powers

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Police Power

HN18 **Local Governments, Duties & Powers**

See *RSA 135-C:28(III)* (2005).

Governments > Local Governments > Duties & Powers

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Police Power

HN19 **Local Governments, Duties & Powers**

See *RSA 172-B:3* (2002).

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN20 **Immunities, Qualified Immunity**

The exercise of discretion, even to a significant degree is not the sole factor for determining whether government conduct constitutes a discretionary function. To be protected, the official discretion must constitute a choice of policy or planning, involving the consideration of competing economic, social, and political factors.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN21[] Local Governments, Claims By & Against

As the last remnant of common law municipal immunity, the discretionary function immunity exception has been tailored to satisfy the underlying policy of preserving and respecting the system of separation of powers.

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > Judicial Immunity

HN22[] Local Governments, Employees & Officials

Official immunity protects individual government officials or employees from personal liability for discretionary actions taken by them within the course of their employment or official duties. The Supreme Court of New Hampshire has applied official immunity to protect various government employees from personal liability. For example, any public officer performing judicial duties is immune from suit for harm caused by a mistake made in the performance of official duties, provided the officer had jurisdiction over the person and subject matter. Prosecutors also enjoy immunity when performing advocacy functions; that is, functions which are intimately related to initiating and pursuing judicial proceedings against a person. The New Hampshire Legislature has provided official immunity to certain municipal employees performing particular job functions on the government's behalf. Further, it has adopted official immunity as the law of the State of New Hampshire concerning all state officers, trustees, officials, and employees. RSA 99-D:1 (2001).

Torts > Public Entity
Liability > Immunities > Absolute Immunity

HN23[] Immunities, Absolute Immunity

The goal of official immunity is to protect public officials from the fear of personal liability, which might deter independent action and impair effective performance of their duties. A genuine need exists to preserve independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. Further, those individuals charged with exercising discretion and judgment when conducting the affairs of government stand in a unique position. The complex process of the administration of government requires that officers and employees be charged with the duty of making decisions, either of law or of fact, and of acting in accordance with their determinations.

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > State & Territorial
Governments > Employees & Officials

HN24[] Local Governments, Employees & Officials

It would be manifestly unfair to place any public official in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight.

Governments > Local Governments > Employees & Officials

Torts > Public Entity

Liability > Immunities > General Overview

Governments > State & Territorial
Governments > Employees & Officials

HN25[] Local Governments, Employees & Officials

The United States Supreme Court has pointed out that the consequences of personal liability are not limited to liability for money damages; they also include the general costs of subjecting officials to the risks of trial--distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > State & Territorial
Governments > Employees & Officials

HN26[] Local Governments, Employees & Officials

Official immunity is designed to encourage and safeguard the ability of public officials to act properly in the exercise of the discretion required by their official duties to the benefit of the public on whose behalf the officials act.

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN27[] Local Governments, Employees & Officials

Whether, and to what extent, official immunity should be granted to a particular public official is largely a policy question, and depends upon the nature of the claim against the official and the particular government activity that is alleged to have given rise to the claim. It is necessary to examine the kind of discretion which is exercised and whether or not the challenged government activities require something more than the performance of ministerial duties.

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > State & Territorial
Governments > Employees & Officials

HN28[] Local Governments, Employees & Officials

Numerous factors must be examined and weighed to determine to what extent official immunity should be granted to a particular public official, and the Supreme Court of New Hampshire has identified but a few: (1) the nature and importance of the function that the officer is performing; (2) the importance that the duty be performed to the best judgment of the officer, unhampered by extraneous matters; (3) whether the function is performed by private individuals for which they could be held liable in tort or it is one performed solely by the government; (4) the extent of the responsibility involved and the extent to which the imposition of liability would impair the free exercise of discretion by the officer; (5) the likelihood that the official will be subjected to frequent accusations of wrongful motives; (6) the extent to which the threat of vexatious lawsuits will impact the exercise of discretion; (7) whether the official would be indemnified by the government or whether any damage award would be covered by insurance; (8) the likelihood that damage will result to members of the public in the absence of immunity; (9) the nature of the harm borne by the injured party should immunity attach; and (10) the availability of alternative remedies to the injured party.

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > State & Territorial
Governments > Employees & Officials

HN29[] Local Governments, Employees & Officials

The importance of a public officer's freedom of decision and the likelihood of unjust suit for honest decisionmaking are factors to be considered in deciding whether official conduct is discretionary and immune or ministerial and unprotected.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > General Overview

Governments > Local Governments > Employees & Officials

HN30[] Local Governments, Claims By & Against

The Supreme Court of New Hampshire has emphasized that compelling a citizen to bear his loss himself when injured by the negligence of municipal employees offends the basic principles of equality of burdens and of elementary justice. The court has further recognized that leaving an injured citizen exposed without recourse is foreign to the spirit of the constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person or property.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

HN31[] Local Governments, Claims By & Against

It is impossible to know whether a claim against an official is well founded until the case has been tried, and thus to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Police Power

HN32[] Local Governments, Claims By & Against

The Supreme Court of New Hampshire has decided that encouraging independent police judgment for the protection and welfare of the citizenry at large must prevail over ensuring common law civil recourse for individuals who may be injured by errant police decisions. The court has adopted parameters for official immunity, as informed by the New Hampshire case law, the law in foreign jurisdictions as well as the scope of official immunity identified by the New Hampshire Legislature in *RSA 99-D:1* (2001). Accordingly, the court holds that municipal police officers are immune from personal liability for decisions, acts or omissions that are: (1) made within the scope of their official duties while in the course of their employment; (2) discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner.

Governments > Local Governments > Claims By & Against

Torts > Public Entity

Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

HN33[] Local Governments, Claims By & Against

The Supreme Court of New Hampshire cautions against a formulaic approach to discerning discretionary and ministerial decisions, acts or omissions. In the context of immunity, these terms are not subject to a dictionary definition, nor can they be reduced to a set of specific rules. The prescription the court provides for discerning the dividing point between discretionary and ministerial decisions, acts or omissions is intended not to provide exacting strictures, but rather to furnish guiding criteria to enable courts to render legal conclusions that accomplish the policies underlying the grant of official immunity. Above all, the distinction must serve the purposes underlying official immunity.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

HN34[] Local Governments, Claims By & Against

A discretionary decision, act, or omission involves the exercise of personal deliberation and individual professional judgment that necessarily reflects the facts of the situation and the professional goal. Such decisions include those for which there are no hard and fast rules as to the course of conduct that one must or must not take and those acts requiring the exercise of judgment and choice and involving what is just and proper under the circumstances. An official's decision, act, or omission is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion, and includes those decisions, acts or omissions imposed by law with performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

HN35[] Local Governments, Claims By & Against

"Discretionary" necessarily has a broader meaning in the context of official immunity than that in the context of the discretionary function immunity exception for municipalities given the differing policies underlying the two. The discretionary function immunity exception protects municipalities from judicial intrusion into the province of the executive or legislative branch by supervising its policy and planning decisions through tort law. Thus, the discretionary functions that fall within the protection of the exception are limited to discretionary decisions involving municipal policy-making or planning. By contrast, official immunity is premised upon removing the fear of personal liability for public officials who are required to exercise discretion in the performance of their official duties so that they are free to exercise independent judgment and effectively perform the responsibilities of their government employment.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Qualified Immunity

Governments > Local Governments > Employees & Officials

HN36[] Local Governments, Claims By & Against

Public officials may be required to exercise discretion in the operation or implementation of a government policy or plan, such that subjecting the decision to unbridled tort liability would compromise the official's ability to render independent judgment and effectively perform his job. Accordingly, the scope of the discretionary decisions, acts or omissions protected by official immunity must be broader than functions of governing, with official immunity protecting the kind of discretion

exercised at the operational level rather than exclusively at the policy-making or planning level.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > General Overview

HN37 **Local Governments, Claims By & Against**

The purpose of immunity is to operate as a bar to a lawsuit, rather than as a mere defense against liability, and is effectively lost if a case is erroneously permitted to go to trial.

Governments > Local Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Absolute Immunity

Governments > Local Governments > Employees & Officials

Torts > Public Entity
Liability > Immunities > Qualified Immunity

HN38 **Local Governments, Claims By & Against**

Official immunity, when available to individual public officials, generally may be vicariously extended to the government entity employing the individual, but it is not an automatic grant. Vicarious immunity ought to apply when the very policies underlying the grant of official immunity to an individual public official would otherwise be effectively undermined. In other words, vicarious immunity applies when exposing the municipality to liability would focus stifling attention upon the individual official's job performance and thereby deter effective performance of the discretionary duties at issue.

Counsel: *Thomas Craig, PA*, of Manchester (Thomas Craig and David Woodbury on the brief, and Mr. Woodbury orally), for the plaintiff.

Devine, Millimet & Branch, P.A., of Manchester (Donald E. Gardner and Donald L. Smith on the brief, and Mr. Smith orally), for defendant Keith Lee.

Ransmeier & Spellman, P.C., of Concord (Charles P. Bauer & a. on the brief, and Mr. Bauer orally), for defendants Town of Hooksett and Owen Gaskell.

Wiggin & Nourie, P.A., of Manchester (Gordon A. Rehnborg, Jr. and Mary Ann Dempsey on the brief, and Mr. Rehnborg orally), for defendant Jeremiah Citro.

Judges: BRODERICK, C.J. DALIANIS and DUGGAN, JJ., concurred.

Opinion by: BRODERICK

Opinion

[834] [*204]** BRODERICK, C.J. This interlocutory appeal, *see Sup. Ct. R. 8*, was brought by direct defendants, Town of Hooksett (Town), Owen Gaskell and Keith Lee, and third-party defendant Jeremiah Citro, from two rulings of the Superior Court (*Conboy*, J.). The first denied the direct defendants' motion for summary judgment seeking immunity from the negligence claim brought by the plaintiff, Sarah Everitt, and the second denied Citro's motion to dismiss the third-party claims against him. **[***2]** We affirm in part, reverse in part and remand.

I

The following facts are taken from the interlocutory appeal statement, unless otherwise noted. *See Guglielmo v. Worldcom, 148 N.H. 309, 311, 808 A.2d 65 (2002)*. Citro was employed at the General Electric (GE) facility in Hooksett. On Saturday morning, November 1, 2003, he arrived at work, and his supervisor reminded him that on the day before, he had been instructed not to return to work until Monday. When Citro failed to leave, GE security contacted the Hooksett Police Department. Lee, a Hooksett police officer, arrived at about 10:45 a.m., but Citro had already left. Officer Lee was familiar with Citro from a prior encounter and went to his home to speak with him. Citro admitted that he was not supposed to be at the GE facility and agreed not to return there until the following Monday. Around 12:45 p.m. that day, however, Citro returned to GE. Hooksett Police were again contacted, and Officer Lee responded to the call. When he arrived, he noticed Citro sitting in his vehicle outside of the company gate. Citro told the officer that he was supposed to meet with the company nurse. During this conversation, Lieutenant

Gaskell, also from the Hooksett **[***3]** Police Department, arrived. He observed that Citro had difficulty understanding the situation. As a result, the police conducted field sobriety tests and determined that Citro should be released. At about 3:00 p.m., Citro was involved in a motor vehicle accident with the van in which Everitt was a passenger, allegedly causing her significant injuries. **[*205]** Everitt and Citro settled prior to suit for the full amount of Citro's automobile liability insurance limits.

Everitt then sued GE, a GE supervisor, the Town of Hooksett, Lieutenant Gaskell and Officer Lee. She later added as defendants the security company for GE and **[**835]** one of its employees. Everitt asserts that, because of Citro's unusual behavior, each defendant owed her a duty of care to prevent Citro from operating his motor vehicle on the day of the accident. With respect to the Town and the police officers, Everitt also alleges that they had knowledge of or access to information about Citro's prior motor vehicle accidents. For example, she asserts that two years before her accident, Citro hit a car in a parking lot while operating his automobile and that the Hooksett police took him into protective custody because of his disoriented **[***4]** state.

Officer Lee moved for summary judgment, which the Town and Lieutenant Gaskell joined, arguing, *inter alia*, that the doctrines of discretionary function immunity and qualified immunity precluded any liability for the decision not to detain Citro. The trial court denied the motion. Lee then brought a contribution action against Citro for his role in the accident, and defendants Town and Lieutenant Gaskell filed a claim against Citro, contending that he was an indispensable party who should be joined as a third-party defendant. Citro moved to dismiss these claims, arguing that under RSA 507:7-h (1997), no contribution action could be filed against him because he had entered into a valid settlement agreement with Everitt. He also contended that common law did not support including him in the litigation as an indispensable party, and that *Nilsson v. Bierman, 150 N.H. 393, 839 A.2d 25 (2003)*, did not permit the joinder of a settling party. The trial court denied the motion and subsequently certified five questions for interlocutory appeal. We accepted three, none of which pertains to defendants GE, the GE supervisor, GE's security company or its employee.

II

The first two questions relate to whether **[***5]** the trial court properly denied Citro's motion to dismiss him as a participating party in the litigation. They inquire:

> Does 507:7-h, Effect of Release or Covenant Not to Sue, preclude a settling tortfeasor from being brought into litigation under a claim of contribution when there is no allegation that the settlement was not made in good faith?
>
> Does *Nilsson v. Bierman, 150 N.H. 393, 839 A.2d 25 (2003)* allow a defendant to bring a settling tortfeasor into the litigation as a party, as **[*206]** opposed to simply allowing them to be named on the jury verdict form, thereby requiring them to participate in the litigation itself and incur the costs of litigation despite obtaining a full release from liability?

Because defendant Lee now concedes that his contribution claim is barred by RSA 507:7-h, we need not address the first question. Thus, we only consider whether under *Nilsson*, a settling tortfeasor can be compelled to join litigation as a participating party. ***HN1***[↑] This inquiry constitutes a question of law, which we review *de novo*. *See K & B Rock Crushing v. Town of Auburn, 153 N.H. 566, 568, 904 A.2d 697 (2006)*

HN2[↑] The legislature has enacted a "comprehensive statutory framework for apportionment of liability and contribution" in **[***6]** tort actions, designing several provisions of *RSA chapter 507* to work in concert to create "a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution." *Nilsson, 150 N.H. at 395* (quotation omitted). In *Nilsson*, we were asked to decide whether the trial court properly instructed the jury to assess the percentage of fault attributable to a joint tortfeasor who settled before trial and to a non-settling party in accordance with *RSA 507:7-e*. *Id.* That statutory provision states in pertinent part:

> ***HN3***[↑] In all actions, the court shall:
>
> **[**836]** (a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and
> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

RSA 507:7-e, I(a), (b) (1997). We held that HN4[↑] for the purposes of apportionment under RSA 507:7-e, I(b), the term "party" [***7] refers to "parties to an action, including settling parties," and affirmed the jury verdict that apportioned ninety-nine percent of the fault to the settling defendant and one percent to the non-settling defendant. Nilsson, 150 N.H. at 396 (ellipsis and quotations omitted).

In DeBenedetto v. CLD Consulting Engineers, 153 N.H. 793, 903 A.2d 969 (2006), a decision issued after this interlocutory appeal was filed, we again reviewed the scope of the term "party" in the apportionment statute, RSA 507:7-e. [*207] We examined whether the trial court erred by instructing the jury to consider the apportionment of fault against "non-parties," a settling tortfeasor and a tortfeasor who was immune from liability. DeBenedetto, 153 N.H. at 797. Following *Nilsson,* we upheld the trial court's instruction noting that HN5[↑] "for apportionment purposes under RSA 507:7-e, the word 'party' refers not only to parties to an action, including settling parties," but incorporates "all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise [never sued.]" Id. at 804 (quotations and ellipsis omitted).

Permitting juries to allocate fault on the verdict form among current parties, [***8] former parties who have settled, tortfeasors who settled before suit and immune tortfeasors does not mean that a settling tortfeasor (whether that tortfeasor settled with the plaintiff before or after suit was filed) may be joined in the litigation as an active litigant. In *Nilsson,* the settling tortfeasor was not an active litigant at trial. Nilsson, 150 N.H. at 396. The trial court simply instructed the jury about apportioning fault and, in its special verdict questions, asked the jury to assess the percentage of fault, if any, that was attributable to the defendant and the settling non-litigant tortfeasor. Id. at 394. We note that the jury returned a verdict assessing ninety-nine percent of fault to the settling tortfeasor who was not an active litigant. *Id.*

Further, in *DeBenedetto,* we anticipated that jurors would apportion fault among joint tortfeasors, including those "otherwise not before the court." DeBenedetto, 153 N.H. at 804. Indeed, we noted that HN6[↑] a defendant "may not easily shift fault under RSA 507:7-e; allegations of a *non-litigant* tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." *Id.* (emphasis [***9] added). Thus, we anticipated that the jury or the court would need to apportion fault among joint tortfeasors, even when some tortfeasors were not active litigants at trial, and we expected that the burden of establishing fault on the part of "non-litigant" tortfeasors would be borne by the litigant defendants. *Id.* Requiring a settling tortfeasor to participate actively in litigation, regardless of whether the defense cost is borne by an insurer, is not contemplated or permitted by Nilsson or DeBenedetto. Therefore, we conclude that HN7[↑] a defendant is not permitted under Nilsson [**837] or DeBenedetto to bring a settling tortfeasor into the case as an active litigant, requiring him to participate in and incur the cost of the litigation itself. Accordingly, we hold that the trial court erred in denying Citro's motion to dismiss him as an active litigant in the case.

HN8[↑] We decline to address arguments raised by the defendants that were not preserved for our review because they exceed the scope of the [*208] interlocutory question presented. The defendants Town and Lieutenant Gaskell argue that the trial court properly exercised its discretion to retain Citro as a third-party defendant pursuant to RSA 514:10 [***10] (2007), Superior Court Rule 27 and our common law practice regarding necessary and indispensable parties. Defendant Lee joined in their argument, identifying Citro as a necessary and indispensable party. The interlocutory appeal question, however, is limited to inquiring whether *Nilsson* permits the defendants to join a settling tortfeasor as a party to the litigation. Thus, we decline to address the defendants' additional arguments. Further, we do not address the contention made by defendants Town and Gaskell that joinder of Citro comports with their rights to equal protection and due process under our State Constitution. This argument is also beyond the scope of the interlocutory appeal question, was asserted in a mere passing manner without further development, *see* Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 592, 825 A.2d 480 (2003), and was not raised below.

III

We now turn to the third question posed in the defendants' interlocutory appeal:

> Were Officer Lee, Lt. Gaskell and/or the Town of Hooksett entitled to summary judgment because the decision not to detain Mr. Citro was a discretionary decision entitled to immunity under the doctrines of discretionary function immunity and/or qualified [***11] immunity?

This question incorporates two separate immunity

inquiries: (1) whether the discretionary function immunity exception to municipal liability protects the individual police officers and/or the Town; and (2) whether qualified immunity affords similar protection. At the outset, we note that while Everitt asserts a direct claim against the Town for failing to provide proper training and discipline for its police officers, this claim was not included in the interlocutory appeal. Thus, our analysis regarding the defendants' possible immunity reaches only Everitt's claim of negligence premised upon the officers' decision not to detain Citro.

In denying the defendants' motion for summary judgment, the trial court ruled that it could not "find, under all the circumstances, that the Hooksett defendants are entitled[,] as a matter of law[,] to municipal immunity." It offered no other analysis or reasoning and did not separately address qualified immunity. ***HN9***[↑] When reviewing the denial of a motion for summary judgment, "we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Porter v. City of Manchester, 155 N.H. 149, 151, [*209] 921 A.2d 393, 398 (2007)*. **[***12]** If "no genuine issue of material fact existed, and the moving party was entitled to judgment as a matter of law, then summary judgment should have been granted." *Id.* (quotation omitted); *see* *RSA 491:8-a, III* (1997). We review the trial court's application of the law to the facts *de novo*. *Belanger v. MMG Ins. Co., 153 N.H. 584, 586, 899 A.2d 985 (2006)*.

A

HN10[↑] Various concepts of immunity exist under both common law and statutory law **[**838]** to protect governmental entities and public officials from liability for injury allegedly caused by official conduct. Sovereign and municipal immunity are distinct doctrines, both designed to protect particular government entities and both rooted in the common law at their inception. *Tilton v. Dougherty, 126 N.H. 294, 298, 493 A.2d 442 (1985)* (sovereign immunity); *Merrill v. Manchester, 114 N.H. 722, 727, 332 A.2d 378 (1974)* (municipal immunity). Sovereign immunity protects the State itself "from suit in its own courts without its consent," and shields it "from liability for torts committed by its officers and employees." *Tilton, 126 N.H. at 297*. In 1978, the legislature adopted the doctrine of sovereign immunity by statute, *RSA 99-D:1* (2001), and has waived immunity for certain circumscribed acts, see, **[***13]** *e.g.*, *RSA 507-B:2* (1997) (governmental unit may be held liable for certain damages arising out of government's operation, *inter alia*, of motor vehicles and premises). The doctrine of municipal immunity has historically protected local governments from tort liability. *Merrill, 114 N.H. at 724*. More than three decades ago, however, this court abrogated the common law doctrine of municipal immunity with limited exception. *Id. at 729*. Consequently, municipalities are subject in most instances to the same rules of liability as private corporations. *Id. at 730*.

HN11[↑] With respect to personal liability for public officials and employees, the doctrines of qualified immunity and official immunity provide immunity for wrongful acts committed within the scope of their government employment. *Richardson v. Chevrefils, 131 N.H. 227, 232, 552 A.2d 89 (1988)*; *Tilton, 126 N.H. at 299*. The doctrines are distinct, however, in that the former shields against lawsuits alleging constitutional violations, such as claims brought under *42 U.S.C. § 1983* (2000), whereas the latter shields against lawsuits alleging common law torts, such as negligence. *Compare Richardson, 131 N.H. at 232, with Tilton, 126 N.H. at 299; see also Mulligan v. Rioux, 229 Conn. 716, 643 A.2d 1226, 1234 (Conn. 1994)* **[***14]** (standard for qualified immunity that protects public officials from constitutional claims under *42 U.S.C. § 1983* is distinct from that for official immunity against common law claims). When it adopted sovereign immunity as the law of this state in 1978, the legislature also adopted official immunity for state **[*210]** and state agency **[**839]** officers, trustees, officials and employees. *RSA 99-D:1*. This provision states in part that:

> ***HN12***[↑] The doctrine of sovereign immunity of the state, and by the extension of that doctrine, the official immunity of officers, trustees, officials, or employees of the state or any agency thereof acting within the scope of official duty and not in a wanton or reckless manner, except as otherwise expressly provided by statute, is hereby adopted as the law of the state.

RSA 99-D:1. It further provides that:

> The immunity of the state's officers, trustees, officials, and employees as set forth herein shall be applicable to all claims and civil actions, which claims or actions arise against such officers, trustees, officials, and employees in their personal capacity or official capacity, or both such capacities, from acts or omissions within the scope of their official duty while **[***15]** in the course of their employment for the state and not in a wanton or

reckless manner.

Id. HN13[↑] While the legislature also has adopted isolated provisions affording immunity to certain municipal officials, it has not enacted a provision corollary to RSA 99-D:1 extending official immunity to all municipal officers, trustees, officials and employees. *See, e.g.,* RSA 31:104 (2000) (certain municipal officials, such as selectmen, school board members, mayors and city managers, cannot be held liable for certain acts or decisions made "in good faith and within the scope of [their] authority"). Thus, other than those instances in which the legislature has spoken, the scope of official immunity for municipal employees sued in their individual capacities remains a common law question.

B

We turn now to consider the first part of the immunity inquiry before us, that is, whether discretionary function immunity identified in *Merrill* precludes liability against the Town for the decision of Lieutenant Gaskell and Officer Lee not to detain Citro. HN14[↑] We have recognized that "certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern," *Hacking v. Town of Belmont, 143 N.H. 546, 549, 736 A.2d 1229 (1999)* **[***16]** (quotations and brackets omitted), and thus we preserved the discretionary function immunity exception primarily "to limit judicial interference with legislative and executive decision-making," *Schoff v. City of Somersworth, 137 N.H. 583, 590, 630 A.2d 783 (1993)*. "To accept a jury's verdict as to the reasonableness and safety of a plan of **[*211]** governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations." *Gardner v. City of Concord, 137 N.H. 253, 256, 624 A.2d 1337 (1993)*. To that end, we defined the exception to provide immunity protection only for

> acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.

Merrill, 114 N.H. at 729 (discretionary function immunity exception).

HN15[↑] In assessing whether the discretionary function immunity exception applies in any given case, we "distinguish between planning or discretionary functions and functions that are purely ministerial." *Hacking, 143 N.H. at 549* **[***17]** (quotation omitted); *see Gardner, 137 N.H. at 257*. "We have refused to adopt a bright line rule to determine whether conduct constitutes discretionary planning or merely the ministerial implementation of a plan." *Hacking, 143 N.H. at 549-50*. Rather, recognizing that the distinction is "sometimes blurred," *Gardner, 137 N.H. at 257*, we adopted the following test to discriminate between the different functions:

> When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.

Id. HN16[↑] It is not simply the exercise of a high degree of discretion and judgment that distinguishes immune acts or omissions from those that are not; the discretion or judgment must attach to decisions requiring consideration of public policy or planning to be protected. *See Mahan v. N. H. Dep't of Admin. Services, 141 N.H. 747, 750, 693 A.2d 79 (1997)*. In particular, we distinguish between "policy decisions involving the consideration of competing economic, social, and political factors" and "operational or ministerial decisions **[***18]** required **[**840]** to implement the policy decisions." *Id.* Immunity extends only to decisions, acts and omissions for which attaching liability would permit judicial second-guessing of the governing functions of another branch of government. *See id. at 749-50*.

We have had numerous occasions to address the scope of the discretionary function immunity exception. In so doing, we have held that **[*212]** immunity exists for: a planning board's approval of a subdivision plan without adequate drainage, *Hurley v. Hudson, 112 N.H. 365, 369, 296 A.2d 905 (1972)*; a town selectmen's decision not to lay out certain roads, *Rockhouse Mt. Property Owners Assoc. v. Town of Conway, 127 N.H. 593, 600, 503 A.2d 1385 (1986)*; traffic control and parking regulations, *Sorenson v. City of Manchester, 136 N.H. 692, 694, 621 A.2d 438 (1993)*; setting of road maintenance standards and construction of a sidewalk when based upon a city's faulty plan or design, *Gardner, 137 N.H. at 258, 259*; traffic control and management of roadway safety, *Bergeron v. City of Manchester, 140 N.H. 417, 422, 424, 666 A.2d 982 (1995)*; a decision whether to enact maintenance and inspection regulations, *Mahan, 141 N.H. at 751*; and the training and supervision of coaches and referees at a school

basketball game, **[***19]** Hacking, 143 N.H. at 550.

Yet, we have denied immunity to municipalities for failing to carry out an established plan to inspect roadway signage and railings, Schoff, 137 N.H. at 590, as well as for decisions by the referees and coaches during a school basketball game, Hacking, 143 N.H. at 551-52. We also have analyzed discretionary function immunity as it applies to the State's limited waiver of sovereign immunity. *See, e.g.*, DiFruscia v. N.H. Dept. of Pub. Works & Highways, 136 N.H. 202, 205, 612 A.2d 1326 (1992) (although decision whether or where to place guardrail on a State highway falls within discretionary immunity, State not immune for failure of State worker to install specific guardrail); Bergeron, 140 N.H. at 422 (State immune from liability for decision whether to install flashing beacon at intersection). After examining "the broad spectrum of official actions that can be called discretionary, to determine the point at which the exercise of discretion is no longer characterized by a choice of policy and becomes simply a choice of a means to implement policy," Mahan, 141 N.H. at 750 (quotation and brackets omitted), we conclude that the decision of Lieutenant Gaskell and Officer Lee not **[***20]** to detain Citro does not constitute the type of discretionary function protected under the *Merrill* immunity exception.

The Town seeks ***HN17***[↑] immunity for discretionary functions involving acts or omissions constituting "the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Merrill, 114 N.H. at 729*. According to the Town, the scope of decisions protected by the discretionary function immunity exception "is not limited to planning decisions by a municipal governing body," but extends protection to the exercise of executive functions. The Town argues that under RSA 135-C:28, III and RSA 172-B:3, police authority to take a person into protective custody requires officers to evaluate the mental condition of a person, the cause of the condition, likely future conduct and harm, and alternative approaches to assisting the person and protecting the public. **[*213]** These decisions, according to the Town, "require[ ] the deliberation and judgment characteristic of discretionary conduct, **[**841]** and fundamental judgments about how to deal with members of the public as a representative **[***21]** of government."

RSA 135-C:28, III (2005) provides in pertinent part that:

> ***HN18***[↑] When a peace officer observes a person engaging in behavior which gives the peace officer reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that unless the person is placed in protective custody the person poses an immediate danger of bodily injury to himself or others, the police officer may place the person in protective custody.

RSA 172-B:3 (2002), states, in pertinent part, that:

> ***HN19***[↑] I. When a peace officer encounters a person who, in the judgment of the officer, is intoxicated as defined in RSA 172-B:1, X, the officer may take such person into protective custody and shall take whichever of the following actions is, in the judgment of the officer, the most appropriate to ensure the safety and welfare of the public, the individual, or both.
>
> . . . .
>
> II. When a peace officer encounters a person who, in the judgment of the officer, is incapacitated as defined in RSA 172-B:1, IX, the officer may take such person into protective custody and shall take whichever of the following actions is, in the judgment of the officer, the most appropriate to ensure the **[***22]** safety and welfare of the public, the individual, or both.

Certainly, under these statutes, the process of reaching a decision about whether to detain Citro required Lieutenant Gaskell and Officer Lee to evaluate carefully Citro's conduct and attendant circumstances, and to use their trained judgment, experience and discretion. Their decision was not menial, rote or automatic. ***HN20***[↑] The exercise of discretion, even to a significant degree, however, is not the sole factor for determining whether government conduct constitutes a discretionary function. To be protected, the official discretion must constitute a choice of policy or planning, involving the consideration of competing economic, social, and political factors. The officers' discretion in this case did not involve legislative or executive policy-making or government planning. *Cf.* Hacking, 143 N.H. at 552 (decisions of referees and coaches during basketball game, while perhaps involving some discretionary judgment, were not decisions **[*214]** concerning municipal planning and public policy); Peavler v. Monroe Cty. Bd. of Com'rs, 528 N.E.2d 40, 45 (Ind. 1988) (question not simply whether judgment was exercised, but whether judgment required consideration **[***23]** of policy). Simply put,

their decision did not involve municipal governing. Therefore, subjecting the Town to liability for the officers' decision is not tantamount to judicial interference with legislative or executive decision-making which would otherwise compromise our system of separation of powers. *See* Schoff, 137 N.H. at 590. Accordingly, the Town, as a matter of law, cannot rely upon discretionary function immunity to protect it from liability for the alleged negligence of Lieutenant Gaskell and Officer Lee.

We decline the Town's invitation to expand the scope of discretionary function immunity. HN21[↑] As the last remnant of common law municipal immunity, the exception was tailored to satisfy the underlying policy of preserving and respecting our system of separation of powers. We are not convinced that this case requires an extension or modification of the parameters already recognized.

[842]** C

The second component of the immunity question before us requires us to consider whether the doctrine of qualified immunity shields the individual police officers from personal liability, as well as vicariously protecting the Town. In reality, Lieutenant Gaskell and Officer Lee seek official immunity, **[***24]** not qualified immunity, because Everitt seeks recovery based upon a common law tort claim and not upon an alleged constitutional violation. Further, in the pleadings below and the briefs before us, Lieutenant Gaskell and Officer Lee argue for application of official immunity, as demonstrated by the legal authority cited for their position, albeit they at times interchange the term qualified immunity.

HN22[↑] Official immunity protects individual government officials or employees from personal liability for discretionary actions taken by them within the course of their employment or official duties. *See* Tilton, 126 N.H. at 298-99; Sletten v. Ramsey County, 675 N.W.2d 291, 300 (Minn. 2004); Cameron v. Lang, 274 Ga. 122, 549 S.E.2d 341, 344 (Ga. 2001). We previously have applied official immunity to protect various government employees from personal liability. For example, any public officer performing judicial duties is immune from suit for harm caused by a mistake made in the performance of official duties, provided the officer had jurisdiction over the person and subject matter. *See* Sargent v. Little, 72 N.H. 555, 556-57, 58 A. 44 (1904) (immunity for members of state board of license commissioners for granting state **[***25]** licenses); Sweeney v. Young, 82 N.H. 159, 165-66, 131 A. 155 (1925) (immunity for members of school board for quasi-judicial decision **[*215]** dismissing student). Prosecutors also enjoy immunity when performing advocacy functions; that is, functions which are intimately related to initiating and pursuing judicial proceedings against a person. Belcher v. Paine, 136 N.H. 137, 146, 612 A.2d 1318 (1992). The legislature has provided official immunity to certain municipal employees performing particular job functions on the government's behalf. *See, e.g.*, RSA 31:104 (certain municipal officials, such as selectmen, school board members, mayors and city managers, cannot be held liable for certain acts or decisions made "in good faith and within the scope of [their] authority"). Further, it adopted official immunity as the law of the state concerning all state officers, trustees, officials and employees. RSA 99-D:1. Whether municipal police officers are entitled to the protection of official immunity remains a common law question, a matter of first impression before us today.

HN23[↑] "The goal of official immunity is to protect public officials from the fear of personal liability, which might deter independent action and impair effective **[***26]** performance of their duties." Sletten, 675 N.W.2d at 299; *see also* Dokman v. County of Hennepin, 637 N.W.2d 286, 296 (Minn. Ct. App. 2001); Hudson v. Town of East Montpelier, 161 Vt. 168, 638 A.2d 561, 564 (Vt. 1993); Restatement (Second) of Torts § 895D comment b at 412 (1979). A genuine need exists to "preserv[e] independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits." Restatement, supra comment b at 412. Further, those individuals charged with exercising discretion and judgment when conducting the affairs of government stand in a unique position:

> The complex process of the administration of government requires that officers and employees be charged with the duty of making decisions, either of law or of fact, and of acting in accordance with their determinations.

Id. HN24[↑] It would be

> manifest[ly] unfair[ ] [to] plac[e] any [public official] in a position in which he **[**843]** is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of **[***27]** hindsight.

Id.; see also Cameron, 549 S.E.2d at 344 (immunity meant to preserve public employee's independence of action without fear of lawsuits and to prevent review of his judgment in hindsight). ***HN25***[↑] The United States Supreme Court has pointed out that the consequences of personal liability

> **[*216]** are not limited to liability for money damages; they also include the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (quotation omitted) (discussing qualified immunity). In sum, ***HN26***[↑] official immunity is designed to encourage and safeguard the ability of public officials to act properly in the exercise of the discretion required by their official duties to the benefit of the public on whose behalf the officials act.

HN27[↑] Whether, and to what extent, official immunity should be granted to a particular public official is largely a policy question, *see* Tilton, 126 N.H. at 299, and depends upon the nature of the claim against the official and the particular government activity that is alleged to have given rise **[***28]** to the claim, *see* Sletten, 675 N.W.2d at 304; Restatement, supra comment f at 415-16. It is necessary to examine "the kind of discretion which is exercised and whether or not the challenged government activities require something more than the performance of ministerial duties." Sletten, 675 N.W.2d at 304. ***HN28***[↑] Ultimately, numerous factors must be examined and weighed, and we identify but a few: (1) the nature and importance of the function that the officer is performing; (2) the importance that the duty be performed to the best judgment of the officer, unhampered by extraneous matters; (3) whether the function is performed by private individuals for which they could be held liable in tort or it is one performed solely by the government; (4) the extent of the responsibility involved and the extent to which the imposition of liability would impair the free exercise of discretion by the officer; (5) the likelihood that the official will be subjected to frequent accusations of wrongful motives; (6) the extent to which the threat of vexatious lawsuits will impact the exercise of discretion; (7) whether the official would be indemnified by the government or whether any damage award would be **[***29]** covered by insurance; (8) the likelihood that damage will result to members of the public in the absence of immunity; (9) the nature of the harm borne by the injured party should immunity attach; and (10) the availability of alternative remedies to the injured party. *See generally* Restatement, supra comment f at 416-17. A commentator aptly stated the nature of the comparison and evaluation of these competing factors:

> Some official conduct is more vulnerable to attack than other conduct. Some official conduct especially needs a free range of choice that is not hampered by concerns over potential personal liability. Other official conduct is neither especially vulnerable to **[*217]** complaint nor in need of especially unhampered decision-making. One who repairs the street can do a good job without provoking a citizen suit; the prosecuting attorney cannot do a good job without provoking anger and, sooner or later, a citizen suit. Good operation of the prosecutor's office **[**844]** does adversely affect people (usually criminals, but, unavoidably, others as well); good operation of the street repair department does not harm people, but on the contrary makes their travel safer. Both kinds of work are socially **[***30]** desirable, but one kind, since it is intended to adversely affect others and does so, is more likely to generate claims than the other. The range of free choice needed in the two kinds of work is also quite different. ***HN29***[↑] The importance of the officer's freedom of decision and the likelihood of unjust suit for honest decision-making are factors to be considered in deciding whether official conduct is "discretionary" and immune or "ministerial" and unprotected.

W.P. Keeton, *et al., Prosser and Keeton on the Law of Torts* § 132, at 1065 (5<th> ed. 1984). Within this framework, we examine whether public policy demands the extension of official immunity to municipal police officers.

Police officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety. This essential and inherently governmental task is not shared with the private sector. Police officers are regularly called upon to utilize judgment and discretion in the performance of their duties. They must make decisions and take actions which have serious consequences and repercussions to the individuals immediately involved, to the public at large and to themselves. On any **[***31]** given day, they are required to employ their training, experience, measured judgment and prudence in a variety of volatile situations, such as investigatory stops, investigations of crime, arrests and high speed pursuits, to name a few.

Even routine traffic stops can be unpredictable and can escalate into dangerous, and sometimes deadly, affairs.

Further, law enforcement by its nature is susceptible to provoking the hostilities and hindsight second-guessing by those directly interacting with police as well as by the citizenry at large. Police officers, as frontline agents for the executive branch, are particularly vulnerable to lawsuits, whether the underlying police conduct or decision was errant or not. Unbridled exposure to personal liability and hindsight review of their decisions would undoubtedly compromise effective law enforcement and unfairly expose officers to personal liability for performing inherently governmental tasks. The public safety entrusted to police officers demands **[*218]** that they remain diligent in their duties and independent in their judgments, without fear of personal liability when someone is injured and claims an officer's decision or conduct was to blame. The **[***32]** public simply cannot afford for those individuals charged with securing and preserving community safety to have their judgment shaded out of fear of subsequent lawsuits or to have their energies otherwise deflected by litigation, at times a lengthy and cumbersome process.

Certainly, it is incontrovertible that immunity can be fundamentally unfair to our citizens who are injured by erroneous police decisions. When abrogating municipal immunity in *Merrill,* ***HN30***[↑] we emphasized that compelling a citizen to bear his loss himself when injured by the negligence of municipal employees "offends the basic principles of equality of burdens and of elementary justice." *Merrill, 114 N.H. at 724.* We further recognized that leaving an injured citizen exposed without recourse "is foreign to the spirit of our constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person or property." *Id. at 725; see* N.H. CONST. pt. I, art. 14. We are, **[**845]** however, at a crossroad of competing policies, and we must formulate a necessary compromise.

Numerous jurisdictions have adopted some version of official immunity to protect police officers from personal liability, either by **[***33]** common law or by legislation. *See, e.g., Borders v. City of Huntsville, 875 So. 2d 1168, 1178 (Ala. 2003)* (statutory immunity); *Samaniego v. City of Kodiak, 2 P.3d 78, 83 (Alaska 2000)* (common law immunity); *Mulligan, 643 A.2d at 1234* (common law immunity); *Cameron, 549 S.E.2d at 344* (common law immunity); *Dokman, 637 N.W.2d at 296* (common law immunity); *Clea v. City of Baltimore, 312 Md. 662, 541 A.2d 1303, 1308 (Md. 1988)* (common law immunity); *Brumfield v. Lowe, 744 So. 2d 383, 388 (Miss. Ct. App. 1999)* (common law immunity); *Prior v. Pruett, 143 N.C. App. 612, 550 S.E.2d 166, 174 (N.C. Ct. App. 2001)* (common law immunity); *Alston v. City of Camden, 168 N.J. 170, 773 A.2d 693, 697, 703-04 (N.J. 2001)* (statutory immunity); *Clark v. University of Houston, 60 S.W.3d 206, 208 (Tex. Ct. App. 2001)* (common law immunity); *Long v. L'Esperance, 166 Vt. 566, 701 A.2d 1048, 1052 (Vt. 1997)* (common law immunity). When affording official immunity to town selectmen, we emphasized realities that are equally applicable here:

> [I]t ***HN31***[↑] is impossible to know whether [a] claim [against an official] is well founded until the case has been tried, and [thus] to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable **[***34]** danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the **[*219]** public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Voelbel v. Town of Bridgewater, 144 N.H. 599, 601, 747 A.2d 252 (1999) (quotation omitted).

Today, ***HN32***[↑] we decide that encouraging independent police judgment for the protection and welfare of the citizenry at large must prevail over ensuring common law civil recourse for individuals who may be injured by errant police **[***35]** decisions. We adopt parameters for official immunity, as informed by our case law, the law in foreign jurisdictions as well as the scope of official immunity identified by the legislature in *RSA 99-D:1.* Accordingly, we hold that municipal police officers are immune from personal liability for decisions, acts or omissions that are: (1) made within the scope of their official duties while in the course of their employment; (2) discretionary, rather than

ministerial; and (3) not made in a wanton or reckless manner. HN33[↑] We caution against a formulaic approach to discerning discretionary and ministerial decisions, acts or omissions. In the context of immunity, these terms are not subject to a dictionary definition, nor can they be reduced to a set of specific rules. Restatement, supra comment d at 413; Hudson, 638 A.2d at 564. The prescription we provide today for discerning the dividing point between discretionary and ministerial decisions, acts or omissions is intended **[**846]** not to provide exacting strictures, but rather to furnish guiding criteria to enable courts to render legal conclusions that accomplish the policies underlying the grant of official immunity. Above all, the distinction must **[***36]** serve the purposes underlying official immunity. See Hudson, 638 A.2d at 564.

HN34[↑] A discretionary decision, act or omission involves the exercise of personal deliberation and individual professional judgment that necessarily reflects the facts of the situation and the professional goal. Sletten, 675 N.W.2d at 306; Clark, 60 S.W.3d at 208. Such decisions include those for which there are no hard and fast rules as to the course of conduct **[*220]** that one must or must not take and those acts requiring the exercise of judgment and choice and involving what is just and proper under the circumstances. Borders, 875 So. 2d at 1178. An official's decision, act or omission is ministerial when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Sletten, 675 N.W.2d at 306; Dokman, 637 N.W.2d at 296; Clark, 60 S.W.3d at 208 (ministerial actions are those which require obedience to orders or performance of a duty which leave no choice for the public official). "Ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion," Mulligan, 643 A.2d at 1233 (quotations and brackets **[***37]** omitted), and includes those decisions, acts or omissions "imposed by law with performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion," Brumfield, 744 So. 2d at 388 (quotation and brackets omitted); see also Restatement, supra comment h at 418 (acts are ministerial when official administers law "with little choice as to when, where, how or under what circumstances their acts are to be done").

We note that the criteria adopted today for characterizing a decision, act or omission as "discretionary" for purposes of official immunity is in accord with Tilton. In Tilton, we refused to apply official immunity to individual state employees because the alleged negligent acts and omissions did not "call for deliberation, discretion, judgment or policy choice," and otherwise constituted "mere inaction or inattention" not protected by official immunity. Tilton, 126 N.H. at 300. Yet, we left open the question of "whether the discretionary character of official action that may support an immunity claim must involve the exercise of a governmental **[***38]** function." Id. (citing discretionary function immunity exception under Merrill). In other words, we did not decide whether official immunity could extend to discretionary decisions, acts or omissions that do not involve governmental policy-making or planning.

HN35[↑] "Discretionary" necessarily has a broader meaning in the context of official immunity than that in the context of the discretionary function immunity exception for municipalities under Merrill given the differing policies underlying the two. See Nusbaum v. Blue Earth County, 422 N.W.2d 713, 718 n.4 (Minn. 1988). The discretionary function immunity exception protects municipalities from judicial intrusion into the province of the executive or legislative branch by supervising its policy and planning decisions through tort law. Thus, the discretionary functions that fall within the protection of the exception are limited to discretionary decisions involving municipal policy-making or planning. By contrast, official **[*221]** immunity is premised upon removing the fear of personal liability for public officials who are required to **[**847]** exercise discretion in the performance of their official duties so that they are free to exercise independent judgment **[***39]** and effectively perform the responsibilities of their government employment. HN36[↑] Public officials may be required to exercise discretion in the operation or implementation of a government policy or plan, such that subjecting the decision to unbridled tort liability would compromise the official's ability to render independent judgment and effectively perform his job. Accordingly, the scope of the discretionary decisions, acts or omissions protected by official immunity must be broader than functions of governing, with official immunity protecting the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level. See Sletten, 675 N.W.2d at 301-02; Hudson, 638 A.2d at 565 n.1.

Because today we have adopted, for the first time, official immunity for municipal police officers, and identified the standard for determining whether such

immunity protects an officer's particular decision, act or omission, we remand this case to the trial court for it to determine whether official immunity applies in this case. We caution that HN37[↑] the purpose of immunity is to operate as a bar to a lawsuit, rather than as a mere defense against liability, and is "effectively **[***40]** lost if a case is erroneously permitted to go to trial." *Sletten, 675 N.W.2d at 300* (quotation omitted); *see also Richardson, 131 N.H. at 231* (discussing qualified immunity for constitutional claims).

IV

One final matter remains, determining whether the Town may enjoy vicarious immunity should the trial court determine that official immunity protects Lieutenant Gaskell and Officer Lee from personal liability for their allegedly negligent decision not to detain Citro. HN38[↑] Official immunity, when available to individual public officials, generally may be vicariously extended to the government entity employing the individual, but it "is not an automatic grant." *Sletten, 675 N.W.2d at 300*; *see also Restatement, supra comment j* at 419-20. Vicarious immunity ought to apply when the very policies underlying the grant of official immunity to an individual public official would otherwise be effectively undermined. *See Sletten, 675 N.W.2d at 300*. In other words, vicarious immunity applies when exposing the municipality to liability would focus "stifling attention" upon the individual official's job performance and thereby deter effective performance of the discretionary duties at issue. *Id.; cf. Tilton, 126 N.H. at 299* **[***41]** (indemnification of individual state officials does not protect independence in judgment and discretion because individuals still would **[*222]** fear retribution from government that would have to pay the judgment). We note that the legislature is free to enact legislation that would otherwise afford relief to citizens harmed by the negligent conduct of municipal police officers. *See Cameron, 549 S.E.2d at 347* (immunity for individual public employee does not protect government employer to the extent that employer has secured liability insurance). On remand, should the trial court determine that Lieutenant Gaskell and Officer Lee are entitled to official immunity, it must also determine whether the Town is protected by vicarious immunity under the standard adopted today.

In sum, we conclude that our holdings under *Nilsson* and *DeBenedetto* do not permit joinder of Citro, a tortfeasor who has fully settled Everitt's liability claim against him, as an active litigant in the case. Thus, we reverse the trial court's denial of Citro's motion to dismiss him as a necessary and indispensable party. Should **[**848]** the case go to trial, pursuant to *RSA 507:7-e, I*, the jury should apportion fault among all of the **[***42]** alleged tortfeasors, and the jury verdict form should identify Citro as a party for purposes of apportioning fault. We affirm the trial court's denial of the Town's motion for summary judgment, but hold as a matter of law that the Town is not entitled to immunity under discretionary function immunity. We remand for the trial court to determine whether Lieutenant Gaskell and Officer Lee are entitled to official immunity for their decision not to detain Citro, and whether the Town is entitled to vicarious immunity.

Affirmed in part; reversed in part; and remanded.

DALIANIS and DUGGAN, JJ., concurred.

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Tiberghein v. B.R. Jones Roofing Co.

Supreme Court of New Hampshire

June 14, 2007, Argued; August 28, 2007, Opinion Issued

No. 2006-657

Reporter
156 N.H. 110 *; 931 A.2d 1223 **; 2007 N.H. LEXIS 150 ***

CHARLES TIBERGHEIN & a. v. B.R. JONES ROOFING COMPANY

Subsequent History: [***1] Released for Publication on August 28, 2007.

Prior History: Strafford.

Tiberghein v. B.R. Jones Roofing Co., 151 N.H. 391, 856 A.2d 21, 2004 N.H. LEXIS 159 (2004)

Disposition: Affirmed.

Core Terms

settlement, arbitration award, arbitration, trial court, plaintiffs', damages, proceedings, superior court, fault, tortfeasor, roof

Case Summary

Procedural Posture
Plaintiffs, a husband and wife, sued, inter alia, defendant roofing company, alleging the husband slipped and fell on a puddle of water that formed due to a leak in a roof the company had repaired. The matter was submitted to arbitration. The Strafford Superior Court (New Hampshire) held that the company satisfied an arbitrator's award in favor of plaintiffs through a tender that reflected credits for previous settlements. Plaintiffs appealed.

Overview

Plaintiffs settled with some defendants, and paid to settle a cross-suit of a defendant that claimed it was wrongfully named as a party. Their claims against the company were arbitrated and they prevailed. The company's attorney tendered a check that reflected a credit for the settlements plaintiffs received, including sums they paid on the cross-suit. The arbitrator stated the award represented the entire amount of damages due plaintiffs, not just damages caused by the company. Plaintiffs argued the company was not entitled to a credit for the settlements under *RSA 507:7-h* because *RSA 507:7-h* was not intended to apply to arbitration awards. The high court disagreed. *RSA 507:7-h* entitled a non-settling tortfeasor to a reduction in the amount of the judgment equal to the consideration the plaintiff received from a settlement with one of two or more tortfeasors. As the company was charged with a common theory of liability, it was jointly and severally liable. To disallow the credit plaintiffs received from the settlements would give them a windfall. As their settlement of the cross-suit was due to an independent claim against them, the company should not bear their litigation costs.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1 **Reviewability of Lower Court Decisions, Preservation for Review**

Where issues were not raised in the appellants' motions to the trial court, or by motion for reconsideration, they are not properly preserved on appeal and the appellate court will therefore not consider their merit.

Civil Procedure > Settlements > Releases From

Liability > Covenants Not to Sue

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN2[] Releases From Liability, Covenants Not to Sue

See RSA 507:7-h.

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Civil Procedure > Settlements > Effect of Agreements

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

HN3[] Releases From Liability, Covenants Not to Sue

See RSA 507:7-i.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN4[] Jury Trials, Jury Instructions

RSA 507:7-e (1997) directs the court to instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded in accordance with the proportionate fault of each of the parties.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

In statutory interpretation, the New Hampshire Supreme Court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. It begins by considering the statutory language, construing its plain and ordinary meaning.

Civil Procedure > Settlements > Effect of Agreements

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN6[] Settlements, Effect of Agreements

The language of RSA 507:7-e, 507:7-h and 507:7-i does not restrict their application to court proceedings. Rather, reference to "the court," "a verdict" and "the jury" in RSA 507:7-i and 507:7-e merely instructs the trial court on how to proceed when a credit is required in a trial proceeding. RSA ch. 507 (2007), as part of RSA tit. LII, "Actions, Process, and Service of Process," plainly does not limit the taking of a credit to court proceedings. RSA 507:7-h contains language that is generally applicable to both court and arbitration proceedings. RSA 507:7-h plainly affords a credit, determined by the consideration paid for a settlement, for all proceedings in which two or more persons are liable in tort for the same injury. There is no language in RSA 507:7-h restricting its application to civil proceedings in law or equity, and a court will not add words to the statute. RSA 507:7-h simply codifies the common law regarding such credits.

Civil Procedure > Settlements > Effect of Agreements

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN7[] Settlements, Effect of Agreements

RSA 507:7-h entitles a non-settling tortfeasor to a dollar-for-dollar reduction in the amount of the judgment equal to the consideration the plaintiff received from a good faith settlement with one of two or more tortfeasors.

Civil Procedure > Settlements > Effect of Agreements

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Civil Procedure > Remedies > Damages > General Overview

HN8[] Settlements, Effect of Agreements

RSA 507:7-e(I)(b) instructs the court to enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him. Therefore, a defendant is jointly and severally liable and entitled to a credit for the settlement received unless there is a finding of minimal fault.

Civil Procedure > Judgments > Entry of Judgments > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Civil Procedure > Remedies > Damages > General Overview

HN9[] Judgments, Entry of Judgments

To constitute a joint tort, there need not be concerted action on the part of all sought to be charged; if the conduct of each is a proximate cause of a single, indivisible harm, a common liability is established. A defendant is jointly and severally liable where it is charged with a common theory of liability from which damages are awarded.

Civil Procedure > Settlements > Effect of Agreements

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Civil Procedure > Settlements > Releases From Liability > General Overview

HN10[] Settlements, Effect of Agreements

The settlement with one tortfeasor does reduce the claim against the others to the extent of the consideration paid for the release. It is usually conceded that one who has suffered a single personal injury caused by the concurring negligence of two or more persons is not entitled to more than one compensation. He is not entitled to full damages from each of several wrongdoers for the same injury. In almost all jurisdictions, settlement payments to the plaintiff from one of several joint tortfeasors--those who actively contributed to the same injury--reduce any judgment later secured against the nonsettling tortfeasor(s).

Counsel: Burns, Bryant, Cox, Rockefeller & Durkin, of Dover (Paul R. Cox and Sharon A. Spickler on the brief, and Ms. Spickler orally), for the plaintiff.

Donahue, Tucker & Ciandella, of Exeter (Robert M. Derosier on the brief and orally), for the defendant.

Judges: HICKS, J. BRODERICK, C.J., and DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Opinion by: HICKS

Opinion

[1224] [*111]** HICKS, J. The plaintiffs, Charles and Janet Tiberghein, appeal orders of the Superior Court (*Nadeau,* J.) confirming that the defendant, B.R. Jones Roofing Company, satisfied the arbitrator's award through a tender that reflected credits for previous settlements. We affirm.

This is the second time this matter has come before us. A detailed account of the underlying facts of this case can be found in our previous decision, *Tiberghein v. B.R. Jones Roofing Co., 151 N.H. 391, 856 A.2d 21 (2004)* (*Tiberghein I*). We recite only those facts pertinent to this appeal.

On October 15, 1995, Charles Tiberghein slipped and fell on a puddle of water in the Durham Market and fractured his right ankle. *Id. at 392*. After the fall, store employees traced the water to a leak in the roof. *Id.* The defendant had repaired and restored the roof in 1992.

Id. The defendant had provided **[***2]** a ten-year roofing guarantee, which stated that upon notice of defects, such as leaks, it would repair the roof and thereafter maintain it in a watertight condition. *Id.* The defendant was notified of roof leaks, yet failed to satisfy his guarantee. *Id.*

The plaintiffs sued: (1) the defendant; (2) Durham Market Place; (3) Hannaford Brothers, Inc., which sublet the property to Durham Market Place; and (4) Colonial Durham Associates, the owner of the shopping plaza. *Id.* The plaintiffs settled with Durham Market Place and Colonial Durham Associates whereby each agreed to pay the plaintiffs $ 32,500 ($ 65,000 total). Subsequently, the plaintiffs were joined in a cross-suit for indemnification filed by Hannaford against Durham Market Place. Hannaford alleged that it had been wrongfully named as a defendant. The plaintiffs paid $ 8,000 to settle that claim. Following the settlements, the only remaining parties were the plaintiff and the defendant. *Id.* After the superior court denied the defendant's summary judgment motion, the **[*112]** parties agreed to submit the case to binding arbitration. *Id.* The arbitrator found in favor of the plaintiffs and awarded them, collectively, $ 250,000. *Id.*

The defendant **[***3]** appealed the arbitrator's award to the superior court, which affirmed it. *Id. at 392-93.* Following an appeal by the defendant, we affirmed the superior court's decision. *Id.* In October 2004, the defendant's attorney forwarded a check in the amount of **[**1225]** $ 192,152.33, which included interest from the date of the award, pursuant to *RSA 336:1* (Supp. 2006). This amount reflected a credit of $ 65,000, which included the $ 8,000 the plaintiffs remitted to Hannaford, for the settlements the plaintiffs received.

The plaintiffs disputed this amount and in July 2005, they asked the superior court to determine the balance due and order the defendant to pay it. The plaintiffs asserted that the defendant erroneously calculated the amount it owed by including the $ 8,000 the plaintiffs paid to Hannaford as part of the total amount they recovered from the settlements. The defendant argued that it had satisfied the arbitrator's award.

In January 2006, the plaintiffs amended their motion, claiming that the defendant should not have subtracted from the amount it owed, any of the $ 65,000 settlement the plaintiffs received. The court referred to the arbitrator the question of "whether the $ 250,000 award **[***4]** was intended to represent . . . just the damages due . . . as a result of the defendant's negligent conduct." The arbitrator responded:

> No apportionment of fault between the defendant Jones and [those] with whom the plaintiffs reached settlements was affected in the arbitration. In fact, settlement amounts were not disclosed to the arbitrator.
>
> The award of $ 250,000 by the arbitrator was intended to represent the entire amount of damages due the plaintiffs for their loss resulting from the accident of October 15, 1995. The award was not intended to represent just the damages due the plaintiffs caused only by the conduct of the defendant.

Thereafter, the plaintiffs filed a motion to obtain final disposition on all pending issues, asking the court to find that the defendant was not entitled to reduce its payment for damages by taking a credit for the $ 65,000 already paid to the plaintiffs. On July 31, 2006, the trial court denied the plaintiffs' motion, ruling that the October 2004 payment of $ 192,152.33 fully satisfied the arbitrator's award. This appeal followed.

On appeal, the plaintiffs raise the following issues: (1) whether the defendant is entitled to take a credit under *RSA 507:7-h* **[***5]** (1997) and *RSA 507:7- i* (1997) against the arbitrator's award after we confirmed the award under *RSA 542:8* (2007); and (2) whether the defendant's failure to raise **[*113]** the issue of its entitlement to the $ 65,000 credit in a motion to vacate the arbitration award now precludes the defendant from claiming such credit.

First, we identify several issues that have not been preserved for our review because they were not raised in the trial court. *See Tiberghein I, 151 N.H. at 393.* The plaintiffs contend that once an arbitration award has been confirmed by the superior court, "there can be no variation from it." *Leach v. O'Neill, 132 N.H. 665, 667, 568 A.2d 1189 (1990)* (quotation and brackets omitted). The plaintiffs rely upon *RSA 542:8* (2007), which provides that, "[a]t any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award." The plaintiffs argue that because the defendant failed to request a modification of the award to establish a credit under *RSA 507:7-h* and *RSA 507:7-i* within the statutory time limit, and as the trial court could not reduce the arbitration award outside the parameters **[***6]** of *RSA 542:8*, the defendant's request for the $ 65,000 credit was improper. Although the plaintiffs filed a motion in superior court arguing that the defendant was not

entitled to the credit, they did not assert in any of their pleadings to the trial court that allowing the **[**1226]** credit violated RSA 542:8. Therefore, we will not address this issue on appeal. *See* Tiberghein I, 151 N.H. at 393.

The plaintiffs raise two other issues for the first time on appeal. The plaintiffs claim that res judicata precludes the defendant from relitigating the amount owed to them per the arbitrator's award because any credits under RSA 507:7-h and RSA 507:7-i should have been litigated in *Tiberghein I*. The plaintiffs further argue that judicial estoppel bars the defendant from asserting inconsistent positions regarding modification of the award. ***HN1***[↑] Because these issues were not raised in the plaintiffs' motions to the trial court, or by motion for reconsideration, they are not properly preserved on appeal and we will therefore not consider their merit. *See* Tiberghein I, 151 N.H. at 393.

We now address the issues properly before us on appeal. The plaintiffs assert that RSA 507:7-h must be read in the context of **[***7]** RSA 507:7-e and RSA 507:7-i. They argue therefore, that the defendant is not entitled to a pro tanto, dollar-for-dollar credit under RSA 507:7-h for the settlement because RSA 507:7-e and RSA 507:7-i do not apply to arbitration awards.

RSA 507:7-h provides that:

> ***HN2***[↑] A release or covenant not to sue given in good faith to one of 2 or more persons liable in tort for the same injury discharges that person in accordance with its terms and from all liability for contribution, but it does not discharge any other person liable upon the same claim unless its terms expressly so provide. **[*114]** However, it reduces the claim of the releasing person against other persons by the amount of the consideration paid for the release.

RSA 507:7-i provides, in relevant part:

> [U]pon ***HN3***[↑] return of a verdict for the plaintiff by the jury in any such trial, the court shall inquire of counsel the amount of consideration paid for any such settlement, release, or covenant not to sue, and shall reduce the plaintiff's verdict by that amount.

HN4[↑] RSA 507:7-e (1997) directs the court to "[i]nstruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded . . . in accordance with the proportionate fault **[***8]** of each of the parties."

HN5[↑] "In statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." John A. Cookson Co. v. N.H. Ball Bearings, 147 N.H. 352, 357, 787 A.2d 858 (2001) (quotation omitted). We begin by considering the statutory language, construing its plain and ordinary meaning. *Id.*

HN6[↑] The language of RSA 507:7-e, RSA 507:7-h and RSA 507:7-i does not restrict their application to court proceedings. Rather, reference to "the court," "a verdict" and "the jury" in RSA 507:7-i and RSA 507:7-e merely instructs the trial court on how to proceed when a credit is required in a trial proceeding. RSA chapter 507 (2007), as part of Title LII, "Actions, Process, and Service of Process," plainly does not limit the taking of a credit to court proceedings. RSA 507:7-h contains language that is generally applicable to both court and arbitration proceedings. The statute plainly affords a credit, determined by the consideration paid for a settlement, for all proceedings in which "2 or more persons [are] liable in tort for the same injury." RSA 507:7-h.

Accordingly, we agree with the defendant that "there is no language in RSA 507:7-h **[***9]** restricting its application to civil proceedings in law or equity," and we will not add words to the statute. RSA 507:7-h simply codifies the common law regarding such credits.

[1227]** ***HN7***[↑] RSA 507:7-h, therefore, entitles a non-settling tortfeasor to a dollar-fordollar reduction in the amount of the judgment equal to the consideration the plaintiff received from a good faith settlement with one of two or more tortfeasors. Nilsson v. Bierman, 150 N.H. 393, 398, 839 A.2d 25 (2003). We hold that in this case, the trial court did not err in ruling that the defendant satisfied the arbitrator's award. The payment of $ 192,152.33 was a proper reduction of the plaintiffs' verdict pursuant to RSA 507:7-h.

[*115] The plaintiffs rely upon our reasoning in *Leach* to support their conclusion that RSA 507:7-e, RSA 507:7-h and RSA 507:7-i apply only to jury verdicts and not to arbitration awards. In *Leach*, after submitting their claim to arbitration and receiving an award, the plaintiffs filed a motion with the trial court asking the court to add interest from the date of the writ pursuant to RSA 524:1-b (2007). Leach, 132 N.H. at 667. We ultimately affirmed the award but held RSA 524:1-b to be inapplicable and only added interest **[***10]** from the

date of the award based upon RSA 336:1 (Supp. 2004). Id. at 670. We find neither the issue in Leach nor the statutory language regarding prejudgment interest in RSA 524:1-b to be analogous to the taking of a pro tanto credit. Therefore, the plaintiffs' reliance upon *Leach* is misplaced.

RSA chapter 524 (2007) is included under Title LIII, which is titled "Proceedings in Court." Furthermore, the language in RSA 524:1-b restricts the prejudgment interest to "civil proceedings at law or in equity in which a verdict is rendered or a finding is made." Because of the restrictive language in RSA 524:1-b and the narrow scope of Title LIII, we refused to apply the statute to all arbitration proceedings. Id. at 668.

The plaintiffs also argue that the defendant was not entitled to the $ 65,000 credit for settlements because the arbitrator did not apportion fault among the tortfeasors. The plaintiffs rely upon Nilsson and DeBenedetto v. CLD Consulting Eng'rs, 153 N.H. 793, 903 A.2d 969 (2006) to support their argument. Neither Nilsson nor DeBenedetto is availing.

DeBenedetto and *Nilsson* do not require a finding of joint and several liability before settlement credit can be taken. Rather, they address **[***11]** fault allocation pursuant to RSA 507:7-e, I, between parties who have causally contributed to an accident. DeBenedetto, 153 N.H. at 798; Nilsson, 150 N.H. at 396.

HN8[↑] RSA 507:7-e, I(b) instructs the court to:

> Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

Therefore, a defendant is jointly and severally liable and entitled to a credit for the settlement received unless there is a finding of minimal fault. Unlike Nilsson, where the jury found the defendant to be one percent liable and, pursuant to RSA 507:7-e, only severally liable, in this case there was no finding that the defendant was less than fifty percent at fault. Absent such a finding, the defendant is jointly and severally liable.

[*116] Furthermore, HN9[↑] "[t]o constitute a joint tort, there need not be concerted action on the part of all sought to be charged; if the conduct of each is a proximate cause of [a] single, indivisible harm, a common liability . . . is established." 9 R. McNamara, *New Hampshire Practice, [***12] Personal Injury -- Tort and Insurance Practice* § 23.09, at 23-12 (2003). According **[**1228]** to New Hampshire common law and the plaintiffs' pleadings, the injuries resulted from a single accident in the Durham Market Place. The plaintiffs' writ states "[t]hat as a direct result of joint, combined and concurrent negligence of the aforementioned defendants . . . the plaintiff has suffered grave and permanent personal injuries." The defendant is therefore jointly and severally liable because it is charged with a common theory of liability from which damages were awarded.

The arbitrator's response clearly states that the $ 250,000 award represents the total amount of damages to which the plaintiffs are entitled. Therefore, to disallow the $ 65,000 credit received from the settlements would permit a windfall and would be contrary to a majority of jurisdictions, the arbitrator's award, and established New Hampshire law and practice. See Morrill v. Webb, 123 N.H. 276, 279, 461 A.2d 93 (1983) (HN10[↑] "[T]he settlement with one tortfeasor does reduce the claim against the others to the extent of the consideration paid for the release."); Carpenter v. Company, 78 N.H. 118, 119, 97 A. 560 (1916) ("[I]t is usually conceded that one who **[***13]** has suffered a single personal injury caused by the concurring negligence of two or more persons is not entitled to more than one compensation. He is not entitled to full damages from each of several wrongdoers for the same injury."); Villarini-Garcia v. Hospital del Maestro, 112 F.3d 5, 7 (1 st Cir. 1997) ("In almost all jurisdictions, settlement payments to the plaintiff from one of several joint tortfeasors -- those who actively contributed to the same injury -- reduce any judgment later secured against the nonsettling tortfeasor(s).").

The plaintiffs also argue that even if RSA 507:7-h required a reduction in the plaintiffs' award, the trial court erred by reducing the award by $ 65,000, as that amount was not the actual "consideration" received in the settlement. The plaintiffs assert that their $ 8,000 settlement with Hannaford Brothers reduced the defendant's credit to $ 57,000. On appeal, the plaintiffs cite no authority for such a reduction. Furthermore, the defendant was not a party to Hannaford's cross-claim against the plaintiffs, nor did it participate in the subsequent settlement with Hannaford. We agree with the defendant that the plaintiffs' voluntary settlement was **[***14]** a result of Hannaford's independent claim against the plaintiffs. The defendant should not bear the plaintiffs' litigation costs. Therefore, we see no error in the trial court's order finding that the defendant satisfied

the arbitrator's award.

[*117] Finally, we note that the result herein can hardly come as a surprise to the plaintiffs. Although not expressly relied upon by the trial court, the record includes a letter written to the defendant's counsel by the plaintiffs' counsel on March 6, 2003, prior to the arbitration, acknowledging that the defendant "will, of course, be entitled to a credit should we prevail relative to the settlements that we received from earlier defendants."

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and GALWAY, JJ., concurred.

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Goudreault v. Kleeman

Supreme Court of New Hampshire

September 16, 2008, Argued; January 9, 2009, Opinion Issued

No. 2007-807

Reporter
158 N.H. 236 *; 965 A.2d 1040 **; 2009 N.H. LEXIS 4 ***

JOSEPH P. GOUDREAULT, JR. v. THOMAS J. *KLEEMAN*

Notice: Released for Publication January 9, 2009.

Prior History: [***1] Hillsborough-northern judicial district.

Disposition: Reversed and remanded.

Core Terms

vascular, fault, injuries, surgery, trial court, compartment, syndrome, quotation, surgeon, argues, expert testimony, parties, apportionment, jury's, non-litigants, damages, reliability, joint and several liability, common plan, admissibility, apportion, causation, nonparty, burden of proof, training, adequate evidence, knowingly, contributory negligence, apportionment of fault, exercise of discretion

Case Summary

Procedural Posture
Plaintiff patient brought a medical malpractice suit against defendant physician. A jury in the Superior Court for the Hillsborough-Northern Judicial District (New Hampshire) found damages of over $1 million and attributed 10 percent of fault to defendant and 90 percent of fault to two nonlitigant physicians. Both parties appealed.

Overview

The court held that the trial court properly qualified a surgeon as an expert under N.H. R. Evid. 702. Although he had not operated on patients since 1986 and had never personally performed an anterior lumbar interbody fusion, he had performed surgery in the posterior lumbar area hundreds of times and had assisted to resolve major vascular problems that occurred during spinal fusions. Next, a jury question was reasonably susceptible of competing interpretations, and the trial court's answer at best addressed one possible, though unlikely, interpretation of the jury's inquiry. This error required reversal, as it likely permitted lingering confusion at minimum or even promoted misapprehension about the applicable law by implying that the jury had to find defendant negligent if plaintiff was to recover anything for his damages. Next, the court held that for a defendant to be jointly liable under RSA 507:7-e, I(c) (1997), his conduct had to be undertaken knowingly. Finally, where a defendant sought to reduce or eliminate the plaintiff's recovery by apportioning professional liability, it was only fair that he carry the plaintiff's burden of proof outlined in RSA 507-E:2 (1997).

Outcome
The court reversed the judgment and remanded the case for a new trial.

LexisNexis® Headnotes

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Torts > Malpractice & Professional Liability > Healthcare Providers

HN1[↓] **Expert Witnesses, Qualifications**

Expert witness testimony is required to establish a prima facie medical negligence case. RSA 507-E:2, I (1997). A witness is qualified as an expert by knowledge, skill, experience, training, or education. N.H. R. Evid. 702. In deciding whether to qualify a witness as an expert, the trial judge must conduct an adequate investigation of

the expert's qualifications.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN2[] Standards of Review, Abuse of Discretion

Because the trial judge has the opportunity to hear and observe the witness, the decision whether a witness qualifies as an expert is within the trial judge's discretion. An appellate court will not reverse that decision absent a clearly unsustainable exercise of discretion. Its inquiry is whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. To prevail on appeal, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN3[] Expert Witnesses, Qualifications

Although a medical degree does not automatically qualify a witness to give an opinion on every conceivable medical question, the lack of specialization in a particular medical field does not automatically disqualify a doctor from testifying as an expert in that field.

Evidence > Admissibility > Expert Witnesses

Torts > Malpractice & Professional Liability > Healthcare Providers

HN4[] Admissibility, Expert Witnesses

To make out a prima facie case of medical negligence, a plaintiff must introduce, by expert testimony, evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed. RSA 507-E:2, I(c) (1997). The plaintiff need only show with reasonable probability, not mathematical certainty, that but for the defendant's negligence, the harm would not have occurred. A medical expert's competent opinion that the defendant's negligence "probably caused" the harm establishes the quantum of expert testimony necessary. However, such an opinion is admissible only after it has been shown to the satisfaction of the court that the testimony is based upon sufficient facts or data; that it is the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case. RSA 516:29-a, I (2007).

Evidence > Admissibility > Expert Witnesses

HN5[] Admissibility, Expert Witnesses

An expert's testimony must rise to a threshold level of reliability to be admissible under N.H. R. Evid. 702. The proper focus for the trial court is the reliability of the expert's methodology or technique. The trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6[] Testimony, Expert Witnesses

See N.H. R. Evid. 703.

Evidence > Admissibility > Expert Witnesses

HN7[] Admissibility, Expert Witnesses

Admissibility of expert opinions turns upon the reliability of the expert's methodology or technique, and not upon the expert's conclusion.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN8[] Admissibility, Expert Witnesses

To the extent there are gaps in an expert's explanations, these omissions concern the relative weight and credibility of competing expert testimony rather than the basic reliability of such testimony, and are the province of the fact-finder, not the trial court. Objections to the basis of an expert's opinion go to the weight to be accorded the opinion evidence, and not to its admissibility. The appropriate method of testing the basis of an expert's opinion is by cross-examination of the expert.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN9 **Standards of Review, Abuse of Discretion**

An appellate court reviews a trial court's decisions on the admissibility of evidence under an unsustainable exercise of discretion standard. It will not disturb the trial court's decision absent an unsustainable exercise of discretion. To meet this standard, the party challenging the evidence must demonstrate that the trial court's rulings were clearly untenable or unreasonable to the prejudice of his case.

Civil Procedure > General Overview

HN10 **Civil Procedure**

The power to reconsider an issue once decided remains in the court until final judgment or decree. It is immaterial that different judges act.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN11 **Expert Witnesses, Qualifications**

The question whether one possesses the requisite qualifications to testify as an expert is one of fact for the trial court.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN12 **Standards of Review, Abuse of Discretion**

The response to a jury question is left to the sound discretion of the trial court. An appellate court reviews the court's response under the unsustainable exercise of discretion standard. First, the party challenging an instruction must show that it was a substantial error such that it could have misled the jury regarding the applicable law. The instruction must be judged as a reasonable juror would probably have understood it. An appellate court reviews the trial court's answer to a jury inquiry in the context of the court's entire charge to determine whether the answer accurately conveys the law on the question and whether the charge as a whole fairly covered the issues and law in the case. Even if the supplemental instruction is shown to be a substantial error, an appellate court will only set aside a jury verdict if the error resulted in mistake or partiality.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN13 **Jury Trials, Jury Instructions**

The general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. It should address those matters fairly encompassed within the question.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN14 **Jury Trials, Jury Instructions**

The failure to answer or the giving of a response which provides no answer to the particular question of law posed by a jury can result in prejudicial error.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN15[] Jury Trials, Jury Instructions

A jury instruction given after deliberations have begun comes at a particularly delicate juncture and therefore evokes heightened scrutiny.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN16[] Appeals, Standards of Review

An appellate court considers the trial court's supplemental instruction in the context of the whole jury charge.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN17[] Jury Trials, Jury Instructions

The influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. If the court's answer is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN18[] Multiple Defendants, Joint & Several Liability

Under the rule of joint and several liability, a defendant who is only partly responsible for a plaintiff's injuries may be held responsible for the entire amount of recoverable damages. This allows a plaintiff to sue any one of several tortfeasors and collect the full amount of recoverable damages. As a result, numerous jurisdictions, including New Hampshire, have enacted legislation seeking to ameliorate the inequities suffered by low fault, "deep pocket" defendants.

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN19[] Comparative Fault, Multiple Parties

Under New Hampshire's statutory scheme, liability is "joint and several" for each party fifty percent at fault or greater. RSA 507:7-e, I(b) (1997). However, where any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN20[] Comparative Fault, Multiple Parties

See RSA 507:7-e, I(c) (1997).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN21[] Standards of Review, De Novo Review

The interpretation of a statute is a question of law, which an appellate court reviews de novo. The court is the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. The court first examines the language of the statute, and, where possible, ascribes the plain and ordinary meanings to the words used. When a statute's language is plain and unambiguous, the court need not look beyond it for further indication of legislative intent, and the court will not consider what the legislature might have said or add language that the legislature did not see fit to include. If a statute is ambiguous, however, the court considers legislative history to aid its analysis. Its goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.

Torts > ... > Defenses > Comparative

Fault > General Overview

HN22 **Defenses, Comparative Fault**

The comprehensive scheme of *RSA ch. 507* reflects the legislature's careful balance of the rights of defendants and plaintiffs, and it is not a court's place to upset this balance.

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN23 **Comparative Fault, Multiple Parties**

The plain language of *RSA 507:7-e, I(c)* (1997) imposes joint liability where a tortfeasor (1) knowingly (2) pursued or took active part in (3) a common plan or design (4) resulting in harm.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN24 **Mens Rea, Knowledge**

The better reading of the statute, considering its object and purpose, takes account of the fact that, to be subject to *RSA 507:7-e, I(c)* (1997), the conduct must be undertaken "knowingly." Under the Criminal Code, a person acts knowingly with respect to conduct or to a circumstance when he is aware that his conduct is of such nature or that such circumstances exist. *RSA 626:2, II(b)* (2007). In other words, a defendant acts knowingly when he is aware that it is practically certain that his conduct will cause a prohibited result.

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN25 **Multiple Defendants, Joint & Several Liability**

The New Hampshire Supreme Court believes that the legislature required the mental state of "knowingly" as a limited exception restoring common law joint liability for all those who, in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN26 **Concerted Action, Civil Conspiracy**

The requirements of *RSA 507:7-e, I(c)* (1997) resemble the concerted activity of civil conspiracy. It is essential that each defendant be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence. However, express agreement is not necessary, and all that is required is that there be a tacit understanding, as where two automobile drivers suddenly and without consultation decide to race their cars on the public highway.

Torts > ... > Comparative Fault > Multiple Parties > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN27 **Comparative Fault, Multiple Parties**

RSA 507:7-e, I(c) (1997) imposes joint liability only as an exception to *RSA 507:7-e, I(b)*.

Torts > ... > Comparative Fault > Multiple Parties > Absent Defendants

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN28 **Multiple Parties, Absent Defendants**

For apportionment purposes under RSA 507:7-e, I(b) (1997), the word "party" refers to parties to an action, including settling parties. The word "party" embraces all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court. However, in order to shift fault, allegations of a nonlitigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes.

Evidence > Burdens of Proof > General Overview

Torts > Remedies > Damages > General Overview

HN29[] Evidence, Burdens of Proof

A civil defendant who seeks to deflect fault by apportionment to nonlitigants is raising something in the nature of an affirmative defense. Thus, the defendant carries the burdens of production and persuasion.

Evidence > Burdens of Proof > General Overview

Torts > Remedies > Damages > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN30[] Evidence, Burdens of Proof

A defendant who raises a nonlitigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a nonlitigant just as the plaintiff seeks to impose it on him. Where the defendant seeks to reduce or eliminate the plaintiff's recovery by apportioning professional liability, it is only fair that he or she carry the plaintiff's burden of proof outlined in RSA 507-E:2 (1997). That statute requires affirmative evidence which must include expert testimony of a competent witness, RSA 507-E:2, I, of the standard of reasonable care, breach thereof and proximate causation of damages, RSA 507-E:2, I(a)-(c).

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Evidence > Expert Testimony > Competency of Experts

In deciding whether to qualify a witness as an expert, the trial judge must conduct an adequate investigation of the expert's qualifications. N.H. R. Ev. 702.

NH2.[] 2.

Evidence > Expert Testimony > Competency of Experts

Because the trial judge has the opportunity to hear and observe the witness, the decision whether a witness qualifies as an expert is within the trial judge's discretion. N.H. R. Ev. 702.

NH3.[] 3.

Evidence > Expert Testimony > Particular Cases

The trial court's ruling qualifying a surgeon as an expert was not an unsustainable exercise of discretion. His lack of laparoscopic anterior lumbar interbody fusion (ALIF) experience and training did not negate his ability to advance the jury's understanding and determination of facts at issue; although he had not operated on patients since 1986 and had never personally performed an ALIF, he had performed surgery in the posterior lumbar area hundreds of times and had assisted to resolve major vascular problems that occurred during spinal fusions. N.H. R. Ev. 702.

NH4.[] 4.

Evidence > Expert Testimony > Competency of Experts

Although a medical degree does not automatically qualify a witness to give an opinion on every conceivable medical question, the lack of specialization in a particular medical field does not automatically disqualify a doctor from testifying as an expert in that field. N.H. R. Ev. 702.

NH5.[] 5.

Physicians and Surgeons > Malpractice
Proceedings > Weight and Sufficiency of Evidence

To make out a *prima facie* case of medical negligence, a plaintiff must introduce, by expert testimony, evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed. The plaintiff need only show with reasonable probability, not mathematical certainty, that but for the defendant's negligence, the harm would not have occurred. RSA 507-E:2, I(c).

NH6. 6.

Physicians and Surgeons > Malpractice Proceedings > Expert Testimony

A medical expert's competent opinion that the defendant's negligence "probably caused" the harm establishes the quantum of expert testimony necessary to make out a *prima facie* case of medical negligence. However, such an opinion is admissible only after it has been shown to the satisfaction of the court that the testimony is based upon sufficient facts or data; that it is the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case. Thus, an expert's testimony must rise to a threshold level of reliability to be admissible. RSA 516:29-a, I; N.H. R. Ev. 702.

NH7. 7.

Evidence > Expert Testimony > Determination of Admissibility

An expert's testimony must rise to a threshold level of reliability to be admissible. The proper focus for the trial court is the reliability of the expert's methodology or technique. The trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony. N.H. R. Ev. 702.

NH8. 8.

Evidence > Expert Testimony > Determination of Admissibility

Admissibility of expert opinions turns upon the reliability of the expert's methodology or technique, and not upon the expert's conclusion.

NH9. 9.

Evidence > Expert Testimony > Particular Cases

To the extent there were gaps in an expert's explanations, these omissions concerned the relative weight and credibility of competing expert testimony rather than the basic reliability of such testimony, and were the province of the fact-finder, not the trial court. Objections to the basis of an expert's opinion go to the weight to be accorded the opinion evidence, and not to its admissibility. The appropriate method of testing the basis of an expert's opinion is by cross-examination of the expert. RSA 516:29-a, I; N.H. R. Ev. 702.

NH10. 10.

Appeal and Error > Motion for Reconsideration > Standards

The power to reconsider an issue once decided remains in the court until final judgment or decree. It is immaterial that different judges act.

NH11. 11.

Appeal and Error > Motion for Reconsideration > Particular Cases

The trial court did not err in reconsidering another judge's prior ruling in a medical malpractice case. Upon clarification of plaintiff's motion *in limine*, the trial court concluded that reconsideration of the prior ruling was necessary to prevent injustice; the trial court could have reasoned that its ruling was necessary to avoid juror confusion regarding the threshold determination of expert witness competency.

NH12. 12.

Trial > Civil Cases > Jury Instructions > Review

The response to a jury question is left to the sound discretion of the trial court. The supreme court reviews the trial court's response under the unsustainable exercise of discretion standard. The party challenging an instruction must show that it was a substantial error such that it could have misled the jury regarding the applicable law. The instruction must be judged as a reasonable juror would probably have understood it. The court reviews the trial court's answer to a jury inquiry in the context of the trial court's entire charge to

determine whether the answer accurately conveys the law on the question and whether the charge as a whole fairly covered the issues and law in the case. Even if the supplemental instruction is shown to be a substantial error, the supreme court will only set aside a jury verdict if the error resulted in mistake or partiality.

NH13.[] 13.

Trial > Civil Cases > Jury Instructions > Requisites

The general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. It should address those matters fairly encompassed within the question.

NH14.[] 14.

Trial > Civil Cases > Jury Instructions > Particular Cases

The trial court committed a substantial error in answering the jury's question. The question posed was reasonably susceptible of competing interpretations, but at best, the trial court's response addressed one possible, though unlikely, interpretation of the jury's inquiry; at worst, it was entirely nonresponsive.

NH15.[] 15.

Trial > Civil Cases > Jury Instructions > Incomplete or Inaccurate Instructions

The failure to answer or the giving of a response which provides no answer to the particular question of law posed by a jury can result in prejudicial error.

NH16.[] 16.

Trial > Civil Cases > Jury Instructions > Review

A jury instruction given after deliberations have begun comes at a particularly delicate juncture and therefore evokes heightened scrutiny.

NH17.[] 17.

Trial > Civil Cases > Jury Instructions > Particular Cases

In a medical malpractice case, a new trial was required when the trial court committed a substantial error in answering the jury's question as to whether it was necessary to prove defendant's negligence in order for plaintiff to seek a remedy from other parties. The jury's question evinced confusion about the law and its application to a dispositive issue, which was heavily disputed at trial, and the trial court's nonresponsive answer likely permitted lingering confusion at minimum or even promoted misapprehension about the applicable law by implying that the jury had to find defendant negligent if plaintiff was to recover anything for his damages.

NH18.[] 18.

Trial > Civil Cases > Jury Instructions > Review

The supreme court considers the trial court's supplemental instruction in the context of the whole jury charge.

NH19.[] 19.

Trial > Civil Cases > Jury Instructions > Incomplete or Inaccurate Instructions

The influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. If the court's answer is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.

NH20.[] 20.

Torts > Joint Liability > Joint and Several Liability

Under the rule of joint and several liability, a defendant who is only partly responsible for a plaintiff's injuries may be held responsible for the entire amount of recoverable damages. This allows a plaintiff to sue any one of several tortfeasors and collect the full amount of recoverable damages. As a result, numerous jurisdictions, including New Hampshire, have enacted legislation seeking to ameliorate the "inequities" suffered by low fault, "deep pocket" defendants.

NH21.[] 21.

Torts > Joint Liability > Joint and Several Liability

The plain language of the statute regarding apportionment of damages imposes joint liability where a tortfeasor (1) knowingly (2) pursued or took active part in (3) a common plan or design (4) resulting in harm. RSA 507:7-e, I(c).

NH22. 22.

Torts > Joint Liability > Joint and Several Liability

The better reading of the provision imposing joint and several liability where the parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, considering its object and purpose, takes account of the fact that, to be subject to the provision, the conduct must be undertaken "knowingly." Under the Criminal Code, a person acts knowingly with respect to conduct or to a circumstance when he is aware that his conduct is of such nature or that such circumstances exist. In other words, a defendant acts knowingly when he is aware that it is practically certain that his conduct will cause a prohibited result. RSA 507:7-e, I(c); 626:2, II(b).

NH23. 23.

Torts > Joint Liability > Joint and Several Liability

There was no merit to a patient's contention that a doctor should be jointly liable regardless of his percentage of fault because he took active part in a common plan or design with the other doctors operating upon the patient. In the provision imposing joint and several liability where the parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, the legislature required the mental state of "knowingly" as a limited exception restoring common law joint liability for all those who, in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit. RSA 507:7-e, I(c).

NH24. 24.

Torts > Joint Liability > Joint and Several Liability

The requirements of the provision imposing joint and several liability where the parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm resemble the concerted activity of civil conspiracy. It is essential that each defendant be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence. However, express agreement is not necessary, and all that is required is that there be a tacit understanding, as where two automobile drivers suddenly and without consultation decide to race their cars on the public highway. RSA 507:7-e, I(c).

NH25. 25.

Torts > Joint Liability > Allocation of Fault

For apportionment purposes, the word "party" refers to parties to an action, including settling parties. The word "party" embraces all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court; however, in order to shift fault, allegations of a nonlitigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes. RSA 507:7-e, I(b).

NH26. 26.

Torts > Joint Liability > Allocation of Fault

A civil defendant who seeks to deflect fault by apportionment to nonlitigants is raising something in the nature of an affirmative defense. Thus, the defendant carries the burdens of production and persuasion.

NH27. 27.

Physicians and Surgeons > Malpractice
Proceedings > Burden of Proof

A defendant who raises a nonlitigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a nonlitigant just as the plaintiff seeks to impose it on him. Where the defendant seeks to reduce or eliminate the plaintiff's recovery by apportioning professional liability, it is only fair that he or she carry the plaintiff's burden of proof outlined in the statute regarding medical injuries. RSA 507-E:2, I(a)-(c).

NH28.[⬇] 28.

Physicians and Surgeons > Malpractice
Proceedings > Weight and Sufficiency of Evidence

There was sufficient expert testimony adduced to support the jury's apportionment of fault to two vascular surgeons who were not litigants in the case. There was evidence that the first surgeon was directing defendant surgeon in accessing the patient's spine and that the patient's four vascular injuries were *per se* breaches of the standard of reasonable care, and there was evidence that the second surgeon did not act quickly after being alerted to the patient's suspected compartment syndrome. *RSA 507-E:2*.

Counsel: *Sullivan & Gregg, P.A.*, of Nashua (*Kenneth M. Brown* on the brief and orally), for the plaintiff.

Nelson, Kinder, Mosseau & Saturley, P.C., of Manchester (*Peter W. Mosseau* and *Jonathan A. Lax* on the brief, and *Mr. Mosseau* orally), for the defendant.

Judges: HICKS, J. BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

Opinion by: HICKS

Opinion

[1045]** **[*240]** HICKS, J. The defendant, Thomas J. ***Kleeman***, M.D., appeals rulings of the Superior Court (*Murphy*, J.) made during a medical malpractice trial. The plaintiff, Joseph P. Goudreault, Jr., cross-appeals the apportionment of fault to non-litigants and the failure to impose joint and several liability upon Dr. ***Kleeman***. We reverse and remand.

The record supports the following. Goudreault developed a back problem in 2001. He consulted Dr. ***Kleeman***, an orthopedic surgeon specializing in spine surgery, who initially recommended conservative therapies. These were unsuccessful and diagnostic testing revealed degeneration in the discs and cartilage of Goudreault's lower back. Dr. ***Kleeman*** recommended a procedure called an anterior lumbar interbody fusion (ALIF). The ALIF procedure uses a bone graft to prevent inflammation by immobilizing **[***2]** the affected discs. The procedure is performed laparascopically to minimize its invasiveness, typically by a vascular surgeon teamed with a spine surgeon.

Goudreault's ALIF was performed at Catholic Medical Center (CMC) in April 2002 by Dr. ***Kleeman*** and vascular surgeons Dmitry Nepomnayshy and Patrick Mahon. The operation began at 7:00 a.m., initially with Drs. ***Kleeman*** and Nepomnayshy. Although there were no complications with the spinal fusion part of the surgery, complications arose with respect to accessing Goudreault's spine. Vascular injuries occurred causing substantial **[*241]** bleeding and requiring conversion from a laparascopic, minimally invasive approach to a more intrusive open approach. Dr. ***Kleeman*** testified that he could not say for sure whether he or Dr. Nepomnayshy caused the vascular injuries. After the vascular injuries arose, Dr. ***Kleeman*** left the surgery table and Dr. Mahon assisted Dr. Nepomnayshy. Dr. ***Kleeman*** returned to complete the ALIF after the vascular injuries were repaired and the bleeding was controlled. The surgery concluded around 4:00 p.m.

Following the surgery, Goudreault was taken to the post-anesthesia care unit (PACU) at CMC, where he was monitored and given **[***3]** intravenous fluid. The PACU nurse eventually transferred him to the intensive care unit (ICU) for monitoring and contacted Dr. ***Kleeman*** and his partner, Dr. Ahn, around 9:00 p.m. due to concern over some of his symptoms. Dr. ***Kleeman***, who was familiar with compartment syndrome, observed Goudreault around 9:30 p.m. and saw no symptoms of the complication.

Dr. ***Kleeman*** began to suspect compartment syndrome in Goudreault's left calf the following morning when he observed him at 6:30 a.m. He testified that he then called Dr. Mahon. The substance and timing of the telephone call to Dr. Mahon were disputed, and the court instructed the jury to consider Dr. ***Kleeman***'s testimony only as evidence that a telephone call was made and not as evidence that Dr. Mahon agreed to take responsibility for treating any potential compartment syndrome. **[**1046]** The ICU nurse observing Goudreault testified that she also contacted Dr. Mahon around 6:30 a.m. and updated him on Goudreault's condition.

Around 6:45 a.m., Dr. ***Kleeman*** requested a tonometer, which is a device that can detect compartment syndrome by measuring pressure in the leg. The ICU nurse testified that she left and asked the charge nurse for the instrument, **[***4]** returned to tell Dr. ***Kleeman*** that there was a tonometer in the emergency room, but found that he had left. Dr. ***Kleeman*** testified that he left

before the nurse returned because she had informed him that she did not think CMC had a tonometer.

Several hours elapsed before surgery took place to treat Goudreault's compartment syndrome, during which time Dr. ***Kleeman*** performed scheduled elective surgery at another hospital. Dr. ***Kleeman*** testified that he placed several telephone calls to Dr. Mahon and the hospital attempting to discover Goudreault's condition. He returned to observe Goudreault around 11:30 a.m. and made additional notes on his chart. Dr. Mahon did not perform the surgery to relieve the pressure in Goudreault's leg until around 2:00 p.m., when the compartment syndrome had reached an advanced state. Goudreault suffered a permanent loss of the peroneal nerve, which runs through one of the compartments in the leg. Although he saw improvement in his back pain, Goudreault testified that he now experiences pain, numbness and difficulty walking.

[*242] Goudreault initiated the instant action for professional negligence against CMC and Drs. Nepomnayshy, Mahon and ***Kleeman***. Dr. ***Kleeman*** was the **[***5]** sole trial defendant, however, because Goudreault settled with the other defendants. Goudreault introduced evidence of several breaches of Dr. ***Kleeman***'s duty of care, including responsibility for causing at least one of the four vascular injuries and for failing to timely diagnose and treat compartment syndrome.

Goudreault maintained that Dr. ***Kleeman*** advised him that he would supervise the surgical team performing the ALIF. Dr. ***Kleeman*** disputed this, and denied any general responsibility for Goudreault's condition as the admitting physician. Dr. ***Kleeman*** further testified that he was not qualified to treat the compartment syndrome and that vascular issues were the vascular surgeon's responsibility. He acknowledged that Dr. Mahon did not act quickly upon being informed of the suspected compartment syndrome, but denied any responsibility for the delay. Additionally, because he was not present for Goudreault's entire surgery, Dr. ***Kleeman*** said his "index of suspicion" regarding compartment syndrome was not high and that he relied upon Drs. Nepomnayshy and Mahon to also monitor Goudreault's condition.

Both sides presented expert testimony. Goudreault called Dr. Michael Golding, a surgeon with **[***6]** vascular training and board-certification in thoracic, cardiovascular and general surgery. Dr. Golding testified that surgical teams commonly have leaders, and that the attending surgeon, in this case Dr. ***Kleeman***, typically heads the team. He further testified that, although injuries to blood vessels sometimes happened during spinal surgery, they are rare. He testified that the quantity and severity of the injuries to Goudreault's blood vessels fell far below the standard of reasonable surgical care. Although Dr. Golding initially said that it was difficult to tell whether Dr. Nepomnayshy or Dr. ***Kleeman*** caused the injuries, he later testified that it was more likely than not that Dr. ***Kleeman*** caused at least one of Goudreault's vascular injuries.

As for the compartment syndrome, Dr. Golding opined that as Goudreault's admitting physician, Dr. ***Kleeman*** was responsible **[**1047]** for post-surgical monitoring. In Dr. Golding's opinion, the circumstances of Goudreault's surgery created an environment that predisposed him to compartment syndrome and any surgeon would know that vascular injury was one of its common causes. He also testified that Dr. ***Kleeman*** breached the standard of reasonable care by **[***7]** failing to timely confirm or deny the presence of compartment syndrome, notwithstanding the presence of warning signs. He testified that early diagnosis and treatment of compartment **[*243]** syndrome usually averts permanent injury and that Dr. ***Kleeman***'s failure to timely diagnose and treat the compartment syndrome caused permanent injuries.

Dr. ***Kleeman*** called two expert witnesses: Dr. Bruce Morgan, a board-certified general and vascular surgeon, and Dr. John Regan, a board-certified orthopedic surgeon and internist who had performed over two thousand ALIFs. Both disputed the assertions that Dr. ***Kleeman*** breached duties of care and caused Goudreault's injuries.

At the close of evidence, both parties moved for a directed verdict. Dr. ***Kleeman*** argued that no jury could reasonably find for Goudreault on the count alleging negligent vascular injury because Dr. Golding's expert opinion on causation was speculative. As to the count alleging negligent postoperative care, Dr. ***Kleeman*** argued that Dr. Golding lacked the requisite experience with ALIFs to give expert testimony on the breach of duty. Goudreault moved for a directed verdict prohibiting the apportionment of fault to Drs. Nepomnayshy and Mahon **[***8]** for lack of adequate evidence. The trial court denied each motion.

After the jury was instructed and heard closing arguments, the court explained the special verdict form. The first question asked whether the defendant was at fault for the plaintiff's injuries. If so, the jury was

instructed to address question two, which asked the jury to determine the total amount of damages.

Upon learning that the jury was deadlocked, the court gave an additional charge that apprised the jury, for the first time, of its ability to apportion fault to non-litigants. The court cautioned the jury not to "reach that issue unless you find D[r.] ***Kleeman*** is responsible to any degree." The court then instructed the jury to deliberate further.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

Thereafter, the jury foreperson submitted a written question to the court asking:

> Does a Decision which Favors The Defendant Preclude other Remedies? [O>ie is it Necessary before [pursuing] other People<O] i.e. Is it necessary to prove Dr. K's negligence in order to seek remedy from other parties? (For example, Dr. Mahon?)

Over Dr. ***Kleeman***'s objection, the court responded in writing:

> [I]n order **[***9]** for any apportionment of fault among parties other than the defendant Dr. ***Kleeman*** to occur, Dr. ***Kleeman*** would have to be found legally at fault for plaintiff's injuries to some degree.

The jury then returned an affirmative response to the first question regarding liability but failed to answer the second question concerning **[*244]** damages. The court gave the jury another special verdict form with two additional questions: question three asked whether non-litigants were at fault and, if the answer was "yes," question four asked the jury to attribute percentages of fault to each. The court instructed the jury to proceed to the remaining questions and apportion fault "to each person who [it] determine[d] contributed to cause [Goudreault's] injuries." It reminded the jury that the defendant bore the burden of proving the fault of non-litigants. Each counsel then gave further closing arguments **[**1048]** on the issue of apportionment. The jury found total damages of $ 1,109,000 and attributed 10% of fault to Dr. ***Kleeman***, 20% of fault to Dr. Nepomnayshy and 70% of fault to Dr. Mahon.

On appeal, Dr. ***Kleeman*** argues that the trial court committed reversible error by: (1) qualifying Dr. Golding as an expert witness; **[***10]** (2) permitting Dr. Golding to opine that Dr. ***Kleeman*** likely caused at least one of Goudreault's vascular injuries; (3) granting Goudreault's motion *in limine* to exclude impeachment of Dr. Golding by the American College of Surgeons' (ACS) policy statement; and (4) unfairly prejudicing the jury by submitting a nonresponsive and misleading answer to its question during deliberations.

Goudreault cross-appeals, arguing that: (1) Dr. ***Kleeman*** should be jointly liable with Drs. Nepomnayshy and Mahon under *RSA 507:7-e, I(c)* (1997); and (2) Dr. ***Kleeman*** failed to adduce adequate evidence to apportion fault to non-litigants pursuant to our holdings in *Nilsson v. Bierman, 150 N.H. 393, 839 A.2d 25 (2003)*, and *DeBenedetto v. CLD Consulting Eng'rs, 153 N.H. 793, 903 A.2d 969 (2006)*.

We reverse and remand based upon the court's response to the jury's question. We address the remaining issues because they "are likely to arise on remand." *Figlioli v. R.J. Moreau Cos., 151 N.H. 618, 622, 866 A.2d 962 (2005)*.

I. Testimony of Dr. Golding

A. Qualification as an Expert Witness

Dr. ***Kleeman*** first argues that the trial court erred by allowing Dr. Golding to offer expert testimony. He argues that Dr. Golding was not qualified because he had not operated **[***11]** since 1986 and had relinquished all surgical privileges by 1988. Additionally, Dr. ***Kleeman*** points out that Dr. Golding "was never trained in and had never performed any lapar[a]scopic surgery, observed an ALIF, or cared for a post-operative ALIF patient."

Goudreault counters that, although Dr. Golding retired from surgery for health reasons, he remained active in medicine. Goudreault points out that his was not strictly a laparascopic procedure because the complications required conversion to an open approach, which was within Dr. Golding's experience. Goudreault asserts that Dr. Golding was "very familiar with **[*245]** the ... lumbar anatomy" and "while [he] had never performed a lapar[a]scopic spinal surgery, he was well familiar with the techniques and [related] equipment." Goudreault maintains that vascular injuries are not unique to the ALIF procedure and that compartment syndrome can arise from various types of surgery.

NH[1][↑] [1] ***HN1***[↑] Expert witness testimony is

required to establish a *prima facie* medical negligence case. *See* RSA 507-E:2, I (1997). A witness is "qualified as an expert by knowledge, skill, experience, training, or education." N.H. R. Ev. 702. "In deciding whether to qualify a witness **[***12]** as an expert, the trial judge must conduct an adequate investigation of the expert's qualifications." *Milliken v. Dartmouth-Hitchcock Clinic*, 154 N.H. 662, 667, 914 A.2d 1226 (2006) (quotation omitted); *cf.* RSA 516:29-a, I (2007).

NH[2][2] ***HN2***"Because the trial judge has the opportunity to hear and observe the witness, the decision whether a witness qualifies as an expert is within the trial judge's discretion." *Milliken*, 154 N.H. at 667 (quotation omitted). We will not reverse that decision absent a clearly unsustainable exercise of discretion. *Hodgdon v. Frisbie Mem. Hosp.*, 147 N.H. 286, 289, 786 A.2d 859 (2001); *State v. Lambert*, 147 N.H. 295, 296, 787 A.2d 175 (2001). Our inquiry is "whether the record establishes an objective basis sufficient to sustain the discretionary judgment **[**1049]** made." *Lambert*, 147 N.H. at 296. To prevail on appeal, "the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *Id.* (quotation omitted).

After a hearing, the trial court ruled that "[b]ased on his training and experience, ... Dr. Golding is qualified to render his opinions about the surgery performed on the plaintiff and his follow-up care" together with opinions about "the role and responsibility **[***13]** of Dr. ***Kleeman*** as the lead surgeon ... on plaintiff's procedure."

NH[3][3] We cannot say that the trial court's ruling was an unsustainable exercise of discretion. Dr. Golding had training in vascular surgery and was board-certified in thoracic, cardiovascular and general surgery. Although he no longer operates, he has been licensed to practice medicine since 1959 and is currently licensed to practice in three states. During his career, he taught medicine, performed research and practiced as a cardiac surgeon. He is an attending surgeon and consultant at three different hospitals. In addition to teaching surgeons about compartment syndrome, Dr. Golding authored a chapter about vascular trauma in a medical textbook including a discussion of compartment syndrome.

NH[4][4] Dr. Golding's lack of laparascopic ALIF experience and training does not negate his ability to advance the jury's understanding and determination of facts at issue. ***HN3***"Although a medical degree does not automatically **[*246]** qualify a witness to give an opinion on every conceivable medical question," *Mankoski v. Briley*, 137 N.H. 308, 313, 627 A.2d 578 (1993) (quotation omitted), we have held that "[t]he lack of specialization in a particular medical field does **[***14]** not automatically disqualify a doctor from testifying as an expert in that field." *Milliken*, 154 N.H. at 667 (quotation omitted); *see also Mankoski*, 137 N.H. at 312 ("An orthopedic surgeon is not *per se* unqualified to render expert testimony on the psychological health of a patient.").

Although Dr. Golding had not operated on patients since 1986 and had never personally performed an ALIF, he had performed surgery in the posterior lumbar area hundreds of times and had assisted to resolve major vascular problems that occurred during spinal fusions. Thus, we find no error in the trial court's ruling qualifying Dr. Golding as an expert. *See* N.H. R. Ev. 702.

B. Causation of Vascular Injuries

Dr. ***Kleeman*** next argues that the trial court erred by allowing Dr. Golding to opine that Dr. ***Kleeman*** more likely than not caused at least one of Goudreault's vascular injuries. Dr. ***Kleeman*** points out that Dr. Golding also testified that either Dr. Nepomnayshy or Dr. ***Kleeman*** could have caused Goudreault's vascular injuries. He contends that Dr. Golding's opinion on causation had no foundation under RSA 516:29-a, I, because of insufficient facts or data and a lack of "reliable principles reliably applied **[***15]** to the facts of th[is] case."

Goudreault argues that Dr. Golding's opinion was admissible because he based it upon the records, depositions and testimony coupled with his experience as a surgeon. Goudreault maintains that any inconsistent testimony given by Dr. Golding should go the weight of his opinion, not its admissibility.

NH[5][5] ***HN4***To make out a *prima facie* case of medical negligence, a plaintiff must introduce, by expert testimony, "evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed." *Bronson v. The Hitchcock Clinic*, 140 N.H. 798, 801, 677 A.2d 665 (1996); *see* RSA 507-E:2, I(c). "The plaintiff need **[**1050]** only show with reasonable probability, not mathematical certainty, that but for the defendant's negligence, the harm would not have occurred." *Bronson*, 140 N.H. at 802-03.

NH[6,7][↑] [6, 7] A medical expert's competent opinion that the defendant's negligence "probably caused" the harm establishes the quantum of expert testimony necessary. *See id. at 802*; *see also* N.H. R. Ev. 704; *Emerson v. Bentwood, 146 N.H. 251, 256, 769 A.2d 403 (2001)*. However, such an opinion is admissible only after it has been shown to the satisfaction of the court that the **[*247]** "testimony **[***16]** is based upon sufficient facts or data; ... is the product of reliable principles and methods; and ... [that t]he witness has applied the principles and methods reliably to the facts of the case." *RSA 516:29-a, I*; *see also* N.H. R. Ev. 702. Thus, *HN5*[↑] "an expert's testimony must rise to a threshold level of reliability to be admissible under New Hampshire Rule of Evidence 702." *Emerson, 146 N.H. at 254* (quotation omitted).

> The proper focus for the trial court is the reliability of the expert's methodology or technique. The trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony.

Baker Valley Lumber v. Ingersoll-Rand, 148 N.H. 609, 616, 813 A.2d 409 (2002).

> *HN6*[↑] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.H. R. Ev. 703.

The trial court permitted Dr. *Kleeman* to explore the basis **[***17]** for Dr. Golding's opinion in the jury's presence before allowing him to render an opinion on causation. Dr. Golding testified that "[t]he basis is when I reviewed the records and some depositions and testimony that I heard here yesterday and forty years of experience in surgery." Dr. Golding conceded that the records he reviewed did not expressly identify which doctor caused the vascular injuries, but he elaborated that "[i]n reviewing the operative records, there was a progression of major bleeding episodes" coupled with his "sense of how dissection in the retro-peroneal space is done, and how vessels get injured in the retro-peroneal space." He added that the "use of blunt and sharp dissection ... requires traction and counter-traction" performed by two sets of hands, which occurred here in an area of blood vessels that "can easily be damaged by either traction or counter-traction." Dr. Golding testified that two vascular injuries were "[c]ertainly" caused by traction and a third "could be from the traction."

The trial court recessed to examine the record outside of the jury's presence in response to Dr. *Kleeman*'s objection. Dr. Golding was then allowed to give his opinion "that **[***18]** more likely than not that Doctor *Kleeman* caused at least one of these vascular injuries."

NH[8][↑] [8] The trial court did not expressly rule as to the reliability of Dr. Golding's methodology. He appears to have relied upon something akin to **[*248]** "differential etiology," *Baker Valley Lumber, 148 N.H. at 616*, "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." **[**1051]** *Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (4th Cir. 1999)*. We find no error in admitting this testimony because *HN7*[↑] admissibility of expert opinions turns upon the "reliability of the expert's methodology or technique," *Baker Valley Lumber, 148 N.H. at 616*, and not upon the expert's conclusion, *see id. at 615*; *see also Baxter v. Temple, 157 N.H. 280, 285, 949 A.2d 167 (2008)*.

NH[9][↑] [9] *HN8*[↑] To the extent there were gaps in Dr. Golding's explanations, "these omissions concern the relative weight and credibility of competing expert testimony rather than the basic reliability of such testimony, and are the province of the fact-finder, not the trial court." *Baker Valley Lumber, 148 N.H. at 615*. "[O]bjections to the basis of an expert's opinion go to the weight to be accorded **[***19]** the opinion evidence, and not to its admissibility." *Id.* (quotation omitted). "The appropriate method of testing the basis of an expert's opinion is by cross-examination of the expert." *Id. at 615-16* (quotation omitted).

C. Use of ACS Policy for Impeachment

Prior to trial, Goudreault sought to exclude any evidence suggesting that, by testifying, Dr. Golding was failing to abide by the ACS policy statement on expert testimony because he lacked sufficient experience to offer opinion testimony on matters related to the ALIF procedure. The Trial Court (*McGuire*, J.) denied Goudreault's motion *in limine*, ruling that the "standard is relevant to the competency and credibility of Dr. Golding, particularly

where he is a Fellow of the [ACS], and is not unfairly prejudicial." Goudreault moved for reconsideration clarifying that he objected only to identification of the ACS as the source of statements and not their contents. The Trial Court (*Murphy*, J.) reconsidered the earlier decision and granted Goudreault's motion *in limine*, ruling "it is appropriate to prevent injustice."

Dr. ***Kleeman*** argues that the trial court "erred by granting plaintiff's untimely motion to reconsider." He urges that the **[***20]** policy statement "exposed a legitimate basis for rejecting Dr. Golding's testimony" because it "would have demonstrated [that] the professional organization Dr. Golding relies upon to burnish his reputation had promulgated recommendations that, if ... followed, would have precluded him from testifying" due to a lack of experience and demonstrated competence in ALIF surgery and post-operative care. Dr. ***Kleeman*** cites case law attaching weight to similar policies promulgated by the American Association of Neurosurgeons. *See* ***[*249]*** *Austin v. American Ass'n of Neurological Surgeons, 253 F.3d 967 (7th Cir. 2001), cert. denied, 534 U.S. 1078, 122 S. Ct. 807, 151 L. Ed. 2d 693 (2002).*

Goudreault argues that "medical specialty societies, such as ACS, ... should not have any role in determining the qualifications of any expert witness in a judicial proceeding." Rather, he maintains that the trial court made the determination that Dr. Golding was qualified as an expert guided by judicial standards and not those of a private organization.

HN9[↑] We review a trial court's decisions on the admissibility of evidence under an unsustainable exercise of discretion standard. *Boynton v. Figueroa, 154 N.H. 592, 599-600, 913 A.2d 697 (2006)*. We will not disturb the **[***21]** trial court's decision absent an unsustainable exercise of discretion. *Id. at 600*. "To meet this standard, [Dr. ***Kleeman***] must demonstrate that the trial court's rulings were clearly untenable or unreasonable to the prejudice of h[is] case." *Desclos v. S. N.H. Med. Ctr., 153 N.H. 607, 610, 903 A.2d 952 (2006)*.

NH[10,11][↑] [10, 11] **[**1052]** We cannot say that the trial court's ruling was unreasonable or untenable. ***HN10***[↑] "[T]he power to [reconsider an issue once decided] remains in the court until final judgment or decree." *Redlon Co. v. Corporation, 91 N.H. 502, 506, 23 A.2d 370 (1941)* (quotation omitted). "It is immaterial that different judges act." *Id.* Upon clarification of Goudreault's motion *in limine*, Judge Murphy concluded that reconsideration of Judge McGuire's prior ruling was necessary to prevent injustice. The trial court could have reasoned that its ruling was necessary to avoid juror confusion regarding the threshold determination of expert witness competency. *Emery v. Company, 89 N.H. 165, 169, 195 A. 409 (1937)* (***HN11***[↑] "The question whether one possesses the requisite qualifications to testify as an expert is one of fact for the trial court ... ."). Thus, we cannot say the trial court's ruling exceeded its "broad discretion to fix the limits of cross-examination." **[***22]** *State v. Miller, 155 N.H. 246, 253, 921 A.2d 942 (2007)*.

II. The Supplemental Jury Instruction

Dr. ***Kleeman*** maintains that the trial court committed reversible error by submitting a nonresponsive answer to a deadlocked jury, resulting in a verdict that was the product of bias and confusion about the law. Noting the jury's ignorance of the previous settlements reached with Drs. Mahon and Nepomnayshy, he maintains that the correct response to the jury's question was that Goudreault's remedies against the other doctors would not be affected by its finding on Dr. ***Kleeman***'s liability. He argues that "the jury's verdict was based on the mistaken belief that unless it found [him] liable[,] ... Goudreault would be left without a remedy."

Goudreault argues that the trial court's response was a correct statement of the law because "[i]f Dr. ***Kleeman*** was not [found to be] legally at fault **[*250]** to any degree, [then he] could not pursue anyone else because he had settled with those parties." Goudreault also argues that the original jury instructions regarding liability and collateral sources of recovery were sufficient to ensure that the jury understood the requisites for a determination of liability. Finally, Goudreault **[***23]** argues that any perceived prejudice is but "wild speculation."

NH[12][↑] [12] ***HN12***[↑] "The response to a jury question is left to the sound discretion of the trial court." *State v. Stewart, 155 N.H. 212, 214, 921 A.2d 933 (2007)* (quotation omitted). "[W]e review the court's response under the unsustainable exercise of discretion standard." *Id.* "First, [the party challenging an instruction] must show that it was a substantial error such that it could have misled the jury regarding the applicable law." *Francoeur v. Piper, 146 N.H. 525, 531, 776 A.2d 1270 (2001)*. "The instruction must be judged as a reasonable juror would probably have understood it

... ." State v. Dingman, 144 N.H. 113, 115, 738 A.2d 357 (1999). "We review the trial court's answer to a jury inquiry in the context of the court's entire charge to determine whether the answer accurately conveys the law on the question and whether the charge as a whole fairly covered the issues and law in the case." Stewart, 155 N.H. at 214 (quotation omitted). Even if the supplemental instruction is shown to be a substantial error, we will only set aside a jury verdict if the error resulted in mistake or partiality. See Babb v. Clark, 150 N.H. 98, 100, 834 A.2d 364 (2003) (quotation omitted); Francoeur, 146 N.H. at 531.

*A. [***24] The Question and Answer*

NH[13,14] [13, 14] HN13 "[T]he general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification **[**1053]** on a point of law arising from facts about which there is doubt or confusion." People v. Childs, 159 Ill. 2d 217, 636 N.E.2d 534, 539, 201 Ill. Dec. 102 (Ill. 1994). It should address "those matters fairly encompassed within the question." Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 176 (1st Cir. 1998). Here, we conclude that the trial court committed a substantial error in answering the jury's question. The question posed to the court was reasonably susceptible of competing interpretations. The jury asked:

> Does a Decision which Favors The Defendant Preclude other Remedies? [O>ie is it Necessary before [pursuing] other People<O] i.e. Is it necessary to prove Dr. K's negligence in order to seek remedy from other parties? (For example, Dr. Mahon?)

One trained in the law might interpret this as an inquiry about the apportionment of fault and whether that issue is germane to the threshold finding of liability. However, we believe the better reading of the question, especially in view of the portion that was stricken, is whether returning a **[*251]** defendant's **[***25]** verdict on liability would foreclose the plaintiff from pursuing damages against other persons involved in bringing about his alleged harm.

NH[15] [15] The trial court responded to the former interpretation but ignored the latter. At best, its response addressed one possible, though unlikely, interpretation of the jury's inquiry. At worst, it was entirely nonresponsive. Thus, it likely "was, in effect, no response at all." Van Winkle v. Owens-Corning Fiberglas, 291 Ill. App. 3d 165, 683 N.E.2d 985, 991, 225 Ill. Dec. 482 (Ill. App. Ct. 1997); see Bollenbach v. United States, 326 U.S. 607, 613-15, 66 S. Ct. 402, 90 L. Ed. 350 (1946) (declining to sustain conviction where question and answer between judge and deliberating jury was subject to multiple interpretations). HN14 "The failure to answer or the giving of a response which provides no answer to the particular question of law posed ... [can result in] prejudicial error." Van Winkle, 683 N.E.2d at 990 (quotation omitted). The trial court should have taken special care to specifically and accurately dispel any confusion about the law. See id.; Bollenbach, 326 U.S. at 612-13. Accordingly, we cannot sustain its answer to the deadlocked jury's question. See Lambert, 147 N.H. at 296.

B. Prejudice

The fact that the trial court **[***26]** substantially erred does not end our inquiry. To warrant reversal, the error must be said to have prejudiced Dr. **Kleeman**. See Stewart, 155 N.H. at 217; Francoeur, 146 N.H. at 531. We are persuaded that the trial court's error likely caused prejudice.

NH[16,17] [16, 17] We begin by noting that HN15 "a jury instruction given after deliberations have begun comes at a particularly delicate juncture and therefore evokes heightened scrutiny." Testa, 144 F.3d at 175. In addition, the jury's question evinces confusion about the law and its application to a dispositive issue, see Van Winkle, 683 N.E.2d at 991; Hassler v. Simon, 466 N.W.2d 434, 437 (Minn. Ct. App. 1991), which was heavily disputed at trial, see Stewart, 155 N.H. at 217; Francoeur, 146 N.H. at 531-32. The court's nonresponsive answer likely permitted lingering confusion at minimum or even promoted misapprehension about the applicable law by "impl[ying] that the jury must find [Dr. **Kleeman**] negligent if [Goudreault] was to recover anything for [his] damages." Hassler, 466 N.W.2d at 437.

NH[18,19] [18, 19] Although HN16 we consider the trial court's supplemental instruction in the context of the whole jury charge, see **[**1054]** Francoeur, 146 N.H. at 531, the prior charge on collateral **[***27]** sources of recovery and the requisites of professional negligence did not cure the prejudice. See id.; Baraniak v. Kurby, 371 Ill. App. 3d 310, 862 N.E.2d 1152, 1157, 308 Ill. Dec. 949 (Ill. App. Ct.) (trial court has duty to resolve jury confusion about law "[even though] the jury was properly instructed" originally), appeal denied, 224 Ill. 2d 571, 871 N.E.2d 54, 312 Ill.

Dec. 654 (Ill. 2007). HN17 "The influence of the trial judge on the jury is necessarily and properly of great weight and **[*252]** jurors are ever watchful of the words that fall from him." *Bollenbach, 326 U.S. at 612* (quotation and citation omitted). "If [the court's answer] is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge." *Id.*

Accordingly, we reverse and remand for a new trial.

III. Joint & Several Liability

NH[20] [20] Goudreault argues that Dr. **Kleeman** should have been jointly and severally liable. HN18 "Under the rule of joint and several liability, a defendant who is only partly responsible for a plaintiff's injuries may be held responsible for the entire amount of recoverable damages." *DeBenedetto, 153 N.H. at 798*. "This allows a plaintiff to sue any one of several tortfeasors and collect the full amount of recoverable damages." **[***28]** *Id.* "As a result, numerous jurisdictions[, including New Hampshire,] have enacted legislation seeking to ameliorate the 'inequities' suffered by low fault, 'deep pocket' defendants ... ." *Id. at 799*.

HN19 Under New Hampshire's statutory scheme, liability is "joint and several" for each party fifty percent at fault or greater. *See RSA 507:7-e, I(b)* (1997). However, where "any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him." *Id.* Notwithstanding *RSA 507:7-e, I(b)*, *RSA 507:7-e, I(c)*, restores joint liability by providing, in pertinent part:

> [I]n HN20 all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, [the court shall] grant judgment against all such parties on the basis of the rules of joint and several liability.

RSA 507:7-e, I(c) (1997).

Goudreault asserts that Dr. **Kleeman** should be jointly liable regardless of his percentage of fault because he "t[ook] active part in a common plan or design," *id.*, with the other doctors operating upon him where each "w[as] responsible for [his] treatment and care[,] **[***29]** ... stood side by side during surgery and assisted one another[,] ... wrote notes and observations in the same chart[,] ... and individually profited [from] the services rendered." We disagree.

HN21 The interpretation of a statute is a question of law, which we review *de novo*. We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. When **[*253]** a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include. If a statute is ambiguous, however, we consider legislative history to aid our analysis. Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy **[**1055]** sought to be advanced by the entire statutory scheme.

Cloutier v. City of Berlin, 154 N.H. 13, 17, 907 A.2d 955 (2006) (citations omitted).

We begin our analysis by considering *RSA 507:7-e, I(c)*, in context. *RSA chapter 507* is a broad framework **[***30]** governing comparative fault and apportionment of tort liability. *See Nilsson, 150 N.H. at 395*. "The New Hampshire legislature first enacted a comparative negligence statute in 1969, motivated by a deep conviction that the contributory negligence rule was so basically unfair and illogical that it should have no further place in the State's law." *DeBenedetto, 153 N.H. at 808* (quotation and brackets omitted). "However, the statute abolished not only contributory negligence, but joint and several liability as well." *Id.*

In 1986, the legislature separated the concepts of apportionment and contributory negligence, "enact[ing] *section 7-d* to address contributory negligence and *section 7-e* to address apportionment." *Nilsson, 150 N.H. at 397*. "As enacted in 1986, *section 7-e* provided for apportionment of damages in all actions, not only those involving contributorily negligent plaintiffs." *Id.* (quotation and brackets omitted). "[T]he legislature [thereby] established a system for contribution among tortfeasors and reinstituted joint and several liability," *DeBenedetto, 153 N.H. at 808*, for " 'each party liable,' " *id. at 798* (quoting Laws 1986, 227:2).

"In 1989, the legislature amended *section 7-e, I(b)* **[***31]** to protect minimally liable defendants." *Nilsson, 150 N.H. at 399* (quotation omitted). "[R]ecognizing that manufacturers, professionals and public agencies become targets for damage recoveries because of their

potential money resources rather than their fault, [it] sought to amend RSA 507:7-e to treat fairly those entities which may be unfairly treated under the rule of joint and several liability." DeBenedetto, 153 N.H. at 799 (quotations and ellipsis omitted). "[It] rejected [a] pure several liability approach and instead passed a compromise measure adopting several liability only for those parties less than 50 percent at fault." *Id.* (quotation omitted). "The resulting legislation made New Hampshire a hybrid jurisdiction" employing both several and joint liability. *Id.* **HN22** "[T]he comprehensive scheme of RSA chapter 507 **[*254]** reflects the legislature's careful balance of the rights of defendants and plaintiffs ... [, and i]t is not our place to upset this balance." Nilsson, 150 N.H. at 400.

NH[21] [21] **HN23** The plain language of RSA 507:7-e, I(c) imposes joint liability where a tortfeasor (1) knowingly (2) pursued or took active part in (3) a common plan or design (4) resulting in harm. *See* RSA 507:7-e, I(c). **[***32]** The present dispute centers upon what the legislature meant by "a common plan or design." *Id.* Goudreault argues that its plain meaning is "concerted action, taken by each with knowledge of the others' participation" without proof of civil conspiracy or specific intent. He argues it is enough that the doctors "t[ook] a conscious part in a common plan which results in harm." On the other hand, Dr. **Kleeman** argues that Goudreault's construction "would have the absurd result of subjecting every doctor involved in a patient's care to joint and several liability for the full extent of the patient's [] damages." He maintains that RSA 507:7-e, I(c) "creates a narrow exception to several liability, preserving the common law rule of joint and several liability when there is concerted wrongful activity such as ... civil conspiracy or when a defendant intentionally aids and abets another's tortious conduct."

[1056]** We note that of the several ways one may be subject to joint and several tort liability, RSA 507:7-e, I(c), most closely resembles the common law imposition of joint and several liability for concerted activity. *See* 2 J.D. LEE & B. A. LINDAHL, MODERN TORT LAW LIABILITY & LITIGATION § 19:4, **[***33]** at 19-7 to -8 (2d ed. 2002); (2000). Recognizing this, both parties attempt to define what constitutes concerted activity; specifically, whether it contemplates collaboration to achieve a tortious result, or, conversely, if the pursuit of a desirable result gone awry due to negligence is sufficient.

NH[22] [22] Goudreault correctly points out that the legislature did not include words such as "common plan or design" *to commit a tortious act*. However, neither did it require a "common plan or design" to achieve any other variety of result. **HN24** The better reading of the statute, considering its object and purpose, takes account of the fact that, to be subject to RSA 507:7-e, I(c), the conduct must be undertaken "knowingly." Under the Criminal Code, "[a] person acts knowingly with respect to conduct or to a circumstance ... when he is aware that his conduct *is of such nature* or *that such circumstances exist*." RSA 626:2, II(b) (2007) (emphases added). "In other words, a defendant acts knowingly when he is aware that it is practically certain that his conduct will cause a prohibited result." State v. Hall, 148 N.H. 394, 398, 808 A.2d 55 (2002) (quotation **[***34]** omitted).

NH[23] [23] **[*255]** **HN25** We believe the legislature required the mental state of "knowingly" as a limited exception restoring common law joint liability for "[a]ll those who, in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit." W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984) (footnotes omitted).

NH[24] [24] In this way, **HN26** the requirements of RSA 507:7-e, I(c) resemble the concerted activity of civil conspiracy. *See* Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47, 534 A.2d 706 (1987) (outlining elements of civil conspiracy). "It is ... essential that each ... defendant ... be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence." KEETON, *supra* at 324. However, "[e]xpress agreement is not necessary, and all that is required is that there be a tacit understanding, as where two automobile drivers suddenly and without consultation decide to race their cars on the public highway." *Id.* at 323 (footnotes omitted).

Our construction is guided by the legislative **[***35]** policy behind RSA chapter 507. We have previously observed that **HN27** RSA 507:7-e, I(c) imposes joint liability only as an *exception* to RSA 507:7-e, I(b). Rodgers v. Colby's Ol' Place, 148 N.H. 41, 44, 802 A.2d 1159 (2002). Goudreault's expansive exception would contravene the legislature's objective of shielding minimally liable tortfeasors from undue civil liability. Dr. **Kleeman** correctly points out that "[d]octors, lawyers, dentists, and architects rarely practice their trades in isolation" and that Goudreault's construction "would swallow the rule" of several liability.

Finally, we note that our construction accords with the decisions of other states. See, e.g., GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11, 15 (Nev. 2001); Schneider v. Schaaf, 1999 ND 235, 603 N.W.2d 869, 876 (N.D. 1999); Kottler v. State, 136 Wn.2d 437, 963 P.2d 834, 841 (Wash. 1998).

IV. Apportionment of Fault to Non-litigants

NH[25] [25] Goudreault argues that Dr. **Kleeman** failed to adduce "adequate evidence," DeBenedetto, [**1057] 153 N.H. at 804, for the jury to apportion fault to Drs. Mahon and Nepomnayshy. In *Nilsson*, we held "that HN28 for apportionment purposes under [RSA 507:7-e, I(b)], the word 'party' refers to parties to an action, including settling parties." Nilsson, 150 N.H. at 396 (quotation **[***36]** and ellipsis omitted). In *DeBenedetto*, we elaborated that "the word 'party' [embraces] ... all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." DeBenedetto, 153 N.H. at 804. However, in order to shift fault, we noted that "allegations of a non-litigant tortfeasor's fault must be supported **[*256]** by *adequate evidence* before a jury or court may consider it for fault apportionment purposes." *Id.* (emphases added).

Goudreault's effort to preclude apportionment of liability to Drs. Mahon and Nepomnayshy derives from RSA chapter 507-E, the statute governing the elements of a medical negligence plaintiff's *prima facie* case. He argues that the defendant should carry the same or a similar burden of proof in order to shift fault to non-litigants. He premises this argument on equal protection grounds and fundamental fairness to litigants.

Dr. **Kleeman** argues that New Hampshire law does not require him to apportion fault by presenting a *prima facie* case through "unequivocal expert testimony," testimony from the "apportionees," or evidence from a defense expert. He cites Wilder v. Eberhart, 977 F.2d 673 (1st Cir. 1992), **[***37]** *cert. denied*, 508 U.S. 930, 113 S. Ct. 2396, 124 L. Ed. 2d 297 (1993), arguing that the burden of proof on causation "rests and remains with the plaintiff."

NH[26] [26] First, we consider whether, as the trial court instructed the jury over his objection, Dr. **Kleeman** had the burden of proving non-litigant liability. Dr. **Kleeman** did not appeal this issue, but clarification may assist the litigants upon retrial. Goudreault correctly observes that HN29 a civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an *affirmative defense*. *Cf.* RSA 507:7-d (1997) (stating, with regard to comparative fault of a party, that "[t]he burden of proof as to the existence of amount of fault attributable to a party shall rest upon the party making such allegation"). Thus, the defendant carries the burdens of production and persuasion. *See id.*; *see also* Brann v. Exeter Clinic, 127 N.H. 155, 159, 498 A.2d 334 (1985); Gust v. Jones, 162 F.3d 587, 593 (10th Cir. 1998) (interpreting Kansas law to require defendant asserting non-party doctor's fault to bear burden of proving such fault); Carroll v. Whitney, 29 S.W.3d 14, 21 (Tenn. 2000) ("[T]he nonparty defense is an affirmative defense [and as such], a jury can apportion **[***38]** fault to a nonparty only after it is convinced that the defendant's burden of establishing that a nonparty caused or contributed to the plaintiff's injury has been met.").

NH[27] [27] We further agree with Goudreault that HN30 a defendant who raises a non-litigant apportionment defense essentially "becomes another plaintiff who must seek to impose liability on a [non-litigant] just as plaintiff seeks to impose it on him." Where the defendant seeks to reduce or eliminate the plaintiff's recovery by apportioning professional liability, it is only fair that he or she carry the plaintiff's burden of proof outlined in RSA 507-E:2. That statute requires "affirmative evidence which must include expert testimony of a competent witness," RSA 507-E:2, I, of the standard of reasonable care, breach thereof and proximate causation of damages, *see* RSA 507-E:2, I(a)-(c).

[*257] In *Gust*, a case we relied upon in *DeBenedetto*, defendants in a vehicle accident **[**1058]** action sought to apportion fault to a nonparty doctor, Gust, 162 F.3d at 593, after the plaintiff sought recovery for harm to his femur, foot and ankle, id. at 591. The Tenth Circuit applied Kansas law to require "adequate evidence" in support of "allegations that a nonparty's **[***39]** negligence caused a plaintiff's harm." Id. at 593. In the context of a medical negligence claim "where the lack of reasonable care would [not] be apparent to the average layman," *id.*, such adequate evidence "require[d] expert testimony to establish that the [nonparty doctor breached] the accepted standard of medical care." Id. at 593-94. The lack of such expert testimony with respect to the treatment of the plaintiff's femur precluded apportionment to the nonparty doctor. Id. at 594. Although some evidence suggested a breach of care regarding treatment of the plaintiff's foot and ankle, those claims were also properly excluded from jury apportionment where the "[d]efendants produced no

expert testimony that [the doctor's] treatment exacerbated [the plaintiff's] foot and ankle injuries or resulted in any harm to [the plaintiff.]" *Id.*

Dr. ***Kleeman***'s reliance upon the First Circuit's holding in *Wilder* is misplaced. Notably, it preceded our decision in *Nilsson* by over ten years. Moreover, it is distinguishable from the case before us today. *Wilder* stands for the proposition that the plaintiff must prove proximate causation of his or her injuries, *Wilder, 977 F.2d at 676*, while "the defendant **[***40]** need not disprove causation" but only "discredit or rebut the plaintiff's evidence," *id.* "Defendant need not prove another cause, he only has to convince the trier of fact that the alleged negligence was not the legal cause of the injury." *Id.* Here, unlike *Wilder*, the defendant *is* seeking to prove another cause and, so, must go beyond the mere rebuttal of the plaintiff's expert evidence in *Wilder*.

NH[28][↑] [28] After reviewing the record, we conclude that there was sufficient expert testimony adduced to support the jury's apportionment of fault to Drs. Nepomnayshy and Mahon. As for Dr. Nepomnayshy's fault, Drs. ***Kleeman*** and Regan both testified that vascular issues were the vascular surgeon's responsibility. Dr. Morgan testified that Dr. Nepomnayshy would have been directing Dr. ***Kleeman*** in accessing Goudreault's spine. Dr. Golding opined that vascular injuries in such an approach were rare and that Goudreault's four injuries were *per se* breaches of the standard of reasonable care. Even Dr. Morgan conceded that it is unusual to have four vascular injuries during an ALIF. At minimum, the jury could have reasonably found that the vascular injuries caused Goudreault to endure additional surgeries and **[***41]** prolonged hospitalization.

[*258] As for Dr. Mahon, he was present for the repair of Goudreault's vascular injuries. Dr. Morgan testified that Goudreault's compartment syndrome was likely the product of procedures to repair the vascular injuries coupled with the excess of fluid in Goudreault's system following surgery. Dr. Morgan testified that the vascular surgeons, including Dr. Mahon, were responsible for post-surgical monitoring of vascular issues. Both Dr. ***Kleeman*** and the ICU nurse testified to alerting Dr. Mahon of Goudreault's suspected compartment syndrome. Dr. ***Kleeman*** acknowledged that Dr. Mahon did not act quickly and that several hours elapsed before Goudreault's surgery began. Dr. Golding also testified that any surgeon would know that vascular injury was a common cause of compartment syndrome and that time was of the essence in averting permanent injury. He also testified that the failure to timely diagnose and treat the compartment syndrome caused permanent injuries. We conclude that there was ample evidence **[**1059]** supporting the jury's verdict as to Dr. Mahon.

Reversed and remanded.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

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State v. Exxon Mobil Corp.

Supreme Court of New Hampshire

May 21, 2015, Argued; October 2, 2015, Opinion Issued

Nos. 2013-0591 2013-0668

Reporter
168 N.H. 211 *; 126 A.3d 266 **; 2015 N.H. LEXIS 108 ***

THE STATE OF NEW HAMPSHIRE v. EXXON MOBIL CORPORATION *& a.*

Subsequent History: US Supreme Court certiorari denied by *Exxon Mobil Corp. v. New Hampshire, 136 S. Ct. 2009, 195 L. Ed. 2d 215, 2016 U.S. LEXIS 3184 (U.S., May 16, 2016)*

Prior History: [*1]** Merrimack.

Disposition: Affirmed in part; and reversed in part.

Core Terms

trial court, gasoline, damages, market share, manufacturers, contamination, quotation, argues, fault, preemption, oxygenate, preempted, remediation, nonparties, supplier, testing, costs, refiners, warning, sites, cases, parens patriae, statistical, misconduct, asserts, contributed, regulation, funds, state law, groundwater

Case Summary

Overview

HOLDINGS: [1]-The federal Clean Air Act did not preempt the State's claim for damages for groundwater contamination allegedly caused by MTBE; [2]-The trial court properly applied a market share liability theory of recovery, as the State faced an impossible burden of proving which of several MTBE gasoline producers caused New Hampshire's groundwater contamination; [3]-The trial court properly accepted the use of statistical evidence and extrapolation to prove injury-in-fact; [4]-The plain language of RSA 524:1-b provided no support for defendants' argument differentiating past and future damages for purposes of calculating and awarding prejudgment interest; [5]-The fact that the State was allowed to proceed under parens patriae standing did not authorize the imposition of a trust over the money damages award, and the State was thus entitled to a conventional lump-sum damages award.

Outcome
Affirmed in part and reversed in part.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1 **Appeals, Appellate Briefs**

The appealing party bears the burden of demonstrating that it specifically raised the arguments articulated in its appellate brief before the trial court. Generally, the failure to do so bars a party from raising such claims on appeal.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > Separation of Powers

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2 **Standards of Review, De Novo Review**

Whether a lawsuit violates the Separation of Powers Clause of the State Constitution, N.H. Const. pt. I, art. 37, is a question of law, which is reviewed de novo.

Constitutional Law > Separation of Powers

HN3[] Constitutional Law, Separation of Powers

The separation of powers among the legislative, executive and judicial branches of government is an important part of its constitutional fabric. Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people. Thus, under the Separation of Powers Clause, each branch is prohibited from encroaching upon the powers and functions of another branch. Nevertheless, N.H. Const. pt. I, art. 37 does not provide for impenetrable barriers between the branches and the doctrine is violated only when one branch usurps an essential power of another.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4[] Standards of Review, De Novo Review

Statutory interpretation is a question of law, which is reviewed de novo. In matters of statutory interpretation, the New Hampshire Supreme Court is the final arbiter of the intent of the legislature, as expressed in the words of the statute considered as a whole. The court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.

Governments > Courts > Common Law

Governments > Legislation > Interpretation

HN5[] Courts, Common Law

Statutory provisions barring a common law right to recover are to be strictly construed. If such a right is to be taken away, it must be expressed clearly by the legislature.

Environmental Law > Hazardous Wastes & Toxic Substances > Cleanup

HN6[] Hazardous Wastes & Toxic Substances, Cleanup

The purpose of the Oil Discharge and Disposal Cleanup Fund (ODD Fund), RSA ch. 146-D (Supp. 2014), is to establish financial responsibility for the cleanup of oil discharge and disposal, and to establish a fund to be used in addressing the costs incurred by the owners of underground storage facilities and bulk storage facilities for the cleanup of oil discharge and disposal. RSA 146-D:1. The ODD Fund allows owners of eligible facilities to apply for reimbursement of court-ordered damages to third parties for injury or property damage and costs of cleanup of oil discharges up to $1,500,000. RSA 146-D:6, III. The ODD Fund is financed by a fee on imported oil that is paid on a per gallon basis by distributors who import oil into New Hampshire. RSA 146-D:2-:3. The end goal of the ODD Fund is not to offset tort liability for defendants but rather to provide an excess insurance mechanism for underground storage tank owners who are otherwise in compliance with all relevant laws and rules.

Environmental Law > Hazardous Wastes & Toxic Substances > Cleanup

HN7[] Hazardous Wastes & Toxic Substances, Cleanup

The purpose of the Gasoline Remediation and Elimination of Ethers Fund (GREE Fund), RSA ch. 146-G (Supp. 2014), a fund in addition to both the Oil Pollution Control Fund established pursuant to *RSA 146-A:11-a* (Supp. 2014) and the Oil Discharge and Disposal Cleanup Fund (ODD Fund), RSA ch. 146-D (Supp. 2014), is to provide procedures that will expedite the cleanup of gasoline ether spillage, mitigate the adverse effects of gasoline ether discharges, encourage preventive measures, impose a fee upon importers of neat gasoline ethers into the state and establish a fund for the remediation of groundwater and surface water contaminated by gasoline ethers. RSA 146-G:1, II. The GREE nonlapsing, revolving fund shall be used to mitigate the adverse effects of gasoline ether

discharges including, but not limited to, provision of emergency water supplies to persons affected by such pollution, and the establishment of an acceptable source of potable water to injured parties. RSA 146-G:4, I. Not more than $150,000 shall be allocated annually for research programs dedicated to the development and improvement of preventive and cleanup measures concerning such gasoline ether discharges. The fund's balance is capped at $2,500,000. RSA 146-G:4, II. The fund is financed in part by the ODD Fund. RSA 146-D:3, VI(b); RSA 146-G:1.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN8 Standards of Review, Abuse of Discretion

Whether a particular jury instruction is necessary and the exact scope and wording of jury instructions are within the sound discretion of the trial court. The appellate court reviews the trial court's decisions on these matters for an unsustainable exercise of discretion.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > Supremacy Clause > Federal Preemption

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN9 Standards of Review, De Novo Review

Because the trial court's determination of federal preemption is a matter of law, review is de novo.

Constitutional Law > Supremacy Clause > Federal Preemption

HN10 Supremacy Clause, Federal Preemption

The federal preemption doctrine is based upon the Supremacy Clause of the United States Constitution. U.S. Const. art. VI provides that federal law shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. Accordingly, it has long been settled that state laws that conflict with federal law are without effect.

Constitutional Law > Supremacy Clause > Federal Preemption

HN11 Supremacy Clause, Federal Preemption

Congress may preempt state law under the Supremacy Clause in several ways. First, within constitutional limits, Congress is empowered to preempt state law by so stating in express terms In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation.

Constitutional Law > Supremacy Clause > Federal Preemption

HN12 Supremacy Clause, Federal Preemption

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. This "conflict preemption" arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > Federal Preemption

HN13 Supremacy Clause, Federal Preemption

The so-called "obstacle branch" of conflict preemption arises when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The burden of establishing obstacle preemption is heavy: the mere fact of tension

between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power. Indeed, federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

Constitutional Law > Supremacy Clause > Federal Preemption

Environmental Law > Water Quality > General Overview

HN14[] Supremacy Clause, Federal Preemption

The control and elimination of water pollution is a subject clearly within the scope of the police power of the State. Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the states are not to be superseded by federal act unless that is the clear and manifest purpose of Congress. Accordingly, the purpose of Congress is the ultimate touchstone of preemption analysis. Since preemption of any type fundamentally is a question of congressional intent, preemption analysis begins with the source of the alleged preemption.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels

Environmental Law > Air Quality > General Overview

HN15[] Oil & Petroleum Products, Gasoline Fuels

In 1990, Congress enacted amendments to the Clean Air Act that, among other things, created the Reformulated Gasoline Program (RFG Program). 42 U.S.C.S. § 7545(k). The RFG Program required gasoline used in specific geographic areas to have a minimum oxygen content, achieved by the addition of an oxygenate of the manufacturer's choice. § 7545(k)(2)(B), (m)(2). After the passage of the amendments, the Environmental Protection Agency (EPA) certified various blends of gasoline for use in the RFG Program, including gasoline containing methyl tertiary butyl ether (MTBE), but did not mandate the use of any one oxygenate. As the United States Court of Appeals for the Second Circuit explained, the 1990 Amendments did not require, either expressly or implicitly, the use of MTBE. Although the 1990 Amendments required that gasoline in certain geographic areas contain a minimum level of oxygen, they did not prescribe a means by which manufacturers were to comply with this requirement. The EPA identified MTBE as one additive that could be used to "certify" gasoline, but certification of a fuel meant only that it satisfied certain conditions in reducing air pollution. Neither the statute nor the regulations required a manufacturer to use MTBE, rather than other oxygenates, such as ethanol, in its gasoline.

Constitutional Law > Supremacy Clause > Federal Preemption

HN16[] Supremacy Clause, Federal Preemption

Geier does not stand for the proposition that any time an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be preempted. Rather, a conflict results only when the regulation does not just set out options for compliance, but also provides that the regulated parties must remain free to choose among those options.

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN17[] Appeals, Standards of Review

Weighing the evidence is a proper function of the factfinder. The trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses. Factual findings will not be disturbed unless erroneous as a matter of law or

unsupported by the evidence. A fact finder has the discretion to evaluate the credibility of the evidence and may choose to reject that evidence in whole or in part. The appellate court's task is to determine whether a reasonable person could reach the same conclusion as the jury on the basis of the evidence before it. The appellate court reviews sufficiency of the evidence claims as a matter of law.

Torts > ... > Standards of Care > Appropriate Standard > Province of Court & Jury

Torts > ... > Standards of Care > Reasonable Care > Reasonable Person

HN18 **Appropriate Standard, Province of Court & Jury**

The test of due care is what reasonable prudence would require under similar circumstances. Whether the defendant breached that duty of care is a question for the trier of fact. Not every risk that might be foreseen gives rise to a duty to avoid a course of conduct; a duty arises because the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous. Conformity with industry practice is not an absolute defense to liability under New Hampshire law, because entire industries may lag behind the standard of care. But it is nonetheless a factor that the jury may consider in evaluating negligence claims. The test of due care is not custom or usage, but what reasonable prudence would require under the circumstances.

Environmental Law > Water Quality > General Overview

HN19 **Environmental Law, Water Quality**

See *RSA 481:1*.

Environmental Law > Water Quality > General Overview

Environmental Law > Administrative Proceedings & Litigation > Remedies

HN20 **Environmental Law, Water Quality**

As trustee, the State can bring suit to protect from contamination the waters over which it is trustee.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN21 **Justiciability, Standing**

A state may act as the representative of its citizens where the injury alleged affects the general population of a State in a substantial way.

Torts > Procedural Matters > Multiple Defendants > Alternative Liability

HN22 **Multiple Defendants, Alternative Liability**

The purpose behind market share liability is that in our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. In an era of mass production and complex marketing methods the traditional standard of negligence is insufficient to govern the obligations of manufacturer to consumer, courts should acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN23 **Standards of Review, Abuse of Discretion**

An appellate court reviews challenges to a trial court's evidentiary rulings under its unsustainable exercise of discretion standard and reverses only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. The appellate court reviews questions of law de novo.

Torts > Procedural Matters > Multiple Defendants > Alternative Liability

HN24[] Multiple Defendants, Alternative Liability

Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a prima facie case on every element of the claim except for identification of the actual tortfeasors, and the plaintiff has joined the manufacturers of a substantial share of the product's market. Once these elements are established, each defendant is severally liable for the portion of the judgment that represents its share of the market at the time of the injury, unless it proves that it could not have made the product that caused the plaintiff's injuries.

Torts > Products Liability > Types of Defects > Design Defects

Torts > Products Liability > Theories of Liability > Strict Liability

HN25[] Types of Defects, Design Defects

The New Hampshire Supreme Court adopted strict liability for design defect claims because requiring the plaintiff to prove negligence would impose an impossible burden on the plaintiff due to the difficulty of proving breach of a duty by a distant manufacturer using mass production techniques. The rule requiring a person injured by a defective product to prove the manufacturer or seller negligent was evolved when products were simple and the manufacturer and seller generally the same person. Knowledge of the then purchaser was sufficient to enable him to not only locate the defect but to determine whether negligence caused the defect and if so whose. The purchaser of the present day is not in this position. How the defect in manufacture occurred is generally beyond the knowledge of either the injured person or the marketer or manufacturer.

Torts > Products Liability > Types of Defects > Design Defects

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN26[] Types of Defects, Design Defects

The New Hampshire Supreme Court has placed the burden of proving apportionment upon defendants in crashworthiness or enhanced injury cases involving indivisible injuries. The court held that plaintiffs were required to prove that a design defect was a substantial factor in producing damages over and above those caused by the original impact to their car, and, once they had made that showing, the burden would shift to the defendants to show which injuries were attributable to the initial collision and which to the design defect. That burden was placed upon the defendants because the plaintiffs would otherwise have been relegated to an almost hopeless state of never being able to succeed against a defective designer. The court was persuaded by policy reasons not to place a practically impossible burden upon injured plaintiffs.

Torts > Products Liability > Theories of Liability > Negligence

Torts > Products Liability > Theories of Liability

HN27[] Theories of Liability, Negligence

The New Hampshire Supreme Court has declined to expand products liability law in cases in which plaintiffs have not faced a practically impossible burden of proving negligence. The court has also declined to expand products liability law when the defendants could not have been at fault. In Simoneau, the court rejected the product line theory of successor liability, reasoning that liability without negligence is not liability without fault. Under the product line theory, a party that acquires a manufacturing business and continues the output of its line of products, assumes strict liability for defects in units of the same product line manufactured and sold by the predecessor company. The court refused to impose what amounts to absolute liability on a manufacturer, reaffirming the common-law principle that fault and responsibility are elements of our legal system applicable to corporations and individuals alike and that such principle ought not be undermined or abolished by spreading of risk and cost in the state.

Torts > Procedural Matters > Multiple Defendants > Alternative Liability

HN28[] Multiple Defendants, Alternative Liability

Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a prima facie case on every element of the claim except for identification of the actual tortfeasor or tortfeasors.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN29[] Multiple Defendants, Distinct & Divisible Harms

Pursuant to RSA 507:7-e and DeBenedetto, defendants may ask a jury to shift or apportion fault from themselves to other nonparties in a case.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN30[] Multiple Defendants, Distinct & Divisible Harms

See RSA 507:7-e, I.

Evidence > Burdens of Proof > Allocation

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN31[] Burdens of Proof, Allocation

For apportionment purposes under RSA 507:7-e, the word "party" refers not only to parties to an action, including settling parties, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court. A defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes. A civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense. Accordingly, the defendant carries the burdens of production and persuasion. Furthermore, a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN32[] Multiple Defendants, Distinct & Divisible Harms

Apportionment under RSA 507:7-e requires proof of fault. Apportionment must include all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

HN33[] Ripeness, Tests for Ripeness

Ripeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record. Although the New Hampshire Supreme Court has not adopted a formal test for ripeness, it has found persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue.

Civil Procedure > Remedies > Judgment Interest > General Overview

HN34[] Remedies, Judgment Interest

Ordinarily, upon a verdict for damages and upon motion of a party, interest is to be awarded as part of all judgments.

Civil Procedure > Remedies > Judgment Interest > General Overview

HN35[] Remedies, Judgment Interest

Pursuant to RSA 524:1-b, in all civil proceedings, other than an action on a debt, in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of judgment. RSA 524:1-b.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Governments > Legislation > Interpretation

HN36[] Judgment Interest, Prejudgment Interest

The purpose of the legislature in enacting RSA 524:1-b was to clarify and simplify the existing law and to make plain that in all cases where the trial court awarded money to the party entitled to be compensated, interest at the legal rate is to be added to the award. The plain language of the statute does not distinguish between past and future damages. Rather, the statute mandates the award of prejudgment interest "to the amount of damages." Thus, the plain language of the statute provides no support for an argument differentiating past and future damages for purposes of calculating and awarding prejudgment interest. The court will not add words to a statute that the legislature did not see fit to include.

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN37[] Types of Damages, Compensatory Damages

The common law remedy for a tort law cause of action is lump-sum damages. Thus, in the absence of a statute or an agreement between the parties, when a tortfeasor loses at trial it must pay the judgment in one lump sum.

Civil Procedure > ... > Justiciability > Standing > General Overview

Environmental Law > Administrative Proceedings & Litigation > General Overview

HN38[] Justiciability, Standing

Parens patriae is simply a standing doctrine. The public trust doctrine, from which the State's authority as trustee stems, and the parens patriae doctrine are both available to states seeking to remedy environmental harm. While the public trust doctrine is its own cause of action, parens patriae is a concept of standing, which allows the state to protect certain quasi-sovereign interests. Parens patriae does not provide a cause of action, but may provide a state with standing to bring suit to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Appeal and Error > Preservation of Questions > Failure to Raise Issue

The appealing party bears the burden of demonstrating that it specifically raised the arguments articulated in its appellate brief before the trial court. Generally, the failure to do so bars a party from raising such claims on appeal.

NH2.[] 2.

Constitutional Law > Separation of Powers > Generally

The separation of powers among the legislative, executive and judicial branches of government is an important part of its constitutional fabric. Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people. Thus, under the state Separation of Powers Clause, each branch is prohibited from encroaching **[*212]** upon the powers and functions of another branch. Nevertheless, the clause does not provide for impenetrable barriers between the branches and the doctrine is violated only when one branch

usurps an essential power of another. N.H. CONST. pt. I, art. 37.

NH3.[] 3.

Common Law > Abrogation > Preemption by Statute

Statutory provisions barring a common law right to recover are to be strictly construed. If such a right is to be taken away, it must be expressed clearly by the legislature.

NH4.[] 4.

Environment and Natural Resources > Environmental Protection > Statutory Provisions

The end goal of the Oil Discharge and Disposal Cleanup Fund is not to offset tort liability for defendants but rather to provide an excess insurance mechanism for underground storage tank owners who are otherwise in compliance with all relevant laws and rules. *RSA ch. 146-D*.

NH5.[] 5.

Constitutional Law > Separation of Powers > Particular Cases

A suit by the State against a gasoline supplier in which the State sought damages for groundwater contamination allegedly caused by methyl tertiary butyl ether did not violate the state Separation of Powers Clause, as there was no language in either of the provisions establishing the Oil Discharge and Disposal Cleanup Fund and the Gasoline Remediation and Elimination of Ethers Fund indicating a legislative intent to preclude the damages sought here. N.H. CONST. pt. I, art. 37; *RSA ch. 146-D*, 146-G.

NH6.[] 6.

Trial > Civil Cases > Jury Instructions > Generally

Whether a particular jury instruction is necessary and the exact scope and wording of jury instructions are within the sound discretion of the trial court. The court reviews the trial court's decisions on these matters for an unsustainable exercise of discretion.

NH7.[] 7.

Appeal and Error > Harmless Error > Particular Cases

Assuming, without deciding, that there was enough evidence for defendants' implied waiver defense to go to the jury, any error was harmless given the jury's finding that the State did not commit misconduct that contributed to its harm.

NH8.[] 8.

Constitutional Law > Supremacy Clause > Generally

The federal preemption doctrine is based upon the *Supremacy Clause of the United States Constitution*, which provides that federal law shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. Accordingly, it has long been settled that state laws that conflict with federal law are without effect. U.S. CONST. art. VI.

NH9.[] 9.

Constitutional Law > Supremacy Clause > Generally

Congress may preempt state law under the Supremacy Clause in several ways. First, within constitutional limits, Congress is empowered to preempt state law by so stating in express terms In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. U.S. CONST. art. VI.

NH10.[] 10.

Constitutional Law > Supremacy Clause > Generally

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. This "conflict preemption" arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress.

[*213] NH11.[] 11.

Constitutional Law > Supremacy Clause > Generally

The so-called "obstacle branch" of conflict preemption arises when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The burden of establishing obstacle preemption is heavy: the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power. Indeed, federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

NH12.[] 12.

Constitutional Law > Supremacy Clause > Generally

The control and elimination of water pollution is a subject clearly within the scope of the police power of the State. Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the states are not to be superseded by federal act unless that is the clear and manifest purpose of Congress. Accordingly, the purpose of Congress is the ultimate touchstone of preemption analysis. Since preemption of any type fundamentally is a question of congressional intent, preemption analysis begins with the source of the alleged preemption.

NH13.[] 13.

Environment and Natural Resources > Environmental Protection > Air Pollution

In 1990, Congress enacted amendments to the Clean Air Act that, among other things, created the Reformulated Gasoline Program (RFG Program). The RFG Program required gasoline used in specific geographic areas to have a minimum oxygen content, achieved by the addition of an oxygenate of the manufacturer's choice. After the passage of the amendments, the Environmental Protection Agency (EPA) certified various blends of gasoline for use in the RFG Program, including gasoline containing methyl tertiary butyl ether (MTBE), but did not mandate the use of any one oxygenate. As the United States Court of Appeals for the Second Circuit explained, the 1990 Amendments did not require, either expressly or implicitly, the use of MTBE. Although the 1990 Amendments required that gasoline in certain geographic areas contain a minimum level of oxygen, they did not prescribe a means by which manufacturers were to comply with this requirement. The EPA identified MTBE as one additive that could be used to "certify" gasoline, but certification of a fuel meant only that it satisfied certain conditions in reducing air pollution. Neither the statute nor the regulations required a manufacturer to use MTBE, rather than other oxygenates, such as ethanol, in its gasoline. 42 U.S.C. § 7545(k), (m).

NH14.[] 14.

Constitutional Law > Supremacy Clause > Generally

Geier does not stand for the proposition that any time an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be preempted. Rather, a conflict results only when the regulation does not just set out options for compliance, but also provides that the regulated parties must remain free to choose among those options.

NH15.[] 15.

Environment and Natural Resources > Environmental Rights and Actions > Particular Matters

The Clean Air Act did not preempt New Hampshire's suit against a gasoline supplier in which the State sought damages for groundwater contamination allegedly caused by methyl tertiary butyl ether. 42 U.S.C. § 7545.

[*214] NH16.[] 16.

Evidence > Weight and Sufficiency > Civil Cases

Weighing the evidence is a proper function of the factfinder. The trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses. Factual findings will not be

disturbed unless erroneous as a matter of law or unsupported by the evidence. A fact finder has the discretion to evaluate the credibility of the evidence and may choose to reject that evidence in whole or in part. The court's task is to determine whether a reasonable person could reach the same conclusion as the jury on the basis of the evidence before it. The court reviews sufficiency of the evidence claims as a matter of law.

NH17. 17.

Negligence > Standard of Care > Ordinary and Reasonable Care

The test of due care is what reasonable prudence would require under similar circumstances. Whether the defendant breached that duty of care is a question for the trier of fact. Not every risk that might be foreseen gives rise to a duty to avoid a course of conduct; a duty arises because the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous. Conformity with industry practice is not an absolute defense to liability under New Hampshire law, because entire industries may lag behind the standard of care. But it is nonetheless a factor that the jury may consider in evaluating negligence claims. The test of due care is not custom or usage, but what reasonable prudence would require under the circumstances.

NH18. 18.

Negligence > Standard of Care > Ordinary and Reasonable Care

In a negligence case, there was sufficient evidence that defendants breached the standard of care by acting unreasonably under the circumstances in marketing methyl tertiary butyl ether (MTBE), as there was evidence that although defendants knew as early as 1984 about MTBE groundwater contamination issues, they did not warn the State or provide it with any information about those issues.

NH19. 19.

Environment and Natural Resources > Environmental Protection > Water Pollution

As trustee, the State can bring suit to protect from contamination the waters over which it is trustee.

NH20. 20.

Parties > Generally > Standing

A state may act as the representative of its citizens where the injury alleged affects the general population of a State in a substantial way.

NH21. 21.

Negligence > Duty > Duty To Warn

As the jury was not instructed that defendants owed a duty to the State as sovereign, there was no merit to defendants' argument that the State's failure-to-warn claim was improper because it was premised upon a duty to warn the "sovereign qua sovereign."

NH22. 22.

Torts > Products Liability

The purpose behind market share liability is that in our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. In an era of mass production and complex marketing methods the traditional standard of negligence is insufficient to govern the obligations of manufacturer to consumer, courts should acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances.

[*215] ***NH23.*** 23.

Torts > Products Liability

Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasors, and the plaintiff has joined the manufacturers of a substantial share of the product's market. Once these elements are established, each defendant is severally liable for the portion of the judgment that represents its share of the

market at the time of the injury, unless it proves that it could not have made the product that caused the plaintiff's injuries.

NH24. 24.

Torts > Products Liability > Defective Design

The court adopted strict liability for design defect claims because requiring the plaintiff to prove negligence would impose an impossible burden on the plaintiff due to the difficulty of proving breach of a duty by a distant manufacturer using mass production techniques. The rule requiring a person injured by a defective product to prove the manufacturer or seller negligent was evolved when products were simple and the manufacturer and seller generally the same person. Knowledge of the then purchaser was sufficient to enable him to not only locate the defect but to determine whether negligence caused the defect and if so whose. The purchaser of the present day is not in this position. How the defect in manufacture occurred is generally beyond the knowledge of either the injured person or the marketer or manufacturer.

NH25. 25.

Torts > Products Liability > Defective Design

The court has placed the burden of proving apportionment upon defendants in crashworthiness or enhanced injury cases involving indivisible injuries. The court held that plaintiffs were required to prove that a design defect was a substantial factor in producing damages over and above those caused by the original impact to their car, and, once they had made that showing, the burden would shift to the defendants to show which injuries were attributable to the initial collision and which to the design defect. That burden was placed upon the defendants because the plaintiffs would otherwise have been relegated to an almost hopeless state of never being able to succeed against a defective designer. The court was persuaded by policy reasons not to place a practically impossible burden upon injured plaintiffs.

NH26. 26.

Torts > Products Liability > Actions Predicated on Negligence

The court has declined to expand products liability law in cases in which plaintiffs have not faced a practically impossible burden of proving negligence. The court has also declined to expand products liability law when the defendants could not have been at fault. In *Simoneau*, the court rejected the product line theory of successor liability, reasoning that liability without negligence is not liability without fault. Under the product line theory, a party that acquires a manufacturing business and continues the output of its line of products, assumes strict liability for defects in units of the same product line manufactured and sold by the predecessor company. The court refused to impose what amounts to absolute liability on a manufacturer, reaffirming the common-law principle that fault and responsibility are elements of our legal system applicable to corporations and individuals alike and that such principle ought not be undermined or abolished by spreading of risk and cost in the state.

NH27. 27.

Torts > Products Liability

Based upon the court's willingness to construct judicial remedies for plaintiffs who would be left without recourse due to impossible burdens of proof, applying market share liability was justified in the circumstances here. Given the evidence presented, the State faced an **[*216]** impossible burden of proving which of several methyl tertiary butyl ether gasoline producers caused New Hampshire's groundwater contamination.

NH28. 28.

Torts > Products Liability

Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasor or tortfeasors.

NH29. 29.

Torts > Products Liability

The trial court did not err in ruling that the jury was entitled to determine that defendants could be held liable for their percentage of the supply market. Because defendants had or should have had knowledge of the characteristics of methyl tertiary butyl ether

(MTBE) gasoline from their refining role, the jury could find defendants liable for MTBE gasoline they supplied but did not refine.

NH30. 30.

Evidence > Expert Testimony > Particular Cases

In a suit involving methyl tertiary butyl ether (MTBE) contamination, the trial court's determination that the use of statistical evidence and extrapolation to prove injury-in-fact was not an unsustainable exercise of discretion. An expert used substantial data on MTBE contamination in the state to calculate statistically the number of drinking wells currently contaminated by MTBE; the State's experts expressly accounted for the fact that "every site is different."

NH31. 31.

Torts > Joint Liability > Allocation of Fault

Pursuant to statute and *DeBenedetto*, defendants may ask a jury to shift or apportion fault from themselves to other nonparties in a case. RSA 507:7-e.

NH32. 32.

Torts > Joint Liability > Allocation of Fault

For apportionment purposes, the word "party" refers not only to parties to an action, including settling parties, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court. A defendant may not easily shift fault under the apportionment statute; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes. A civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense. Accordingly, the defendant carries the burdens of production and persuasion. Furthermore, a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him. RSA 507:7-e.

NH33. 33.

Torts > Joint Liability > Allocation of Fault

Apportionment requires proof of fault. Apportionment must include all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question. RSA 507:7-e.

NH34. 34.

Torts > Joint Liability > Allocation of Fault

Defendants were not unfairly prejudiced in their ability to present their defense under the apportionment statute and *DeBenedetto*, as the trial court allowed the jury to consider apportioning liability to nonparties, after which the jury answered "no" to the questions involving apportionment on the special verdict form. RSA 507:7-e.

[*217] ***NH35.*** 35.

Appeal and Error > Preservation of Questions > Particular Cases

Because defendants had failed to prove that an argument was raised before the trial court, the argument was not preserved for review, and the court declined to address it substantively.

NH36. 36.

Constitutional Law > Judicial Powers and Duties > Ripeness

Ripeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record. Although the court has not adopted a formal test for ripeness, it has found persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue.

NH37. 37.

Constitutional Law > Judicial Powers and Duties > Ripeness

The State's claims for future testing and treatment were ripe for judicial determination as the harm from methyl tertiary butyl ether had already occurred.

NH38.[📥] 38.

Interest > Recovery > Generally

Ordinarily, upon a verdict for damages and upon motion of a party, interest is to be awarded as part of all judgments.

NH39.[📥] 39.

Interest > Recovery > Prejudgment Interest

The purpose of the legislature in enacting the prejudgment interest statute was to clarify and simplify the existing law and to make plain that in all cases where the trial court awarded money to the party entitled to be compensated, interest at the legal rate is to be added to the award. The plain language of the statute does not distinguish between past and future damages. Rather, the statute mandates the award of prejudgment interest "to the amount of damages." Thus, the plain language of the statute provides no support for an argument differentiating past and future damages for purposes of calculating and awarding prejudgment interest. The court will not add words to a statute that the legislature did not see fit to include. RSA 524:1-b.

NH40.[📥] 40.

Interest > Recovery > Particular Cases

The plain language of the governing statute provided no support for defendants' argument differentiating past and future damages for purposes of calculating and awarding prejudgment interest. Accordingly, the trial court did not err in awarding prejudgment interest as to all of the State's damages. RSA 524:1-b.

NH41.[📥] 41.

Damages > Practice and Procedure > Generally

The common law remedy for a tort law cause of action is lump-sum damages. Thus, in the absence of a statute or an agreement between the parties, when a tortfeasor loses at trial it must pay the judgment in one lump sum.

NH42.[📥] 42.

Parties > Generally > Standing

Parens patriae is simply a standing doctrine. The public trust doctrine, from which the State's authority as trustee stems, and the *parens patriae* doctrine are both available to states seeking to remedy environmental harm. While the public trust doctrine is its own cause of action, *parens patriae* is a concept of standing, which allows the state to protect certain quasi-sovereign interests. *Parens patriae* does not provide a cause of action, but may provide a state with standing to bring suit to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources.

[*218] ***NH43.***[📥] 43.

Damages > Practice and Procedure > Generally

The fact that the State was allowed to proceed under *parens patriae* standing did not authorize the imposition of a trust over the money damages awarded for defendants' torts. Rather, a conventional lump-sum damages award was appropriate.

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McLane, Graf, Raulerson & Middleton, Professional Association, of Manchester (*Bruce W. Felmly* and *Patrick H. Taylor* on the brief), *Bancroft PLLC*, of Washington, D.C. (*Paul D. Clement* on the brief and orally), and *Weil, Gotshal & Manges LLP*, of New York, New York (*Theodore E. Tsekerides* on the brief), for the defendants.

Skadden, Arps, Slate, Meagher & Flom LLP, of Boston, Massachusetts and Washington, D.C. (*Matthew J. Matule*, *John H. Beisner*, and *Geoffrey M. Wyatt* on the brief), for the Chamber of Commerce of the United States of America, as *amicus curiae*.

Judges: HICKS, J., and VAUGHAN, J., retired superior court justice, specially assigned under RSA 490:3, concurred. DALIANIS, C.J.

Opinion by: DALIANIS

Opinion

[273]** DALIANIS, C.J. The defendants, Exxon Mobil Corporation and ExxonMobil Oil Corporation **[***2]** (collectively, either Exxon or ExxonMobil), appeal from a jury verdict awarding approximately $236 million in damages due to groundwater contamination to the plaintiff, the State of New Hampshire, after a trial in Superior Court (*FAUVER*, J.). The State cross-appeals from the trial court's order imposing a trust upon approximately $195 million of the damages award. We affirm the trial court's rulings on the merits and reverse its imposition of a trust.

I. Background

In 1990, Congress amended the Federal *Clean Air Act* to require the use of an "oxygenate" in gasoline in areas not meeting certain national air quality standards. *See 42 U.S.C. § 7545(k) (Supp. 1991)* (amended 2005, 2007). An oxygenate is a substance used to reduce gasoline emissions. *See Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 666 (9th Cir. 2003)* **[**274]** . The amendment did not mandate the use of any particular oxygenate; it simply required that "[t]he oxygen content of the gasoline shall equal or exceed 2.0 percent by weight." *42 U.S.C. § 7545(k)(2)(B)*. To implement the requirement, the Environmental Protection Agency (EPA) launched the Reformulated Gasoline Program (RFG Program), which required gasoline containing **[*219]** an oxygenate of the manufacturer's choice. *See 40 C.F.R. § 80.46(g)(9)(i) (2000)*. Methyl tertiary butyl ether (MTBE) was one among several possible oxygenates. **[***3]** *Id.* MTBE is a gasoline additive that increases the octane levels of fuels. Metropolitan areas with significant concentrations of ambient ozone were required to use reformulated gasoline. *See 42 U.S.C. § 7545(k)*. Other areas, like New Hampshire, could opt in to the program to receive credit toward mandatory emissions reduction requirements. *See 42 U.S.C. § 7545(k)(6)(A)*.

New Hampshire joined the RFG Program in 1991, with respect to the State's four southern-most counties, effective January 1, 1995. Between 1995 and 2006, gasoline with MTBE was sold throughout the State. In 1997, employees at the New Hampshire Department of Environmental Services (DES) became aware that MTBE could pose increased risks to groundwater. In 1998, studies from Maine and California raised concerns about MTBE. In 1999, DES adopted regulations setting a maximum contaminant level for MTBE in drinking water and groundwater at 13 parts per billion (ppb).

In 2000, the EPA advised:

> MTBE is capable of traveling through soil rapidly, is very soluble in water ... and is highly resistant to biodegradation ... . MTBE that enters groundwater moves at nearly the same velocity as the groundwater itself. As a result, it often travels farther than other gasoline constituents, **[***4]** making it more likely to impact public and private drinking water wells. Due to its affinity for water and its tendency to form large contamination plumes in groundwater, and because MTBE is highly resistant to biodegradation and remediation, gasoline releases with MTBE can be substantially more difficult and costly to remediate than gasoline releases that do not contain MTBE.

Advance Notice of Intent to Initiate Rulemaking under the *Toxic Substance Control Act to Eliminate or Limit the Use of MTBE as a Fuel Additive in Gasoline, 65 Fed. Reg. 16094, 16097 (Mar. 24, 2000)*.

In 2001, the Governor petitioned the EPA to allow the State to opt out of the RFG Program, but did not receive a reply until 2004. *See Removal of the Reformulated Gasoline Program From Four Counties in New Hampshire, 69 Fed. Reg. 4903 (Feb. 2, 2004)*. In 2004, the legislature enacted legislation banning MTBE gasoline effective in 2007. *See RSA 146-G:12* (2005) (repealed 2015). In 2005, Congress eliminated the oxygenate requirement and enacted a renewable fuels mandate to increase ethanol usage. *See* Energy Policy Act of 2005, *Pub. L. No. 109-58, §§ 1501, 1504, 119 Stat. 594, 1067, 1076 (2005)*.

[*220] In 2003, New Hampshire sued several gasoline suppliers, refiners, and chemical manufacturers seeking damages for groundwater contamination allegedly caused by MTBE. Before trial, all defendants except Exxon settled with the State. After almost ten years of litigation, the case went to trial in 2013 on **[***5]** three causes of action: negligence; strict liability — design defect; and strict liability — failure to warn. After an

approximately three-month trial, the jury found in favor of the State on all of its claims. The jury rejected Exxon's defenses that "in designing its MTBE gasoline, it complied with the state **[**275]** of the art"; that "the hazards posed by the use of MTBE in gasoline were obvious, or were known and recognized by the State"; and that Exxon "provided distributors with adequate warnings of the hazards of MTBE gasoline." The jury also found that Exxon failed to prove that "the actions of someone other than the State or ExxonMobil (which were not reasonably foreseeable to ExxonMobil) were the sole cause of the State's harm," that "the State committed misconduct that contributed to its harm," or that some or all of Exxon's fault should be allocated to certain nonparties.

The jury awarded total damages in the amount of $816,768,018. These damages included: (a) $142,120,005 for past cleanup costs; (b) $218,219,948 to assess and clean up 228 high-risk sites; (c) $305,821,030 for sampling drinking water wells; and (d) $150,607,035 for treating drinking water wells contaminated with MTBE **[***6]** at or above the maximum contaminant level. The jury found that Exxon's market share for gasoline in New Hampshire during the applicable time period was 28.94%. Accordingly, the trial court entered an amended verdict of $236,372,644 against Exxon. The trial court subsequently awarded the State prejudgment interest in accordance with RSA 524:1-b (2007).

On appeal, Exxon contends that: (1) the State's suit should have been dismissed on the grounds of separation of powers and due process; (2) the suit should have been dismissed due to waiver; (3) the State's claims are preempted by the 1990 amendments to the Federal Clean Air Act; (4) the State failed to establish that Exxon departed from the applicable standard of care; (5) Exxon did not have a duty to warn the State; (6) market share liability is not an acceptable theory of recovery; (7) the State should not have been permitted to rely upon aggregate statistical evidence; (8) Exxon was unfairly prejudiced in its ability to present evidence of fault on the part of other nonparties; (9) the trial court erred in deciding the State had *parens patriae* standing; (10) the State's damages claims for future well impacts are not ripe; and (11) the trial court **[***7]** erred in awarding prejudgment interest on future costs.

[*221] *II. Separation of Powers and Due Process*

Exxon argues that the State's suit should have been dismissed on the grounds of separation of powers and due process. Exxon asserts that based upon the State's decision to participate in the RFG Program beginning in 1991, and the legislature's failure to ban MTBE before 2007, "[t]he retroactive no-MTBE duty" imposed upon it "conflicts with bedrock principles of the separation of powers" and "due process." Exxon also argues that the suit conflicts with the Oil Discharge and Disposal Cleanup Fund (ODD Fund), RSA ch. 146-D (Supp. 2014); *see* Laws 2014, 177:1 (repealing RSA chapter 146-D, eff. July 1 2025), and the Gasoline Remediation and Elimination of Ethers Fund (GREE Fund), RSA ch. 146-G (Supp. 2014); *see* Laws 2014, 177:3, I (repealing RSA chapter 146-G, excluding RSA 146-G:9, eff. July 1, 2025), Laws 2014, 177:3, II (repealing RSA 146-G:9, eff. October 1, 2025). The State asserts that Exxon failed to preserve its separation of powers argument because the arguments it raises on appeal were not made to the trial court, and that Exxon fails to identify where it preserved its due process argument.

NH[1] [1] HN1 The appealing party bears the burden of demonstrating that it "specifically raised **[***8]** the arguments articulated in [its appellate] brief before the trial court." Dukette v. Brazas, 166 N.H. 252, 255, 93 A.3d 734 (2014). Generally, the failure to do so bars a party from raising such claims **[**276]** on appeal. N. Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 619, 843 A.2d 949 (2004). *But see* Sup. Ct. R. 16-A (plain error rule). We have reviewed the record and agree with the State that Exxon failed to preserve its separation of powers argument concerning the State's purported public policy decisions, as well as its due process argument. However, we address, as properly preserved, Exxon's separation of powers argument based upon the ODD and GREE Funds.

Before trial, Exxon moved for summary judgment on separation of powers grounds, arguing that the State's suit threatened to usurp the legislature's appropriations power because the ODD and GREE Funds "embody the legislative choice regarding how testing and remediation should be funded" and "this suit would allow the Attorney General to fund remediation in a very different way and create an appropriation outside of the General Court's purview." Exxon asserted that, because "there is no existing statutory mechanism through which any damages awarded to the State in this litigation could be specifically appropriated to the investigation, testing, and remediation the **[***9]** State requests," it would violate separation of powers for the court or the attorney general "to order such an appropriation." Thus, Exxon argued, "[i]n light of the existing funds and their

structure, this suit implicates appropriations-related separation of powers problems."

[*222] The trial court denied the motion, concluding that Exxon had failed to establish that the legislature intended the ODD or GREE Funds to be the State's exclusive remedy. As to the ODD Fund, the court found that pursuant to the plain language of RSA 146-D:6, I, and I-a, the Fund "is only authorized to disburse funds to owners of underground storage facilities, bulk storage facilities, or the land on which such facilities are stored" and, thus, the statute did not demonstrate legislative intent "to provide a remedy for the damages sought by the State in this litigation." As to the GREE Fund, although noting that it does not contain an explicit limitation upon who may seek payment, because the potential damages at issue in this suit far exceed the $2,500,000 capped balance of the fund, the trial court stated that

> [i]t is reasonable to infer, then, that in creating the GREE Fund the legislature did not intend it to serve as the sole source **[***10]** of cleanup funds for any and all contamination event[s]. Its relatively small size indicates that it was intended to address a small number of isolated incidents at any given time, not a statewide contamination of the type alleged here by the State. Finally, the Court notes that neither fund claims to be an exclusive remedy.

Accordingly, the court found that "the existence of these funds does not evince the intent of the legislature to preclude suits such as this one" and that "the State's suit does not threaten to usurp the legislature's appropriations power."

On appeal, Exxon argues that the legislature "created two detailed statutory schemes — the ODD Fund and the GREE Fund — to enable direct spillers to pay the often substantial costs of remediation," and that "[i]t is precisely when the legislature has established a tailored regulatory framework to address a particular problem that this Court has declined to make judicial 'improvements' to the democratically-enacted scheme." The State argues that its suit "is consistent with the ODD and GREE funds" in that the "caps on those funds, their purposes, and their structures confirm that neither was intended to replace recovery actions for tortious activity **[***11]** against manufacturers of dangerous products or to free manufacturers that withhold **[**277]** knowledge of a dangerous condition from liability."

NH[2] [2] HN2 Whether the State's lawsuit violates the Separation of Powers Clause of the State Constitution, N.H. CONST. pt. I, art. 37, because it conflicts with the ODD and GREE Funds, is a question of law, which we review *de novo*. *See* Cloutier v. State, 163 N.H. 445, 451, 42 A.3d 816 (2012). HN3 "The separation of powers among the legislative, executive and judicial branches of government is an important part of its constitutional fabric." Duquette v. Warden, N.H. State Prison, 154 N.H. 737, 746, 919 A.2d 767 (2007). "Separation of the three co-equal **[*223]** branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people." *Id.* Thus, under the Separation of Powers Clause, "each branch is prohibited ... from encroaching upon the powers and functions of another branch." *Id. at 746-47*. Nevertheless, Part I, Article 37 does "not provide for impenetrable barriers between the branches ... and the doctrine is violated only when one branch usurps an *essential* power of another." *Id. at 747* (citation omitted).

NH[3] [3] HN5 HN4 Statutory interpretation is a question of law, which we review *de novo*. Appeal of Local Gov't Ctr., 165 N.H. 790, 804, 85 A.3d 388 (2014). In matters of statutory interpretation, we are the final arbiter of the intent of the legislature, as expressed in the words of the statute **[***12]** considered as a whole. *Id.* We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. *Id.* We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* Statutory "provisions barring [a] common law right to recover are to be strictly construed." Estate of Gordon-Couture v. Brown, 152 N.H. 265, 267, 876 A.2d 196 (2005). "If such a right is to be taken away, it must be expressed clearly by the legislature." *Id. at 266*.

NH[4] [4] HN6 The purpose of the ODD Fund is "to establish financial responsibility for the cleanup of oil discharge and disposal, and to establish a fund to be used in addressing the costs incurred *by the owners* of underground storage facilities and bulk storage facilities for the cleanup of oil discharge and disposal." RSA 146-D:1 (emphasis added). The ODD Fund allows owners of eligible facilities to apply for reimbursement of court-ordered damages to third parties for injury or property damage and costs of cleanup of oil discharges up to $1,500,000. RSA 146-D:6, III. The ODD Fund is financed by a fee on imported oil that is paid on a per gallon basis by distributors who import oil into **[***13]** New Hampshire. RSA 146-D:2-:3. As the trial court found, "the end goal of the ODD Fund is not to offset tort

liability for Defendants but rather to provide an excess insurance mechanism for [underground storage tank] owners who are otherwise in compliance with all relevant laws and rules."

HN7[↑] The purpose of the GREE Fund, a fund in addition to both the Oil Pollution Control Fund established pursuant to *RSA 146-A:11-a* (Supp. 2014) and the ODD Fund, "is to provide procedures that will expedite the cleanup of gasoline ether spillage, mitigate the adverse [e]ffects of gasoline ether discharges, encourage preventive measures, impose a fee upon importers of neat gasoline ethers into the state and establish a fund for the remediation of groundwater and surface water contaminated by gasoline **[*224]** ethers." *RSA 146-G:1, II*. **[**278]** "Th[e GREE] nonlapsing, revolving fund shall be used ... . to mitigate the adverse [e]ffects of gasoline ether discharges including, but not limited to, provision of emergency water supplies to persons affected by such pollution, and ... the establishment of an acceptable source of potable water to injured parties." *RSA 146-G:4, I*. "Not more than $150,000 shall be allocated annually for research programs dedicated to the development and improvement of **[***14]** preventive and cleanup measures concerning such gasoline ether discharges." *Id.* The fund's balance is capped at $2,500,000. *RSA 146-G:4, II*. The fund is financed in part by the ODD Fund. *RSA 146-D:3, VI(b)*; *RSA 146-G:1*.

NH[5][↑] [5] We agree with the trial court that there is no language in either of the statutory provisions establishing the ODD and GREE Funds indicating a legislative intent to preclude the damages sought by the State in this case. *See also State v. Hess Corp., 161 N.H. 426, 431, 20 A.3d 212 (2011)* (MTBE defendants conceded that the State may recover damages to test and treat statutorily defined public water systems). Accordingly, we reject Exxon's separation of powers argument based upon the ODD and GREE Funds.

III. Waiver

Exxon argues that the State's suit should have been dismissed due to waiver. Before trial, Exxon moved for summary judgment, arguing, in part, that "by requiring that RFG ... gasoline be sold in New Hampshire, with full knowledge that such gasoline would contain MTBE and with full knowledge of all of MTBE's alleged defective properties, the State cannot now be allowed to sue Defendants who thereafter complied with the State's demands and supplied MTBE gasoline to the State." (Quotation omitted.) In denying the motion, the trial court noted that, because Exxon **[***15]** did not assert that the State expressly waived its right to sue for harm from MTBE, Exxon could only proceed under an implied waiver theory. The court found that there were "genuine issues of disputed fact regarding the State's knowledge, [Exxon's] knowledge, and timing of this awareness."

Following the jury verdict, Exxon moved to set aside the verdict and for a new trial. Exxon argued, in part, that it was "unfairly prejudiced" when the trial court instructed the jury on waiver in its preliminary instructions "but then refused to include that instruction in its final instructions or in the verdict form." In its order denying Exxon's motion, the trial court explained:

> In its motion for summary judgment on waiver, Exxon argued that the State knew MTBE's characteristics but still opted in to the RFG program, thereby waiving any claims it had or would **[*225]** develop regarding MTBE contamination. However, the State disputed its level of knowledge. During trial, Exxon attempted to prove the State's knowledge by presenting witnesses that testified that MTBE's characteristics were widely known and understood thereby suggesting the State should have known about MTBE.
>
> The State countered this testimony **[***16]** with its own witnesses explaining that the first time State employees found MTBE in a contamination site, those employees were unable to identify the compound and asked the U.S. EPA for assistance. The State also presented testimony that it did not become aware of MTBE's full nature until the State of Maine published a study.
>
> This testimony goes to the issue of waiver but it is also relevant to the issue of [the State's] misconduct, and the **[**279]** Court gave an instruction on [the State's] misconduct. In fact, the Court instruction on [the State's] misconduct encompassed the same elements embodied in a waiver claim.

(Citations omitted.)

On appeal, Exxon argues that, "with knowledge of MTBE groundwater risks, the State opted-in to the RFG program, participated in that program for years, repeatedly opposed banning MTBE, and ultimately decided in 2004 that continuing MTBE's use for nearly three more years was better for the State than an outright ban." Thus, there was "ample evidence to

support a jury verdict finding waiver," and the trial court's "failure to instruct the jury is clear error." Exxon also argues that the trial court's reasoning that a waiver instruction was unnecessary is erroneous, **[***17]** "as misconduct and waiver are distinct defenses that are appropriately charged separately." The State argues that, at trial, Exxon adduced no evidence of express or implied waiver, that the special verdict form reflects that the jury rejected Exxon's defense "that the hazards posed by the use of MTBE in gasoline were obvious, or were known and recognized by the State," and that, in any event, the trial court "correctly concluded that its misconduct instruction adequately encompassed Exxon's waiver defense."

NH[6][↑] [6] HN8[↑] Whether a particular jury instruction is necessary and the exact scope and wording of jury instructions are within the sound discretion of the trial court. *See State v. Littlefield, 152 N.H. 331, 334, 876 A.2d 712 (2005)*. We review the trial court's decisions on these matters for an unsustainable exercise of discretion. *Id.*

Exxon's "plaintiff's misconduct defense" jury instruction as given by the trial court provided in pertinent part:

> **[*226]** If you find that ExxonMobil's product was unreasonably dangerous, ExxonMobil failed to provide a warning, or behaved negligently and that ExxonMobil is liable, you should then go on to determine if the State committed misconduct that contributed to cause its injuries. With respect to the State's alleged misconduct, **[***18]** ExxonMobil bears the burden to prove that it is more likely than not that the State committed misconduct in its use of the product.
>
> Misconduct includes, but is not limited to, abnormal use of the product, misuse of the product, *failing to discover or foresee dangers that the ordinary person or entity would have discovered or foreseen, voluntarily proceeding to encounter a known danger, and failing to mitigate damages.*

(Emphasis added.)

We note that in its motion for judgment notwithstanding the verdict (JNOV) following the jury verdict, Exxon made the same argument regarding its misconduct defense that it makes on appeal regarding waiver. Asserting in its motion for JNOV that the evidence "overwhelmingly proved ExxonMobil's affirmative defenses," Exxon argued that "[t]he evidence at trial overwhelmingly proves that the State's misconduct contributed to its injuries. First, the evidence established that the State voluntarily encountered a known danger by opting-in to the RFG program with knowledge of MTBE's characteristics. Moreover, the evidence demonstrates that the State knew that MTBE would be used in New Hampshire to comply with the RFG program." (Citation omitted.) In support of its waiver **[***19]** argument on appeal, Exxon asserts that "with knowledge of MTBE groundwater risks, the State opted-in to the RFG program [and] participated in that program for years."

[280]** Concluding that the waiver and misconduct instructions are similar because they both address the State's knowledge and subsequent actions based upon that knowledge, the trial court reasoned:

> Depending on the State's knowledge, the jury could have found that the State knew or should have known the characteristics of MTBE gasoline and thereby either waived any challenge it is now raising or should have been held partially responsible for its own injury. In other words, because the jury was instructed on and considered the issue of the State's knowledge — that the State knew of MTBE and used it anyway — the jury also considered whether the State waived any claims about MTBE contamination risks by knowingly using MTBE. The jury nonetheless rejected this theory. Thus, Exxon was not entitled to an independent **[*227]** waiver instruction because the plaintiff's misconduct instruction encompassed this affirmative defense.

NH[7][↑] [7] Assuming, without deciding, that there was enough evidence for Exxon's implied waiver defense to go to the jury, we hold **[***20]** that any error was harmless given the jury's finding that the State did not commit misconduct that contributed to its harm.

IV. Federal Preemption

Exxon argues that the State's claims are preempted by the Federal *Clean Air Act*. Before trial, Exxon moved for summary judgment, arguing that Congress and the EPA "took actions providing that federal requirements were to be met by allowing refiners to choose MTBE as an additive to gasoline," and that "State law is preempted where it seeks to ban an action that federal law affirmatively chooses to make available to state actors." The trial court rejected Exxon's argument that the State's tort claims present an obstacle to the federal purpose of the *Clean Air Act*.

Noting that "[o]n numerous occasions, courts throughout the United States have considered whether the [*Clean Air Act*] preempts state tort law claims regarding the use of MTBE," the trial court applied the reasoning of the United States District Court for the Southern District of New York. The trial court explained that Exxon's arguments

> are essentially identical to those made by the defendants during *In re MTBE Products Liability Litigation*. Here, the Defendants claim that the federal regulation **[***21]** deliberately provided manufacturers with a range of oxygenate choices and the choice was designed to further the regulation's objectives. The Defendants further argue that Congress and the EPA stressed the importance of MTBE as a choice and encouraged its use. Finally, they point to the lengthy legislative history of the [*Clean Air Act*] to support their arguments.

See In re Methyl Tertiary Butyl Ether (MTBE) Products, 457 F. Supp. 2d 324, 336-42 (S.D.N.Y. 2006), aff'd, 725 F.3d 65 (2d Cir. 2013), cert. denied, 134 S. Ct. 1877, 188 L. Ed. 2d 948 (2014). The trial court concluded that "[l]ike the defendants [in *MTBE Products*], the Defendants here have failed to prove that the State's tort law claims are preempted by the [*Clean Air Act*], and their use of the legislative history is irrelevant due to the unambiguous language of the [Act].

Exxon moved for a directed verdict at the close of the State's case-in-chief, based in part upon its assertion that the evidence presented **[*228]** "demonstrates that the State's claims are preempted based on the *Clean Air Act*'s requirement that gasoline contain an oxygenate and the factual evidence demonstrating that no feasible alternative oxygenate existed sufficient to meet the **[**281]** requirements of RFG in New Hampshire." Noting that Exxon's argument "is presented in a highly summary fashion," the trial court declined to revisit **[***22]** the preemption claim and relied upon its earlier decision denying Exxon's motion for summary judgment.

After the jury verdict, Exxon moved to set aside the verdict and for a new trial arguing, in part, that the trial court "failed to instruct the jury on ExxonMobil's affirmative defense of preemption or include it in the verdict form." According to Exxon, the trial court erred because "there were sufficient facts" to support its argument "that MTBE was the only feasible oxygenate for use in New Hampshire" and, therefore, "the State's claim would be preempted because ExxonMobil was required to use an oxygenate under the Clean Air Act Amendments." Exxon asserted also that "as a matter of law, the State's claims were preempted ... because Congress specifically intended for refiners to be able to choose among oxygenates, including MTBE, to comply with the RFG program and eliminating MTBE would have interfered with the goals of the [Act]."

Noting that "[t]he preemption argument Exxon raises directly alleges the argument it raised pretrial and in its directed verdict motion," the trial court denied the motion. The court reasoned that

> [t]o the extent Exxon argues the jury should have been instructed on preemption in order **[***23]** to find facts from which the Court could further evaluate preemption, the Court considered and rejected this argument in its [order denying Exxon's motion for a directed verdict]. Even assuming New Hampshire courts would adopt this view of preemption, there are no facts to support Exxon's theory. Exxon alleges the State's claims are preempted by the federal *Clean Air Act* and its RFG program. The Court rejected this legal argument. There are no facts that a jury could find that would alter the legal analysis this Court already undertook.

(Citation omitted.)

On appeal, Exxon argues that a state tort duty holding it liable for supplying MTBE is preempted by the *Clean Air Act*, "particularly because Exxon had no safer, feasible alternative to MTBE at the time." According to Exxon, "[p]reemption here follows *a fortiori* from" *Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)*, and *Williamson v. Mazda Motor of America, Inc., 562 U.S. 323, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (2011)*, "which establish that when federal law imposes a mandate but leaves private parties with a choice of how to comply, a state-law tort duty that would take one option off the table **[*229]** obstructs federal objectives when maintaining the choice is a '*significant objective*' of the federal program." Exxon asserts that despite "ample evidence that there was no safer, feasible alternative **[***24]** to MTBE," the trial court erroneously refused to instruct the jury on this issue. The State argues that "[p]reemption arguments like the one Exxon raises here have been rejected by every federal court of appeals to consider them." The State contends that "enabling suppliers to choose MTBE (as opposed to ethanol) was not a significant regulatory objective of Congress or EPA," and that the trial

evidence demonstrated that "safer, feasible alternatives to MTBE existed." (Quotations omitted.)

NH[8] [8] HN9 Because the trial court's determination of federal preemption is a matter of law, our review is *de novo*. N.H. Attorney Gen. v. Bass Victory Comm., 166 N.H. 796, 801, 104 A.3d 181 (2014). HN10 The federal preemption doctrine is based upon the Supremacy Clause of the United States Constitution. *See* Arizona v. United States, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351 (2012); **[**282]** *see also* Appeal of Sinclair Machine Prod's, Inc., 126 N.H. 822, 826, 498 A.2d 696 (1985). Article VI provides that federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI. "Accordingly, it has long been settled that state laws that conflict with federal law are without effect." Mutual Pharmaceutical Co., Inc. v. Bartlett, 133 S. Ct. 2466, 2473, 186 L. Ed. 2d 607 (2013) (quotation omitted).

NH[9] [9] HN11 Congress may preempt state law under the Supremacy Clause in several ways. Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985). First, within constitutional limits, "Congress is empowered to pre-empt state law by so stating in express terms." *Id.* "In the absence of express **[***25]** pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Id.* (quotation omitted).

NH[10] [10] HN12 "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." *Id.* This "conflict preemption" arises when "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotations and citation omitted).

NH[11] [11] Exxon relies upon HN13 the so-called "obstacle branch" of conflict preemption — that state law "stand[s] as an obstacle to the accomplishment **[*230]** and execution of the full purposes and objectives of Congress." Arizona, 132 S. Ct. at 2501 (quotation omitted). "The burden of establishing obstacle preemption ... is heavy: the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the **[***26]** exercise of traditional police power." MTBE Products Liability Litigation, 725 F.3d 65, 101-02 (2d Cir. 2013) (quotations and brackets omitted), *cert. denied*, 134 S. Ct. 1877, 188 L. Ed. 2d 948 (2014). "Indeed, federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." Id. at 102 (quotation omitted).

NH[12] [12] HN14 "The control and elimination of water pollution is a subject clearly within the scope of the police power" of the State. Shirley v. Commission, 100 N.H. 294, 299, 124 A.2d 189 (1956). "Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (quotation, brackets, and ellipses omitted). "Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.* (quotations and brackets omitted). "Since preemption of any type fundamentally is a question of congressional intent, our preemption analysis begins with the source of the alleged preemption." Bass Victory Comm., 166 N.H. at 803 (quotation, brackets, and citation omitted).

[283]** NH[13] [13] As discussed above, HN15 in 1990, Congress enacted amendments to the Clean Air Act that, among other things, created the RFG Program. *See* 42 U.S.C. § 7545(k). The RFG Program **[***27]** required gasoline used in specific geographic areas to have a minimum oxygen content, achieved by the addition of an oxygenate of the manufacturer's choice. *See* 42 U.S.C. §§ 7545(k)(2)(B), (m)(2); *see also* 40 C.F.R. § 80.46(g)(9)(i). After the passage of the amendments, the EPA certified various blends of gasoline for use in the RFG Program, including gasoline containing MTBE, but did not mandate the use of any one oxygenate. As the United States Court of Appeals for the Second Circuit explained,

> the 1990 Amendments did not require, either expressly or implicitly, that Exxon use MTBE. Although the 1990 Amendments required that gasoline in certain geographic areas contain a minimum level of oxygen, they did not prescribe a

means by which manufacturers were to comply with this requirement. The EPA identified MTBE as one additive that could be used to "certify" gasoline, but certification of a fuel meant only that it satisfied **[*231]** certain conditions in reducing air pollution. Neither the statute nor the regulations required Exxon to use MTBE, rather than other oxygenates, such as ethanol, in its gasoline.

MTBE Products Liability Litigation, 725 F.3d at 98 (citations omitted).

We disagree with Exxon that preemption here "follows *a fortiori*" from *Geier* and *Williamson*. Those cases both considered portions **[***28]** of Federal Motor Vehicle Safety Standard 208 (FMVSS 208), promulgated pursuant to the *National Traffic and Motor Vehicle Safety Act of 1966*. In *Geier*, a 1984 version of FMVSS 208 required manufacturers to equip their vehicles with passive restraint systems, but gave manufacturers a choice among several different passive restraint systems, including airbags and automatic seatbelts. *Geier, 529 U.S. at 864-65, 875*. The question before the United States Supreme Court was whether the Act, together with the regulation, preempted a state tort suit that would have held a manufacturer liable for not installing *airbags*. *See id. at 865*. In determining whether, in fact, the state tort action conflicted with federal law, the Court considered whether the state law stood as an "obstacle" to the objectives of the federal law. *Id. at 886*. After examining the regulation, including its history, the promulgating agency's contemporaneous explanation of its objectives, and the agency's current views of the regulation's preemptive effect, the Court concluded that giving auto manufacturers a choice among different kinds of passive restraint devices was a significant objective of the federal regulation. *Id. at 874-83*. Because the tort suit stood as an obstacle **[***29]** to the accomplishment of that objective in that the suit would have deprived the manufacturers of the choice among passive restraint systems that the federal regulation gave them, the Court found the state tort suit preempted. *Id. at 886*.

In *Williamson*, the Supreme Court considered a 1989 version of FMVSS 208 requiring that auto manufacturers install seatbelts on the rear seats of passenger vehicles. *Williamson, 562 U.S. at 326*. The law required manufacturers to install lap-and-shoulder belts on seats next to a vehicle's doors or frames but gave them a choice of installing either simple lap belts or lap-and-shoulder belts on rear inner seats. *Id.* The Court noted that like the regulation in *Geier*, the regulation at issue before it left the manufacturer with a choice and, like the tort suit in *Geier*, the tort suit at issue would restrict **[**284]** that choice. *Id. at 332*. However, after reviewing the history of the regulation before it, including the agency's explanation of the reasons for not requiring lap-and-shoulder belts for rear inner seats and the Solicitor General's representations of the agency's views, the Court concluded that providing manufacturers with this seatbelt choice was not a significant objective of the federal regulation. **[***30]** *Id. at 334-36*. Thus, the Court concluded **[*232]** that because the choice of the type of restraint was not a significant regulatory objective, the state tort suit was not preempted. *Id.*

NH[14][↑] [14] Exxon does not point to any part of the *Clean Air Act* or its legislative history that supports a conclusion that the choice among oxygenate options was a significant objective of the federal law. Indeed, "[t]he [*Clean Air Act*] itself contains no language mandating that [Exxon] have a choice among oxygenates." *In re Methyl Tertiary Butyl Ether (MTBE) Products, 457 F. Supp. 2d at 336-37*. Unlike *Geier*, in which the federal regulation deliberately provided the manufacturer with a range of choices among different passive restraint devices, "[h]ere, the choice of oxygenate options is a means towards improving air quality, and the existence of the choice itself is not critical to furthering that goal." *MTBE Products Liability Litigation, 725 F.3d at 98 n.15*. ***HN16***[↑] "*Geier* does not stand ... for the proposition that any time an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be pre-empted." *Williamson, 562 U.S. at 337* (SOTOMAYOR, J., concurring). Rather, "a conflict results only when [the regulation] ... does not just set out options for **[***31]** compliance, but also provides that the regulated parties must remain free to choose among those options." *Id. at 338* (quotation omitted).

We reject Exxon's argument that "[d]espite ample evidence that there was no safer, feasible alternative to MTBE," the trial court's refusal to instruct the jury on this issue was error because "preemption questions can be informed by questions of fact." Exxon asserts that "[a]t the summary judgment stage, the [trial court] rejected the purely legal argument that the State's claims would be preempted even if there were safer, feasible alternatives, but later ... refused to consider the different and fact-dependent question whether preemption would apply if Exxon had no safer, feasible alternative."

(Citation omitted.)

The record shows, however, that Exxon's proposed jury instruction did not ask the jury to find whether there was *no safer feasible alternative* to MTBE. Rather, the proposed instruction asked "whether prohibiting the use of MTBE in gasoline during the period at issue here *would have resulted in delays and increased costs* to the expansion of the federal RFG program," thus establishing preemption. (Emphasis added.) This position has been rejected as a matter **[***32]** of law. *See* MTBE Products Liability Litigation, 725 F.3d at 103 (although legislative materials demonstrate that Congress was sensitive to the magnitude of the economic burdens it might be imposing by virtue of the RFG Program, "they hardly establish that Congress had a 'clear and manifest intent' to preempt state tort judgments **[*233]** that might be premised on the use of one approved oxygenate over a slightly more expensive one"); Oxygenated Fuels Ass'n Inc., 331 F.3d at 673 (plaintiff "offered virtually no support for its assertion that the Clean Air Act's goals — for purposes of preemption analysis — are a smoothly functioning market and cheap gasoline").

[285]** NH[15] [15] We agree with several other courts that have addressed and rejected the issue of preemption and MTBE. *See, e.g.*, MTBE Products Liability Litigation, 725 F.3d at 100-03 (rejecting Exxon's obstacle branch preemption arguments); In re Methyl Tertiary Butyl Ether (MTBE) Products, 739 F. Supp. 2d at 601-02 (allowing plaintiffs to recover damages for inordinate environmental effects caused by the use of MTBE does not conflict with federal policy, and rejecting Exxon's arguments that because there was no safer, feasible alternative to MTBE, it was impossible for Exxon to comply with federal requirements without using MTBE); In re Methyl Tertiary Butyl Ether (MTBE) Products, 457 F. Supp. 2d at 343 ("Just as the many other courts that have addressed the issue of preemption and MTBE, this Court finds that plaintiffs' tort law claims are not **[***33]** preempted."); Oxygenated Fuels Ass'n, Inc. v. Pataki, 293 F. Supp. 2d 170, 172, 182-83 (N.D.N.Y. 2003) (concluding after bench trial that New York MTBE ban does not conflict with any aspect of Clean Air Act); Exxon Mobil Corp. v. U.S. E.P.A., 217 F.3d 1246, 1256 (9th Cir. 2000) (Nevada regulation requiring that all gasoline sold in wintertime have an oxygen content of at least 3.5 percent does not conflict with, and is not preempted by, any provision of the Clean Air Act); Abundiz v. Explorer Pipeline Co., No. CIV. 3:00-CV-H, 00-2029, 2002 U.S. Dist. LEXIS 13120, *9-15, 2002 WL 1592604, at *3-5 (N.D. Tex. July 17, 2002) (*Geier* does not compel a finding that state MTBE regulations are preempted).

We hold as a matter of law that the State's claims are not preempted by federal law, and that the trial court did not err in refusing Exxon's proposed jury instruction.

V. Standard of Care

Exxon argues that the State failed to establish that it departed from the applicable standard of care "simply by marketing MTBE." In its motion for a directed verdict at the close of the State's case-in-chief, Exxon argued that "[i]n order to establish that ExxonMobil breached its duty of care, the State was obligated to present evidence that ExxonMobil failed to act pursuant to what reasonable prudence would require under similar circumstances." (Quotation omitted.) Exxon asserted that, because the evidence presented at trial "demonstrated that the entire industry **[***34]** acted in the same manner in using gasoline containing MTBE in New Hampshire," there was **[*234]** "no evidence to establish the standard of care or what a reasonable manufacturer or supplier would have done, let alone that ExxonMobil deviated from any applicable standard of care."

The trial court denied Exxon's motion, rejecting its argument that because the State did not present evidence regarding the care exercised by other manufacturers and refiners in the industry, the State failed to show that Exxon's actions were unreasonable. The court stated:

> In fact, the State presented testimony from Duane Bordvick regarding the risk-benefit analysis his company, Tosco — another manufacturer during the relevant time period of this case — conducted. Bordvick testified that Tosco decided not to use MTBE because of the unique and increased risks Tosco perceived MTBE to have. This testimony not only directly contradicts Exxon's argument that the State failed to show the care exercised by other members of the refining industry, it also serves as some evidence from which a jury could conclude that Exxon's behavior in selecting MTBE as its RFG formula oxygenate and doing so without providing a warning was unreasonable. **[***35]**

[286]** (Citations omitted.) The trial court also rejected, as unsupported by the record, Exxon's argument that it could not have foreseen all manners in which the State's alleged harm occurred. The court stated:

> The State admitted Barbara Mickelson's memorandum to Exxon that demonstrates Exxon received warnings against the use of MTBE — that MTBE would take longer and cost more to remediate than traditional gasoline spills. Other witnesses corroborated Exxon's possession of information regarding the expense associated with MTBE remediation as early as the 1980s. In this way, a reasonable jury could conclude that Exxon should have foreseen the harm the State now alleges — increased remediation costs of a different nature than those associated with traditional gasoline.

(Citations omitted.)

Following the jury verdict, Exxon moved for JNOV, arguing, in part, that "there is no evidence in the record regarding the standard of care for a reasonably prudent refiner or manufacturer or what actions ExxonMobil took that breached a standard of care" when the decision to use MTBE was made. Exxon asserted that it presented testimony showing that it "carefully considered the use of MTBE," including consulting **[***36]** with "[a]t least nine different groups within Exxon" to gain information, and that "[o]ther **[*235]** gasoline refiners and manufacturers agreed with Exxon's assessment that the RFG program's requirements could not have been met without the use of MTBE in addition to ethanol." Noting that it had previously rejected Exxon's arguments in its directed verdict ruling, the trial court relied upon that ruling in declining to consider these arguments again "[b]ecause Exxon raises no new facts or law."

On appeal, Exxon argues that the State "offered no evidence to support the notion that a reasonable supplier in New Hampshire would never have used MTBE at any time" and that "[w]ithout a relevant standard against which to compare Exxon's conduct, the State's negligence claim ... fails as a matter of state law." According to Exxon, the State failed to establish that it departed from the applicable standard of care simply by marketing MTBE, asserting that "the evidence presented at trial showed that manufacturers overwhelmingly complied with the RFG program in the Northeast by using MTBE because there was no safer, feasible alternative." The State argues that "[t]he record contains ample evidence that Exxon breached the standard of care," **[***37]** the trial court properly instructed the jury regarding the duty of care, and the jury found Exxon negligent.

NH[16] [16] ***HN17*** Weighing the evidence is a proper function of the factfinder. *93 Clearing House, Inc. v. Khoury, 120 N.H. 346, 350, 415 A.2d 671 (1980)*. The trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses. *Id.* Factual findings "will not be disturbed unless ... erroneous as a matter of law or unsupported by the evidence." *Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 287, 608 A.2d 840 (1992)* (quotations omitted); *see Sutton v. Town of Gilford, 160 N.H. 43, 55, 992 A.2d 709 (2010)*. "A fact finder has the discretion to evaluate the credibility of the evidence and may choose to reject that evidence in whole or in part." *Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256, 651 A.2d 928 (1994)*. Our task is to determine whether a reasonable person could reach the same conclusion as the jury on the basis of the evidence before it. *See Shaka v. Shaka, 120 N.H. 780, 782, 424 A.2d 802 (1980)*. We review sufficiency of the evidence **[**287]** claims as a matter of law. *Tosta v. Bullis, 156 N.H. 763, 767, 943 A.2d 824 (2008)*.

NH[17] [17] ***HN18*** The test of due care is what reasonable prudence would require under similar circumstances. *Carignan v. N.H. Int'l Speedway, 151 N.H. 409, 414, 858 A.2d 536 (2004)*. Whether the defendant breached that duty of care is a question for the trier of fact. *Id.* "[N]ot every risk that might be foreseen gives rise to a duty to avoid a course of conduct; a duty arises because the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably **[***38]** dangerous." *Millis v. Fouts, 144 N.H. 446, 449, 744 A.2d 81 (1999)* (quotation omitted). "[C]onformity with industry practice is not an absolute defense to liability under New Hampshire law, because entire industries **[*236]** may lag behind the standard of care. But it is nonetheless a factor that the jury may consider in evaluating negligence claims." *Bartlett v. Mutual Pharmaceutical Co., Inc., 742 F. Supp. 2d 182, 189 (D.N.H. 2010)* (quotation and citation omitted); *see Bouley v. Company, 90 N.H. 402, 403, 10 A.2d 219 (1939)* (the test of due care is not custom or usage, but what reasonable prudence would require under the circumstances).

NH[18] [18] The record supports that in April 1984, an Exxon employee stated in an internal memo that "we have ... ethical and environmental concerns [about MTBE] that are not too well defined at this point." The memo explained that as there were "strong economic incentives to use MTBE, a study should be started [to] thoroughly review the issues with management." In August 1984, Exxon asked an in-house environmental engineer, Barbara Mickelson, for "information on

additional potential ground water contamination problems that are associated with the use of MTBE in gasoline." Mickelson stated that "MTBE when dissolved in ground water, will migrate farther than [another gasoline additive] before soil attenuation processes stop the MTBE migration." She explained that the **[***39]** "[s]mall household carbon filtration units ... used by Exxon to treat private drinking supplies contaminated by [another gasoline additive] ... would not provide adequate treatment for water supplies additionally contaminated by MTBE." Mickelson concluded that "the number of well contamination incidents is estimated to increase three times following the widespread introduction of MTBE into Exxon gasoline" and that "the closing-out of these incidents would take longer and treatment costs would be higher by a factor of 5." In 1985, Mickelson recommended that "from an environmental risk point of view MTBE not be considered as an additive to Exxon gasolines on a blanket basis throughout the United States" because of its unique contaminating properties.

In the 1980s, Exxon joined the MTBE Committee, an industry group that was formed to address "environmental issues" and "federal and state regulatory issues" relating to MTBE. In a December 1986 meeting with MTBE Committee members, including Exxon, the EPA expressed concern about MTBE leaking into groundwater because MTBE, "which is very soluble in water, can find its way to drinking supplies (i.e. acqu[i]fers)." Nonetheless, in February 1987, the MTBE **[***40]** Committee represented to the EPA that

> there is no evidence that MTBE poses any significant risk of harm to health or the environment, that human exposure to MTBE and release of MTBE to the environment is negligible, that sufficient data exists to reasonably determine or predict that manufacture, processing, distribution, use and disposal of MTBE will not have **[*237]** an adverse effect on health or the environment, and that testing is **[**288]** therefore not needed to develop such data.

After Congress amended the *Clean Air Act* in 1990 to require use of an oxygenate in gasoline, members of the American Petroleum Institute, an industry lobbying group that included Exxon, met with New Hampshire officials and encouraged them to opt in to the RFG Program. During those meetings, it was not disclosed that oil companies would use MTBE in RFG Program gasoline. Robert Varney, who was the commissioner of DES during the relevant time, testified that, although Exxon knew as early as 1984 about MTBE groundwater contamination issues, Exxon did not warn the State or provide it with any information about those issues before Varney recommended that the State opt in to the RFG Program in 1991 or before he recommended that **[***41]** it remain in the Program in 1997. He also testified that the State would not have opted in to the RFG Program if DES had known the information contained in Mickelson's 1984 memo.

In 1999, Exxon had identified more than 100 known contamination sites in New England, many polluted solely with MTBE. That same year, a study by Exxon on the costs of cleaning up MTBE noted that spills containing MTBE could be more difficult and costly to clean up because MTBE "is more soluble [in water] and less biodegradable than other gasoline components." The study found that "[c]ost increases related to MTBE are significant for ... New England" due in part to "hydrogeologic site conditions which maximize the potential for MTBE to 'travel' and impact receptors (e.g., shallow groundwater, fractured bedrock, a high density of private potable wells)." In 2000, Exxon employees observed in an internal communication that "industry has not demonstrated the ability to stop leaks and spills to the level required to avoid MTBE concentrations that effect [*sic*] the taste and odor in drinking water," that "non MTBE fuel leaks are more managable [*sic*]," and that "[b]ased on experience in [the] US, it is fair to assume that other **[***42]** places using MTBE will eventually find groundwater contamination."

Duane Bordvick, a former senior vice-president for safety, health and environment at Tosco Corporation, a gasoline refinery in California, testified that in 1997 he made a statement on behalf of Tosco that the company had decided "that long-term use of MTBE was not in the best interest of" the company or its shareholders due to the "potential threat to California's drinking water resources and the associated liability ... for restoring water resources." He testified that that conclusion was drawn based upon several factors including: "the growing evidence on the threat of MTBE contamination and evidence related to the difficulty of cleaning up MTBE"; "the cost associated [with] potentially having to participate in replacement of drinking water to cities"; "the potential liability for the use **[*238]** of MTBE, associated legal costs, [and] potential lawsuits that may result"; and the "likelihood" that those costs "would exceed ... whatever costs may be associated with no longer relying on MTBE in [Tosco's] gasoline," including refinery changes and other equipment changes.

As the trial court instructed the jury:

> Negligence is **[***43]** the failure to use reasonable care. Reasonable care is the degree of care that an ordinary, prudent manufacturer or supplier would use under the same or similar circumstances.
>
> The failure to use reasonable care may take the form of action or inaction. That is, negligence may consist of either: doing something that an ordinary, prudent manufacturer or supplier would not do under the same or similar circumstances; **[**289]** or, failing to do something that an ordinary, prudent manufacturer or supplier would do under the same or similar circumstances.
>
> A manufacturer or supplier has a duty to make inspections or tests that are reasonably necessary to see that its product is safe for its intended use and for any other reasonably foreseeable purpose.

Viewed in the light most favorable to the State, we hold that the record contains sufficient evidence to support a finding that Exxon breached the standard of care by acting unreasonably under the circumstances. Accordingly, we uphold the trial court's rulings.

VI. Duty to Warn

Exxon argues that it did not have a duty to warn the government as sovereign, rather than as end user or consumer, of the characteristics of MTBE gasoline. In 2008, Exxon moved to dismiss **[***44]** the State's failure-to-warn claim, alleging that when the State claims that, as a bystander, it is a consumer of MTBE, and is therefore entitled to bring a products liability claim, it improperly expands the definition of "consumer," and that the State should be classified as a third party bystander. Because New Hampshire does not recognize bystander liability claims, Exxon argued that the State's strict liability claims should be dismissed.

The trial court denied the motion, finding that the State's claim regarding Exxon's alleged failure to warn of its defective product had been properly pleaded. Based upon *RSA 481:1* (2013), the court concluded that because the State "holds the waters of New Hampshire in trust for the public," the State had properly alleged that "the defendants may be sought to be held liable for damage to the State's waters." The trial court rejected the argument that "the State's interests in its water are akin to those of a **[*239]** bystander." Several years later, Exxon moved for summary judgment on the State's failure-to-warn claim, arguing that because the State was not a "user" or "consumer" of MTBE it "cannot premise a failure-to-warn claim on [Exxon's] alleged failure to warn **[***45]** the State itself." The trial court agreed with the State that the issue had already been addressed in the prior order on the motion to dismiss.

In its motion for a directed verdict at the close of the State's case-in-chief, Exxon argued, in part, that the State "failed to introduce evidence that ExxonMobil failed to warn 'users' of gasoline containing MTBE, instead focusing exclusively on ExxonMobil's alleged failure to warn the State as a regulatory entity, not as a user." The trial court rejected Exxon's arguments, stating that "the State is the party who — if a jury determined a warning was required — would have been owed the warning." The court explained that "[t]he State, as the consumer and in its *parens patriae* capacity, was an end user of MTBE gasoline. This Court has previously ruled the State has standing to assert claims brought on behalf of the people of New Hampshire. Additionally, the State is a consumer itself."

On appeal, Exxon argues that "[t]he theory that there is a duty to warn the sovereign *qua* sovereign" is "wholly unprecedented, oversteps longstanding limitations of New Hampshire tort law, and raises serious *First Amendment* difficulties." The State argues that "although Exxon contends that **[***46]** the verdict hinges on the State's status as sovereign, the trial evidence clearly demonstrated that Exxon provided no warning about MTBE to anyone" and that Exxon, thus, "failed to warn the State as regulator, the State as an end user, or the citizenry represented by the **[**290]** State as *parens patriae*." We agree with the State.

NH[19][↑] [19] The General Court has declared that the State is the trustee over all of the State's water. Pursuant to *RSA 481:1*,

> ***HN19***[↑] an adequate supply of water is indispensable to the health, welfare and safety of the people of the state and is essential to the balance of the natural environment of the state. Further, the water resources of the state are subject to an ever-increasing demand for new and competing uses. The general court declares and determines that the water of New Hampshire whether located above or below ground constitutes a limited and, therefore, precious and invaluable public resource which should be protected,

> conserved and managed in the interest of present and future generations. The state as trustee of this resource for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries. **[***47]**

[*240] RSA 481:1. **HN20**[↑] As trustee, the State can bring suit to protect from contamination the waters over which it is trustee. Hess, 161 N.H. at 432.

NH[20][↑] [20] In State v. City of Dover, 153 N.H. 181, 891 A.2d 524 (2006), we determined that the State was the proper party to bring suit against the MTBE defendants, because it "has a quasi-sovereign interest in protecting the health and well-being, both physical and economic, of its residents with respect to the statewide water supply." City of Dover, 153 N.H. at 186. In addition, we concluded that the State satisfied the requirements of *parens patriae* standing because it asserted an injury to a quasi-sovereign interest, and alleged injury to a substantial segment of its population. Id. at 187-88. **HN21**[↑] "[A] state may act as the representative of its citizens where the injury alleged affects the general population of a State in a substantial way." Hess, 161 N.H. at 433 (quotation omitted). Accordingly, we held that the State has *parens patriae* standing to bring suit against the MTBE defendants on behalf of the residents of New Hampshire. City of Dover, 153 N.H. at 187-88.

The jury was not instructed that Exxon owed a duty to the State as sovereign. Rather, the trial court instructed:

> In deciding whether there was a design defect in the product, you may consider whether there was a warning, and, if so, whether the warning was adequate. The warning **[***48]** is inadequate unless it makes the potential harmful consequences apparent and contains specific language directed at the significant risks or dangers caused by a failure to use the product in the prescribed manner. The manner of the warning is inadequate unless it is of such intensity to cause a reasonable person to exercise caution equal to the potential danger.
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> . . . .
>
> The State has the burden to prove that if ExxonMobil had provided an adequate warning, MTBE gasoline would not have been used or would have been used differently.
>
> A failure to warn amounts to a legal cause of harm when the failure to warn is a substantial factor in bringing about the harm, and if the harm would not have occurred without the failure to warn. The failure to warn need not be the only cause of the injury, but it must be a substantial factor in bringing about the injury.

NH[21][↑] [21] We reject Exxon's argument that the State's failure-to-warn claim was improper because it was premised upon a duty to **[**291]** warn the "sovereign *qua* sovereign." Accordingly, we find no error.

[*241] *VII. Market Share Liability*

Exxon argues that market share liability is not an acceptable theory of recovery and, that, even if it is, the trial court erred in **[***49]** applying market share liability in this case. Several years before trial, Exxon sought an order requiring the State to specify "which Defendants it seeks to hold liable for the damages," "what damages it seeks to recover from those Defendants and when and how the damages occurred," and "the legal theory for holding those Defendants liable for the damages." (Quotations omitted.) The trial court denied the motion, finding that

> requiring the State to allege specifically which defendant caused each injury would create an impossible burden given the allegations of commingling of MTBE and the asserted indivisible injury to the State of New Hampshire's water supplies. To mandate the State to establish more particularized causation would essentially allow the defendants to seek to avoid liability because of lack of individualized proofs where the gravamen of the claim is ... that all defendants placed gasoline containing MTBE into the stream of commerce, thereby causing [the State's] injury.
>
> To allow such a state of events would be to allow claims for tortious conduct for discrete, identifiable, and perhaps lesser tortious acts, but to deny claims for tortious conduct where the conduct alleged **[***50]** may be part of group activity which is alleged [to] have led to a common, and more deleterious, result.

(Quotation omitted.)

In a subsequent order, the trial court, recognizing that "situations exist where a plaintiff may not necessarily be able to identify, specifically, which members of a group, who are engaged in the same activity, caused his or her damages," noted that courts "allow plaintiffs to prove causation through alternative theories of liability,"

including market share liability and "seemingly specific to the MTBE cases, ... commingled product theory." The court found that the "commingled product theory" does not apply here because that theory "only relieves the Plaintiff of its burden to prove the percentage of a particular Defendant's gasoline found at a particular site," and the court "has already found that a specific site-by-site approach is unfeasible and unnecessary in this case." Accordingly, the trial court concluded that market share liability "is a more reasoned approach to this case."

NH[22][↑] [22] As the trial court explained, HN22[↑] the purpose behind market share liability is that

> **[*242]** [i]n our contemporary complex industrialized society, advances in science and technology create fungible **[***51]** goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. In an era of mass production and complex marketing methods the traditional standard of negligence is insufficient to govern the obligations of manufacturer to consumer, courts should acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances.

(Quotation, ellipsis, and brackets omitted.) The court noted that in determining whether market share liability applies in certain circumstances, the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY sets forth six factors that provide a general framework for analysis:

> **[**292]** (1) The generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm; (4) the clarity of the causal connection between the defective product and the harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have **[***52]** caused or materially contributed to the harm; and (6) the availability of sufficient "market share" data to support a reasonable apportionment of liability.

(Quotation and ellipsis omitted.) *See* Restatement (Third) of Torts: Products Liability § 15 comment c at 233 (1998). The court found that in this case "these factors weigh heavily in favor of utilizing market share liability."

Exxon subsequently moved for summary judgment on the issue of causation, asserting that New Hampshire has not adopted the market share liability theory, and that "the theory is contrary to New Hampshire law." The trial court concluded, however, that New Hampshire recognizes market share liability. Citing Buttrick v. Lessard, 110 N.H. 36, 260 A.2d 111 (1969), and Trull v. Volkswagen of America, 145 N.H. 259, 761 A.2d 477 (2000), the court reasoned that "[t]he New Hampshire Supreme Court has repeatedly expressed its willingness to provide plaintiffs with a less stringent burden of proof where they face a 'practically impossible burden,' " and that "[g]iven this willingness, the court is confident that existing New Hampshire law supports the application of Market-Share Liability." Dismissing as unfounded Exxon's suggestion that market share liability "is synonymous with absolute liability," the trial court explained that

> **[*243]** [e]ven where a plaintiff proceeds under **[***53]** a Market-Share Liability theory, he must prove that the defendants breached a duty to avoid an unreasonable risk of harm from their products .... The requirement to prove that a defendant breached his duty to avoid harm is a separate and distinct burden. Only after a plaintiff makes such a showing is he entitled to a relaxed standard for proving causation.

(Quotation and citation omitted.)

Applying the six RESTATEMENT factors, the trial court determined that market share liability should be applied in this case. As to the first factor, the generic nature of the product, the court found that the State had alleged sufficient facts for the court to conclude that MTBE is fungible, *i.e.*, that it is interchangeable with other brands of the same product. As to the second factor, whether the harm caused by the product has a long latency period, the trial court found that the harm caused by MTBE was not latent because it travels faster and further than other chemicals. Thus, the court concluded that this factor weighs in favor of Exxon. As to the third factor, the plaintiff's inability to identify which defendant caused the harm, the trial court concluded this factor weighs in the State's **[***54]** favor because "retailers commingled gasoline in storage tanks at stations, so it would be impossible to determine which of the defendant[s'] MTBE gasoline was discharged into the environment."

The trial court found that the fourth factor, the clarity of the causal connection between the defective product and harm suffered by the State, favors the State. The

court agreed with Exxon's general proposition that the gasoline market does not alone reflect the risk created and, thus, the court required the State "to introduce market share data as targeted as possible (e.g. market share data specific to RFG and non-RFG counties)." (Quotation omitted.) Noting that it is impossible to determine market share with mathematical **[**293]** exactitude, the court concluded that the experts' market data was sufficient.

The trial court found the fifth and sixth factors favor the State. As to the fifth factor, whether other medical or environmental factors could have contributed to the harm, the court noted that Exxon had not asserted that other factors contributed. As to the sixth factor, the sufficiency of the market data, the court found that the State's experts had presented "enough market data to allow the State **[***55]** to proceed" on a market share liability theory.

Following the jury verdict, Exxon moved for JNOV, arguing, in part, that, for five reasons, the market share liability evidence the jury considered was insufficient for the jury to find it liable: (1) there was no evidence **[*244]** that Exxon's market share for MTBE gasoline was 28.94% because that figure measured all gasoline supplied in New Hampshire; (2) there was no evidence to support the jury's finding that all gasoline containing MTBE was fungible; (3) no rational trier of fact could have found that the State could not trace MTBE gasoline back to the company that supplied it because, from 1996 to 2005, the State could identify the suppliers that caused its alleged harm; (4) the State failed to identify a substantial segment of the relevant market for gasoline containing MTBE because it only presented evidence as to "a snapshot of" the wholesale market; and (5) the State failed to establish the relevant market at the time of its alleged injuries. Noting that Exxon had raised, and the court had rejected, all of these arguments before, and because Exxon raised no new law or facts to support its motion, the court addressed Exxon's arguments **[***56]** "only for the purpose of further explanation and clarification."

Considering Exxon's first and fifth arguments together, the court determined that "the State presented sufficient evidence for a reasonable juror to conclude that all gasoline imported into New Hampshire was commingled with MTBE gasoline. From there, the jury could reasonably have assigned Exxon the share of the gasoline market that its supply represented." With respect to Exxon's second argument, the court concluded that there was "sufficient evidence from which a reasonable jury could find that MTBE gasoline was fungible." As to Exxon's third and fourth arguments, the court noted that the State "presented evidence through various witnesses from which a juror could reasonably conclude that all gasoline in New Hampshire was statistically likely to be commingled with MTBE to some concentration. Thus, it was for the jury to decide whether it would rely upon the 100 percent figure [the State's expert] provided, or a lower figure." The court also observed that it had previously found the State's expert qualified, and that her testimony "was based upon sufficient facts and data; her testimony was the product of reliable principles **[***57]** and methods; and she applied the principles and methods reliably to the facts of the case." Finally, the trial court addressed Exxon's additional argument that, because MTBE gasoline could be traced to a supplier from the refinery, the State failed to prove its market share case. The court stated:

> The State's theory of the case, as addressed in pretrial, trial, and directed verdict rulings, was that MTBE gasoline is untraceable once spilled or leaked; once it causes harm to the State. It is wholly irrelevant that gasoline might be traceable to a particular supplier from a wholesale distributor or even the refinery because, as the State alleged, once the gasoline causes harm, it cannot be traced to a supplier, distributor, or refiner. The jury **[*245]** heard evidence to this extent, and could thereby have found **[**294]** that the State met the requisites of relying on market share liability for causation purposes.

Exxon also moved to set aside the verdict and for a new trial arguing, in part, that the trial court erred as a matter of law by allowing the State to use market share liability. Exxon argued that the State "should have been compelled ... to proceed on a site-specific basis and rely on traditional **[***58]** causation to prove its claims," and that it was error "to permit the State to use a wholesale supplier market share when it was undisputed that ... the MTBE gasoline that allegedly caused the State's harm could be traced back to the wholesale suppliers, thus negating the need for or applicability of [market share liability] theories." The trial court rejected Exxon's arguments. As to Exxon's argument that the jury needed to find first that the State could not prove traditional causation in order to find the State entitled to rely upon market share liability, the trial court stated that market share liability "did not require the State to prove that it could not establish traditional causation; it required the State to show that it could not

identify the tortfeasor responsible for its injury. The 'last resort' requirement focuses on the inability of the plaintiff to identify the manufacturer of a product, not the absence of alternative causes of action or theories of recovery." The court concluded:

> During trial, the State presented several witnesses who testified that MTBE gasoline is fungible and commingled at nearly every step in the distribution network, thereby making it virtually **[***59]** impossible if not impossible to trace from a spill or leak back from a contamination site to a retailer or supplier. This testimony tended to fulfill the State's burden of proving that it was unable to identify the specific tortfeasor responsible for its injury. The jury's verdict — finding that the State was unable to identify the specific tortfeasor responsible for its injury — was not conclusively against the weight of the evidence.

(Citations omitted.)

On appeal, Exxon argues that the trial court erred in adopting market share liability in New Hampshire because it "departs from centuries of New Hampshire law." Exxon also argues that "[e]ven if market share liability would ever be appropriate under New Hampshire law, this would be a poor case to make that first jump" and that the trial court "applied the wrong market share." The State argues that traditional principles of tort law support the use of market share evidence, that Exxon has failed to show that market share liability was not warranted on the facts of this case, and **[*246]** that the trial court properly ruled that the jury was entitled to determine that Exxon should be held liable for its percentage of the supply, rather than the refining **[***60]** market.

HN23[↑] We review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. *In the Matter of McArdle & McArdle, 162 N.H. 482, 485, 34 A.3d 700 (2011)*. We review questions of law *de novo*. *Sanderson v. Town of Candia, 146 N.H. 598, 600, 787 A.2d 167 (2001)*.

Market share liability has its roots in a 1980 decision of the California Supreme Court, *Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (Cal. 1980)*. In *Sindell*, the plaintiffs alleged injuries resulting from their *in utero* exposure to the drug diethylstilbesterol (DES), a synthetic hormone that was marketed to women as a miscarriage preventative from 1947 to 1971. *Sindell, 607 P.2d at 925*. In 1971, a link was **[**295]** discovered between fetal exposure to DES and the development many years later of adenocarcinoma. *Id.* Over 200 manufacturers made DES and, because of the long latency period and generic nature of the drug, many plaintiffs were unable to identify the precise manufacturer of the DES ingested by their mothers during pregnancy. *Id. at 931*. Plaintiff Sindell brought a class action against 11 drug manufacturers, alleging that the defendants were jointly and severally liable because they had acted in concert to make, market, and promote DES as a safe and effective drug for preventing miscarriages. *Id. at 925-26*. The trial **[***61]** court had dismissed the claims due to Sindell's inability to identify which defendants had manufactured the DES responsible for her injuries. *Id. at 926*.

NH[23][↑] [23] In reversing that decision, the California Supreme Court expanded alternative liability to encompass what is now known as market share liability. HN24[↑] Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasors, and the plaintiff has joined the manufacturers of a "substantial share" of the DES market. *Id. at 936-37*. Once these elements are established, each defendant is severally liable for the portion of the judgment that represents its share of the market at the time of the injury, unless it proves that it could not have made the DES that caused the plaintiff's injuries. *Id. at 937*.

The court based its decision upon two considerations: (1) "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury"; and (2) "[f]rom a broader policy standpoint," because the manufacturer "is in the best position to discover and guard against defects in its products and to warn of harmful **[***62]** effects ..., holding it liable ... will **[*247]** provide an incentive to product safety." *Id. at 936*. The court held it to be reasonable, in the context of the case, "to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them ... bears to the entire production of the drug sold by all for that purpose." *Id. at 937*. By holding each defendant liable for the proportion of the judgment represented by its share of the market, "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." *Id.*

Several states have adopted some form of market share liability. *See, e.g.*, *Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37, 49-51 (Wis. 1984)* (adopting a form of market share liability in DES case); *Martin v. Abbott Laboratories, 102 Wn.2d 581, 689 P.2d 368, 380-82 (Wash. 1984)* (rejecting *Sindell* market-share theory of liability in favor of market-share alternative liability in DES case); *Hymowitz v. Eli Lilly and Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 1075-78, 541 N.Y.S.2d 941 (N.Y. 1989)* (adopting market share liability theory for a national market in DES case); *Conley v. Boyle Drug Co., 570 So. 2d 275, 285-86 (Fla. 1990)* (adopting market share alternate liability theory in DES case); *Smith v. Cutter Biological, Inc., 72 Haw. 416, 823 P.2d 717, 727-29 (Haw. 1991)* (adopting market share liability theory in action against manufacturers of blood product). In other jurisdictions, courts have left open the possibility of adopting market share liability **[***63]** in the future. *See, e.g.*, *Skipworth v. Lead Industries Ass'n, Inc., 547 Pa. 224, 690 A.2d 169, 172 (Pa. 1997)* (deciding not to adopt market share liability **[**296]** in lead paint case, but recognizing that the need to adopt that theory might arise in the future); *Shackil v. Lederle Laboratories, 116 N.J. 155, 561 A.2d 511, 529 (N.J. 1989)* (decision "should not be read as forecasting an inhospitable response to the theory of market-share liability in an appropriate context"); *Case v. Fibreboard Corp., 1987 OK 79, 743 P.2d 1062, 1066-67 (Okla. 1987)* (rejecting market share liability in asbestos case but recognizing that market share considerations were sufficient in DES context to achieve a balance between the rights of the defendants and the rights of the plaintiffs); *Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171, 190 (Mass. 1982)* (court might recognize "some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant period of time"); *see Abel v. Eli Lilly and Co., 418 Mich. 311, 343 N.W.2d 164, 173-74 (Mich. 1984)* (a "new DES-unique version of alternative liability" will be applied in cases in which all defendants have acted tortiously, but only one unidentifiable defendant caused plaintiff's injury).

NH[24][↑] [24] We disagree with Exxon that the trial court erred in concluding that New Hampshire would recognize market share liability as an alternative **[*248]** liability **[***64]** theory and that the theory is proper on the facts of this case. In *Buttrick v. Lessard* ***HN25***[↑] we adopted strict liability for design defect claims because requiring the plaintiff to prove negligence would impose "an impossible burden" on the plaintiff due to the difficulty of proving breach of a duty by a distant manufacturer using mass production techniques. *Buttrick, 110 N.H. at 39*. We explained:

> The rule requiring a person injured by a defective product to prove the manufacturer or seller negligent was evolved when products were simple and the manufacturer and seller generally the same person. Knowledge of the then purchaser ... was sufficient to enable him to not only locate the defect but to determine whether negligence caused the defect and if so whose. The purchaser of the present day is not in this position. How the defect in manufacture occurred is generally beyond the knowledge of either the injured person or the marketer or manufacturer.

Id. As we later noted, what was crucial to our policy analysis in *Buttrick* "was the recognition that the need to establish traditional legal fault in certain products liability cases had proven to be, and would continue to be, a practically impossible burden. This was **[***65]** the compelling reason of policy without which *Buttrick* would have gone the other way." *Bagley v. Controlled Environment Corp., 127 N.H. 556, 560, 503 A.2d 823 (1986)* (citations and quotation omitted).

NH[25][↑] [25] Based upon this rationale, ***HN26***[↑] we subsequently placed the burden of proving apportionment upon defendants in crashworthiness or enhanced injury cases involving indivisible injuries. *Trull, 145 N.H. at 260*. In *Trull*, we held that plaintiffs were required to prove that a design defect was a substantial factor in producing damages over and above those caused by the original impact to their car, and, once they had made that showing, the burden would shift to the defendants to show which injuries were attributable to the initial collision and which to the design defect. *Id. at 265*. That burden was placed upon the defendants because the plaintiffs would otherwise have been "relegated to an almost hopeless state of never being able to succeed against a defective designer." *Id.* (quotation omitted). We were persuaded by policy reasons not to place a "practically impossible **[**297]** burden" upon injured plaintiffs. *Id.*

NH[26][↑] [26] By contrast, ***HN27***[↑] we have declined to expand products liability law in cases in which plaintiffs have not faced a practically impossible burden of proving negligence. *See, e.g., Royer v. Catholic Med. Ctr., 144 N.H. 330, 335, 741 A.2d 74 (1999)* (strict liability did not **[***66]** apply to tort action against non-

manufacturer hospital for selling defective prosthetic knee to plaintiff); *Bruzga v. PMR [*249] Architects, 141 N.H. 756, 761, 693 A.2d 401 (1997)* (unlike a consumer who purchases a mass-produced good, strict liability does not apply to architect and contractor because the owner or user of a building does not face "extraordinary difficulties in proving liability under traditional negligence principles"); *Bagley, 127 N.H. at 560* (declining to impose strict liability in action by landowner against adjoining landowner for damages resulting from soil and groundwater contamination because "there [was] no apparent impossibility of proving negligence"); *Siciliano v. Capitol City Shows, Inc., 124 N.H. 719, 730, 475 A.2d 19 (1984)* (refusing to extend strict liability to owner and operator of amusement park ride when there was no indication that the plaintiffs suffered an "unfair burden" from not doing so because they possess adequate protection through an action for negligence); *Wood v. Public Serv. Co., 114 N.H. 182, 189, 317 A.2d 576 (1974)* (no "compelling reason of policy or logic" advanced to apply strict liability to electric companies in wrongful death action).

We have also declined to expand products liability law when the defendants could not have been at fault. *Simoneau v. South Bend Lathe, Inc., 130 N.H. 466, 543 A.2d 407 (1988)*. In *Simoneau*, we rejected the product line theory of successor liability, reasoning that "liability without negligence **[***67]** is not liability without fault." *Id. at 469*. Under the product line theory, a party that acquires a manufacturing business and continues the output of its line of products, assumes strict liability for defects in units of the same product line manufactured and sold by the predecessor company. *Id. at 468*. We refused to "impose what amounts to absolute liability on a manufacturer," *id. at 470*, reaffirming "[t]he common-law principle that *fault and responsibility* are elements of our legal system applicable to corporations and individuals alike" and that such principle ought "not be undermined or abolished by spreading of risk and cost in this State." *Id. at 469* (quotation omitted).

NH[27][↑] [27] Based upon the reasoning expressed in our cases developing products liability law in New Hampshire, the trial court concluded that it would "not rigidly apply theories of tort law where doing so would either be impractical or unfairly 'tilt the scales' in favor of one party or another." We agree with the trial court that, based upon our willingness to construct judicial remedies for plaintiffs who would be left without recourse due to impossible burdens of proof, applying market share liability was justified in the circumstances presented by **[***68]** this case. In addition to finding that the State had proven all of the elements of its claims, the jury found: "MTBE gasoline is fungible"; the State "cannot trace MTBE gasoline found in groundwater and in drinking water back to the company that manufactured or supplied that MTBE gasoline"; and the State "has identified a substantial **[*250]** segment of the relevant market for gasoline containing MTBE." We have reviewed the record and conclude that it contains sufficient evidence to support the jury's findings. Given the evidence presented, the State faced an impossible burden of proving which of **[**298]** several MTBE gasoline producers caused New Hampshire's groundwater contamination. We hold that the trial court did not unsustainably exercise its discretion in allowing the State to use the theory of market share liability to determine the portion of the State's damages caused by Exxon's conduct.

NH[28][↑] [28] Exxon argues that because the trial court found that there was sufficient evidence for the State to prove traditional causation, it erred by instructing the jury on market share liability. We disagree. To the contrary, the trial court merely found that the State could prove "but for" causation as required under **[***69]** the market share liability theory. *HN28*[↑] "Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a prima facie case on every element of the claim except for identification of the actual tortfeasor or tortfeasors ... ." *In re Methyl Tertiary Butyl Ether Products Liab., 379 F. Supp. 2d 348, 375 (S.D.N.Y. 2005)*. Exxon argued in its motion for a directed verdict at the close of the State's case-in-chief that, "[f]or each of the State's claims, the State was required to provide evidence specific to ExxonMobil that gasoline containing MTBE from ExxonMobil was the but for cause of the State's alleged injuries and that ExxonMobil's conduct or product were a substantial factor in bringing about the State's alleged injuries." Exxon asserted that such proof "was utterly lacking ... and the State has not identified any evidence that gasoline containing MTBE from ExxonMobil caused any of the alleged contamination in this case under traditional theories of causation."

The trial court denied Exxon's motion, reasoning that, from testimony presented by the State, "a reasonable jury could conclude that Exxon was the proximate cause of the State's alleged injury under a traditional causation theory." Thus, the trial court rejected Exxon's **[***70]** argument that the State had not established a *prima facie* case on each of its claims. Further, the evidence established that MTBE gasoline is a fungible product, that the fungibility of MTBE gasoline allows it to be

commingled at nearly every step of the gasoline distribution system, and that commingling prevents the State from tracing a molecule of MTBE gasoline from the refinery to New Hampshire so that the State cannot identify the refiner of the MTBE gasoline that caused the harm. Thus, because the State could not identify the tortfeasor responsible for its injury, under market share liability the burden of identification shifted to Exxon. Accordingly, the jury was instructed:

> **[*251]** If the State has been harmed by a product that was manufactured and sold by any number of manufacturers and suppliers, and the State has no reasonable means to prove which manufacturer or supplier supplied the product that caused the injury, then the State may use market share liability to satisfy its burden of proof. Under market share liability, ExxonMobil is responsible for the State's harm in proportion to ExxonMobil's share of the market for the defective product during the time that the State's harm **[***71]** occurred.
>
> Market share liability requires that the State ... prove all the elements for negligence, or strict liability defect in design, or strict liability based on a failure to warn and that the State suffered harm. In addition, the State must prove the following: (1) it has identified enough MTBE gasoline manufacturers or suppliers in this case so that a substantial share of the relevant market is accounted for; and (2) MTBE gasoline is fungible, meaning that one manufacturer's or supplier's MTBE gasoline is **[**299]** interchangeable with another's; and (3) the State cannot identify the manufacturer or supplier of the MTBE gasoline that caused the harm.

NH[29][↑] [29] Finally, we find no error with the trial court's ruling that the jury was entitled to determine that Exxon could be held liable for its percentage of the supply market. As the trial court reasoned, because Exxon "had or should have had knowledge of the characteristics of MTBE gasoline from [its] refining role[ ]," a jury could find Exxon liable for MTBE gasoline it supplied but did not refine. The trial court explained that the jury was entitled to estimates of supplier and refiner market share and that both reflected Exxon's "creation of **[***72]** the risk within the State," and that "[a]ny figure within this spectrum would be an appropriate measure of the State's damages."

VIII. Aggregate Statistical Evidence

Exxon argues that the State should not have been permitted to rely upon aggregate statistical evidence rather than individualized evidence of particular water supplies and sites. Before trial, Exxon moved to exclude the opinions of three of the State's experts estimating the probability of MTBE occurrence in New Hampshire, the past costs of MTBE remediation, and the future costs of investigating and remediating MTBE sites. Exxon argued that these experts, Dr. Graham Fogg, Gary Beckett, and Dr. Ian Hutchison, "attempt to draw statewide conclusions about MTBE detections **[*252]** and costs from small 'sample' datasets, extrapolating to the State at large," but "fail ... to follow basic, well-accepted statistical and scientific principles."

Following a hearing, the trial court issued a written order "accept[ing] the [State's] argument that using statistical methods is appropriate and, as a result, the state-wide proof model is acceptable and relevant." The court reasoned that "the use of statistical methods, assuming their reliability, makes the existence **[***73]** of the [State's] injury more probable than it would be without such evidence; likewise, it will assist the trier of fact to understand and determine both the existence and extent of the [State's] injury." Thus, the trial court concluded that the State's experts' opinions "are relevant to prove injury-in-fact and damages" and that it would accept proof of injury "through the use of statistical evidence and extrapolation, i.e. the 'state-wide approach.' "

The trial court set forth several reasons in support of its conclusion. First, the court noted that the majority of the cases cited by Exxon are class-action cases, "which disallow the use of aggregate damages across a class of plaintiffs." The court found those cases distinguishable because, here, the State "does not seek to establish injury among several class plaintiffs through the use of an aggregate model, but instead seeks to prove *its own* injury through the use of statistics." Second, the court reasoned that New Hampshire's " 'declaration of policy' confirms that an injury to both public and private waters within the [s]tate is an indivisible injury, allowing for the State to prove its claim upon state-wide proof." The court stated that **[***74]** under RSA 481:1, "[t]he state as trustee of the waters for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries," and that this statute provides the State "with more than just a vehicle to demonstrate standing: the statute allows the [State] to prove injury to a single resource." (Quotation and brackets omitted.) Finally, the trial court reasoned that

"general policy considerations support allowing the [State] to establish injury and **[**300]** damages using statistical methods." The court stated:

> American manufacturers now mass produce goods for consumption by millions using new chemical compounds and processes, creating the potential for mass injury. As a result, modern adjudicatory tools must be adopted to allow the fair, efficient, effective and responsive resolution of claims of these injured masses. In a perfect setting, the [State] would have the resources to test each individual well over a long period of time and precisely determine its damages. However, if such a process were undertaken here, it would have to continue beyond all lives in being. The Court simply cannot support such a process.
>
> **[*253]** Moreover, **[***75]** requiring the [State] to test each individual well undoubtedly and unfairly "tilts the scales" in [Exxon's] favor .... Here, ... the necessary additional litigation costs the [State] would have to bear would consume much of any recovery, making continued pursuit of the litigation fruitless. Because of these public policy interests, the Court finds that allowing the [State] to use statistical methods of proof is relevant to prove injury and damages in this case.
>
> The fact is that for decades, judges, lawyers, jurors, and litigants have shown themselves competent to sift through statistical evidence in a variety of contexts, from mass toxic torts to single-car collisions. Not only have they shown themselves competent, but also such evidence has become a generally accepted method for a plaintiff to prove his case. This Court is simply not persuaded by [Exxon's] attempt to frame this case as a class action. As a result, the Court rejects the notion that New Hampshire law forbids the use of a statistical approach to prove injury-in-fact.

(Quotations, citations, brackets, and ellipsis omitted.)

Exxon subsequently attempted to exclude the opinions of the same three experts on grounds of **[***76]** reliability, arguing that the State's experts used improper methodologies and, even when they used proper methodologies, they applied the methodologies incorrectly to the facts and data provided. After conducting a thorough analysis of each of the statistical methods employed by the State's experts, the trial court concluded that their opinions and methodologies were reliable and denied Exxon's motion.

Following the trial court's ruling that the statewide approach was acceptable, Exxon sought an interlocutory transfer to this court. The trial court denied the request, finding that Exxon failed to satisfy the requirements of New Hampshire *Supreme Court Rule 8(1). See SUP. CT. R. 8* (interlocutory appeal from ruling). In its order, the trial court noted that, despite its rulings otherwise, Exxon continued to assert that it is feasible to try this case on a well-by-well approach. As the court explained, under Exxon's approach,

> the State would identify a contaminated drinking-water well and then trace the source of contamination to a particular physical location that leached gasoline into the ground. These locations will usually be businesses associated with gasoline, like retail gas stations and junkyards. From **[***77]** here, these entities can then trace the gasoline back through the product chain to the wholesaler and eventually the refiner. In this way, either the State or the retailers **[*254]** can spread the liability throughout the product chain. [Exxon] explain[s] that because all entities in a product chain would be liable for the State's harm, the State should be required to proceed on a well-by-well approach.

[301]** The trial court found this method to be "technically and scientifically infeasible." The court reasoned:

> The State's case attempts to impose liability on manufacturers and refiners. Without decision makers selecting, marketing, and reformulating MTBE, it would never have been included in the RFG program and would never have been imported into New Hampshire to spill, leak, and evaporate. Gasoline imported into New Hampshire would not have been capable of contaminating the State's water resources in the vast, seemingly uncontainable way it has if it did not contain MTBE. The State has chosen to pursue the named Defendants because they created the initial risk that led to widespread contamination. Based on this selected class of defendants, product tracing is virtually impossible.
>
> Defendants themselves admit **[***78]** that tracing MTBE found in a contaminated well all the way back to the refiner is virtually impossible because MTBE lacks a chemical signature, linking it to a particular refiner. Additionally, a contaminated well, many times, cannot be traced to a particular retailer, making it practically impossible to trace MTBE to a specific wholesaler.

Following the jury verdict, Exxon argued in its motion to set aside the verdict that the statewide approach allowed the State "to prove its private well and 'future injury' case using statistical extrapolations from experts about potential hypothetical impacts rather than particularized evidence of an actual injury" and that this "resulted in the State being able to avoid its burden to prove individualized causation with respect to particular private well impacts." The trial court denied the motion, stating that its prior rulings on this issue were rulings of law and that because "Exxon does not raise any new facts regarding these rulings and it does not contend that the jury's verdict was conclusively against the weight of the evidence," the argument "did not properly fall within the purview" of a motion to set aside.

On appeal, Exxon argues that **[***79]** the trial court erred in allowing the State to prove its case on a statewide basis. Exxon asserts that "[e]very other court to address the issue has recognized that MTBE tort cases depend overwhelmingly on individualized questions of law and fact, and thus are not amenable to proof on a mass basis." According to Exxon, the trial court "broke from these precedents" in allowing statewide aggregate evidence. The State argues that the "immense scope of Exxon's pollution" has **[*255]** "directly affected a substantial portion of the State's population" and that "[t]he statewide nature of Exxon's tortious conduct, therefore, required adjudication on a statewide basis." (Quotation omitted.) The State asserts that Exxon has "mischaracterize[d] both the trial record and the relevant standards of review."

We review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. *In the Matter of McArdle, 162 N.H. at 485.*

Exxon cites *In re Methyl Tertiary Butyl Ether Products Litigation, 209 F.R.D. 323 (S.D.N.Y. 2002)*, as an example of why "MTBE tort cases depend overwhelmingly on individualized questions of law and fact." The trial court, however, found this and other MTBE cases involving a determination as to "injury **[***80]** in fact" to be unhelpful, as "the facts of this case are very different." In contrast to the New York MTBE case in which the court dismissed full categories of class plaintiffs who had actually tested and detected no MTBE in **[**302]** their wells, the trial court noted that here, "the [State] has tested many wells where it has discovered the existence of MTBE. It merely seeks to extrapolate that information in order to establish further injury." The trial court agreed that "if the [State] had not tested any wells or had tested wells and found no MTBE, the [State's] pursuit of a statistical approach would be fruitless." As further distinguishing the New York MTBE case, the trial court noted that, whereas in the New York case, the plaintiffs' allegations neither contained any statistics pertaining to MTBE detection rates for private wells nor established that the private wells were located in proximity to possible release sites, here the State "provided the Court with adequate statistical evidence through their experts," and, the State seeks recovery "on the basis of 'high-risk' areas only."

NH[30][↑] [30] At trial, the State offered proof based upon expert testimony regarding 1,584 specific sites where MTBE **[***81]** has been known to leak and has contaminated the subsurface. The State also introduced scientific evidence through expert testimony that 5,590 drinking water wells serving 16,276 people are contaminated with MTBE at levels over 13 ppb, and that many more are expected to become contaminated in the future. Dr. Fogg used substantial data on MTBE contamination in the state to calculate statistically the number of drinking wells currently contaminated by MTBE. The State's experts expressly accounted for the fact that "every site is different." Exxon does not contend on appeal that the expert evidence was irrelevant or unreliable.

Based upon the record, we conclude that the trial court's determination that the use of statistical evidence and extrapolation to prove injury-in-fact **[*256]** was proper was not an unsustainable exercise of discretion. *See Bodwell v. Brooks, 141 N.H. 508, 510-11, 686 A.2d 1179 (1996)* (statistical probability evidence may be used to rebut the presumption of legitimacy); *Rancourt v. Town of Barnstead, 129 N.H. 45, 50-51, 523 A.2d 55 (1986)* (validity of a town's growth control ordinance rests upon a relationship between the town's growth restrictions and a projection of "normal growth" based upon scientific and statistical evidence); *In re Neurontin Marketing and Sales Practices, 712 F.3d 21, 42 (1st Cir. 2013)* ("courts have long permitted parties to use statistical data to establish causal **[***82]** relationships").

IX. RSA 507:7-e and DeBenedetto

Exxon argues that it was "unfairly prejudiced in its ability to present its defense" under *RSA 507:7-e* (2010) and *DeBenedetto v. CLD Consulting Engineers, Inc., 153 N.H. 793, 903 A.2d 969 (2006)*. Before trial, Exxon filed

disclosures containing lists of several thousand non-litigants, including the names of gasoline suppliers, gasoline importers, foreign refiners, domestic refiners, distributors, trucking companies, and persons with leaking underground storage tanks. After reviewing these initial disclosures, the trial court found that they did not sufficiently allege fault against the non-litigants and, as a result, did not provide either the court or the State with adequate notice under *DeBenedetto*. The trial court ordered Exxon to "set forth, with specificity, a good faith basis for why each party listed within their disclosures is responsible for the claims made by the State."

The State subsequently moved to strike Exxon's supplemental disclosures, maintaining that Exxon failed to comply with the trial court's order because the disclosures did not provide sufficient evidence specific to each *DeBenedetto* party. In its order, the trial court stated:

> Despite the fact that the New Hampshire Supreme Court has never directly **[**303]** addressed the **[***83]** present *DeBenedetto* issues, it has, nonetheless, supplied a framework to guide this court's analysis. This framework is made up of four principles: first, that RSA 507:7-e applies to all parties contributing to the occurrence giving rise to the action, including those immune from liability or otherwise not before the court; second, that a civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense; third, the defendant carries the burdens of production and persuasion; and fourth, that a defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes.

[*257] (Quotations and citations omitted.)

The trial court found "the most notable portion of the framework, and the most helpful in the present analysis, is that portion identifying non-litigant liability as akin to an 'affirmative defense.' " Because in New Hampshire defendants are required to plead affirmative defenses to provide the plaintiff with adequate notice of the defense and a fair opportunity to rebut it, the trial court determined **[***84]** that "when a defendant raises a defense under *DeBenedetto*, its disclosure must provide the plaintiff with adequate notice of the defense and the plaintiff must be given fair opportunity to rebut it." Looking at the requirements of other jurisdictions, the court reasoned that the Colorado standard "for evaluating a defendant's notice of non-litigant fault [is] persuasive in molding a standard for 'adequate notice' under *DeBenedetto*." Thus, the court concluded that

> proper notice in the *DeBenedetto* context requires [Exxon] to provide to the State identifying information for the nonparty in addition to a brief statement of the basis for believing such nonparty to be at fault. Furthermore, the notice must allege sufficient facts to satisfy all the elements of at least one of the State's claims.

(Quotations, citations, and brackets omitted.) The trial court rejected Exxon's assertion that it need demonstrate only "how a *DeBenedetto* party contributed to the harm alleged by the State, not correspond each *DeBenedetto* party to individual claims," reasoning that Exxon cannot assert that it has "any less of a burden than to link [its] own allegations of non-litigant fault to at least one of the **[***85]** claims asserted by the State." (Quotation omitted.)

Thereafter, the trial court determined that with respect to negligence, Exxon "must assert that a nonparty owed a duty with respect to MTBE gasoline and breached that duty. This will require demonstrating that a nonparty had some knowledge of MTBE or its characteristics, or should have had some knowledge." With respect to products liability, the trial court determined that Exxon "must assert that a nonparty knew or reasonably should have known of the nature of MTBE upon which the State's claims are based in order to show that an entity below [Exxon] in the product chain is similarly culpable and/or owed a similar duty to warn." The trial court explained that Exxon "need not show that a nonparty was aware of the unique nature of MTBE ... However, a nonparty cannot possibly [have] foreseen the type of harm alleged by the State absent some knowledge that MTBE was generally present in gasoline or could have been present. Alternatively, [Exxon] may demonstrate that a nonparty should have known of MTBE."

[*258] After the jury verdict, Exxon moved to set aside the verdict and for a new trial. Exxon argued that the trial court erred **[**304]** by: (1) "improperly **[***86]** requiring ExxonMobil to prove that the non-parties were liable for the State's claims, rather than proving only that they contributed to the State's injury"; (2) "preventing ExxonMobil from relying on RSA 146-A to establish the non-parties' fault"; (3) "requiring proof that the non-parties had actual or constructive knowledge of MTBE's

presence in gasoline before contributing to the State's injury"; and (4) requiring it to present "categories of evidence rather than evidence about the actions of particular individuals in connection with particular injuries."

The trial court rejected Exxon's first three challenges because they raised pure questions of law that the court addressed pretrial and "Exxon has raised no new fact or law to convince the Court to readdress these arguments." Regarding the statewide proof claim, the trial court agreed with the State that allowing categories was a convenience, not a requirement, and "Exxon could have presented evidence regarding every individual *DeBenedetto* party, as opposed to categorical evidence." As to the categories, the trial court found that "Exxon presented very little evidence establishing nonparty liability" and that its primary witness who testified **[***87]** regarding the various categories of nonparties "did not indicate that nonparties were aware of MTBE's presence in gasoline during the relevant time period, and he never stated that nonparties were aware their actions caused spills and leaks that caused MTBE contamination." Accordingly, the trial court concluded that it "cannot say that a jury verdict rejecting Exxon's *DeBenedetto* defense was conclusively against the weight of the evidence."

On appeal, Exxon argues that the trial court's *DeBenedetto* rulings "deviate from clear precedent and denied Exxon a meaningful opportunity to prove that third parties contributed to at least part of the alleged harm." Exxon asserts that the trial court's ruling that Exxon had to link each *DeBenedetto* party to a claim made by the State "eviscerated Exxon's statutory right to allocate fault to third parties." The State argues that Exxon's *DeBenedetto* argument is "unavailing because Exxon did not show at trial that non-parties were at *fault* for MTBE pollution."

We review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the **[***88]** prejudice of a party's case. *In the Matter of McArdle, 162 N.H. at 485*. We review questions of law *de novo*. *Sanderson, 146 N.H. at 600*.

[*259] *NH[31]*[↑] [31] *HN29*[↑] Pursuant to *RSA 507:7-e* and *DeBenedetto*, defendants may ask a jury to shift or apportion fault from themselves to other nonparties in a case. *RSA 507:7-e, I*, provides:

> *HN30*[↑] I. In all actions, the court shall:
>
> (a) Instruct the jury to determine ... the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and
>
> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

NH[32][↑] [32] *HN31*[↑] "[F]or apportionment purposes under *RSA 507:7-e*, the word 'party' refers not only to 'parties to an action, including settling parties,' but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the **[**305]** court." *DeBenedetto, 153 N.H. at 804* (quotation, ellipsis, and citation omitted). "[A] defendant may not easily shift fault under *RSA 507:7-e*; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court **[***89]** may consider it for fault apportionment purposes." *Id.* "[A] civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an *affirmative defense*." *Goudreault v. Kleeman, 158 N.H. 236, 256, 965 A.2d 1040 (2009)*. Accordingly, "the defendant carries the burdens of production and persuasion." *Id.* Furthermore, "a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." *Id.* (quotation and brackets omitted); *see Wyle v. Lees, 162 N.H. 406, 413, 33 A.3d 1187 (2011)* (trial court implicitly concluded that the defendants failed to prove their allegations of comparative negligence for purposes of apportionment of damages).

NH[33,34][↑] [33, 34] As the trial court correctly concluded, *HN32*[↑] apportionment under *RSA 507:7-e* requires proof of fault. *DeBenedetto, 153 N.H. at 800* (apportionment must include all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question). At trial, Exxon's expert witness, Jeffrey A. Klaiber, an environmental consultant, testified for several days, including providing extensive testimony regarding typical spill and leak scenarios for the various categories of alleged faulty nonparties. He acknowledged, however, that **[***90]** he did not interview anyone at any of the sites that Exxon contends are responsible for MTBE contamination, that he did not

know whether anyone who owned or operated any of **[*260]** those sites knew that MTBE gasoline behaves differently from other gasolines when released into the environment, and that he did not know if any of the owners or operators of those sites even knew that MTBE was in the gasoline that they were receiving. Nonetheless, the trial court allowed the jury to consider apportioning liability to those nonparties. The trial court instructed the jury:

> In this state, courts and juries may apportion fault to all persons or entities who contributed to causing an injury, even if they are not parties to the lawsuit. What that means in this case is that if you find that the State has proven any of its three claims against ExxonMobil, then ExxonMobil shall have the burden of proving that some or all of its fault should be allocated to the nonparties identified in Defense Exhibit 1047.

The jury answered "No" to each portion of this question on the special verdict form: "Has ExxonMobil proven, by a preponderance of the evidence, that some or all of its fault should be allocated to nonparties **[***91]** in the following categories? ... a. Tanks With Holes ... b. Aboveground Releases ... c. Tanks With Releases ... d. Junkyards." Based upon the record, we are not persuaded by Exxon's argument that it was denied "a meaningful opportunity" to apportion fault to third parties or that it suffered any prejudice from the trial court's rulings. Accordingly, we find no error.

X. Parens Patriae

Exxon argues that the trial court erroneously decided that the State had *parens patriae* standing, rather than submitting this question to the jury. Exxon asserts that whether there is an injury to a "substantial segment" of the population is a question of fact for the jury, not a question of law for the judge, and that a rational jury could have found the State's proof insufficient. The State argues that Exxon **[**306]** waived this argument because Exxon failed to raise it before the trial court, including failing to raise it in its motion for summary judgment on *parens patriae* issues or in its motion for a directed verdict, and failed to argue it in either its motion for JNOV or motion to set aside the verdict.

NH[35][↑] [35] We have reviewed the record and agree with the State that Exxon has failed to demonstrate that **[***92]** it specifically raised this argument before the trial court. *See Dukette, 166 N.H. at 255*. Accordingly, because the argument is not preserved for our review, we decline to address it substantively. *See N. Country Envtl. Servs., 150 N.H. at 619*.

[*261] *XI. Future Well Impacts*

Exxon argues that the State's "future, speculative, and unknown well and site impacts" are not ripe for review. Before trial, Exxon raised this argument in a summary judgment motion. The trial court denied the motion, stating:

> It is well settled in New Hampshire that an injured party may seek recovery for future harm that will arise from a current injury. In order to recover for future damages, a party need only show that there is evidence from which it can be found to be more probable than not that the future damages will occur. Thus, contrary to [Exxon's] argument, New Hampshire has no absolute prohibition on awarding future damages.
>
> The court finds that the State's damages for future and unknown well impacts are fit for ... judicial determination. Importantly, the injury causing the future harm has already occurred. The injury occurred when MTBE entered State waters. The State's claim for future damages merely seeks to measure the extent of the harm caused, which New Hampshire allows. **[***93]** Furthermore, the court has already determined that the methods undertaken by the State's experts for determining the future harm ... are relevant and reliable. Therefore, the State's future damages claims are ripe for review under the first prong of the ripeness test.

(Quotation, citations, and brackets omitted.)

Exxon moved for a directed verdict following the State's conclusion of its case-in-chief arguing, in part, that the State failed to present its damages figure with sufficient certainty. Exxon argued that the State failed to prove that it has "sustained a cognizable injury" and that the State's damages evidence was insufficient. The trial court rejected the motion, stating:

> The State need only show an approximation of its harm. As this Court's prior orders on this issue explain, the State does not need to have identified every contaminated well in New Hampshire to show it is injured. Nonetheless, the State presented testimony in its case-in-chief through Gary Beckett, Dr. Ian Hutchison, Dr. Graham Fogg, Steve Guercia, and Brandon Kernen. These witnesses

> estimated the number of wells that are currently suffering contamination based on statistical sampling, the location of spill **[***94]** sites, and the number and proximity of drinking wells in New Hampshire. The mere fact that the State's damages figure is **[*262]** based on an approximation does not make it speculative or legally insufficient. Further, the evidence presented during the State's case-in-chief regarding the estimated costs of remediation efforts based on estimated contamination is sufficient for a reasonable juror to conclude the State has suffered a cognizable injury.

(Citation omitted.)

Following the jury verdict Exxon moved for JNOV, arguing that "several aspects of **[**307]** the jury's damages award for future well testing and treatment ... are unsupported by the evidence." Denying the motion, the trial court stated:

> Exxon explains that even if it is liable, the damages figure the jury awarded is speculative because it is based on expert estimations and not supported by evidence; it is not sufficiently definite. The Court considered and rejected this argument in its directed verdict order: "The mere fact that the State's damages figure is based on an approximation does not make it speculative or legally insufficient." Because Exxon raises no new facts or law, the Court will not reconsider its prior ruling. As such, the **[***95]** record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable.

(Citation omitted.)

In addition, Exxon moved to set aside the verdict and for a new trial, arguing that "[j]ust because MTBE is in groundwater now does not mean that it will injure private wells in the future," and, therefore, "these projected injuries are speculative and were not ripe." The trial court rejected Exxon's argument, stating:

> This Court has ruled that the State's injury already occurred; MTBE has already been brought into New Hampshire. Exxon sought a jury instruction on imminent and immediate harm, which the Court denied. Whether the State has been injured is a question for the jury, but prospective damages are proper where there was evidence from which the jury could find it more probable than otherwise that such damage would occur. Because Exxon's motion raises no new issues of law or fact, the Court declines to reconsider its prior rulings.

(Quotation and citations omitted.)

On appeal, Exxon argues that the trial court erred "in allowing the State to claim more than $300 million in damages for the costs of testing private **[*263]** wells for possible MTBE contamination, $150 million to **[***96]** treat whatever contamination is found in the wells in the future, and another $218 million for anticipated generalized costs to characterize ... and clean up release sites," because these claims are unripe and should be dismissed. Exxon asserts that the State "did not present proof of actual or imminent contamination to particular private wells," and that the State's claims for treatment of future private-well impacts "are even more uncertain, remote, and contingent." According to Exxon, the trial court's ruling "dramatically increased the scope of this suit and took the [court] into territory where no common law court has gone before."

The State argues that its harm "exists today, and recompense for this type of harm is certainly no less recoverable than future medical expenses or damages for loss of income, both of which are regularly awarded in tort actions without raising ripeness concerns." The State also asserts that its testing and future-treatment claims are ripe because the State "presented concrete evidence of damage that already has occurred."

NH[36] [36] ***HN33*** "[R]ipeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an **[***97]** adequately developed record." *Appeal of City of Concord, 161 N.H. 344, 354, 13 A.3d 186 (2011)*. Although we have not adopted a formal test for ripeness, we have found "persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue." *Appeal of State Employees' Assoc., 142 N.H. 874, 878, 714 A.2d 218 (1998)*.

[308]** ***NH[37]*** [37] We find no error in the trial court's rulings on this issue. The State's claims for future testing and treatment are fit for judicial determination as the harm from MTBE has already occurred. *Cf. In re Methyl Tertiary Butyl Ether ("MTBE") Prod., 175 F. Supp. 2d 593, 607-11 (S.D.N.Y. 2001)* (individual plaintiffs could not show a present threat of imminent harm because either they had not tested their private wells or tests did not detect MTBE in their wells). The record establishes that, as of the time of trial, over 1,000 drinking wells in the state had tested positive for MTBE, and, of those, 358 wells were contaminated at levels over the maximum contaminant level of 13 ppb. The record also establishes that more than 5,000 wells,

which have not yet been tested, were likely already contaminated with MTBE above 13 ppb at the time of trial. The record also contains evidence that the damage from MTBE contamination is not limited **[***98]** to drinking wells. According to the State's experts, MTBE has a "residence time" of up to 50 years, during which time it gradually seeps through subsurface zones toward wells, lakes, and wetlands. The State's experts testified that, **[*264]** although leaks from some underground storage tanks might not yet have been detected, those leaks "will continue to pose a hazard to groundwater quality." As the jury was instructed:

> The State is entitled to be fully compensated for the harm resulting from ExxonMobil's legal fault.
>
> ... .
>
> In determining the amount of damages to allow the State, you may ... . consider whether it is more probable than otherwise that its damages will continue into the future as a direct, natural and probable consequence of ExxonMobil's legal fault and, if so, award it full, fair, and adequate compensation for those future damages.

Exxon does not present any argument on the hardship prong of the ripeness test, and we therefore consider any argument regarding that prong to be waived. *See State v. Roy, 167 N.H. 276, 286, 111 A.3d 1061 (2015).*

XII. Prejudgment Interest

Exxon argues that the trial court should not have awarded prejudgment interest on future costs. Following the jury verdict, the State moved for taxation of costs, including **[***99]** prejudgment interest pursuant to *RSA 524:1-b* (2007). Exxon moved to preclude the addition of prejudgment interest on the future costs portion of the State's damage award, arguing that such an award would not serve the statute's purpose and "would amount to an illegal punitive award." Exxon asserted that because money has time value, interest is added to damages for past harms to take into account the time during which the plaintiff was deprived of its use, but "[t]hat rationale is inapposite to an award for future costs associated with establishing investigation, testing and treatment programs and with MTBE impacts that have not yet occurred." The State objected, arguing that because the injury has already occurred when MTBE entered New Hampshire's waters, Exxon's "motion fails in its basic premise; there are no future injuries here." The State also argued that even assuming future injuries were at issue, the statute "does not distinguish between past and future costs or harm."

The trial court rejected Exxon's arguments, noting that, although during trial, "the State categorized its damages as past, current, and future for purposes of breaking the figure into parts for evidentiary presentation, ... **[***100]** this presentation was not **[**309]** intended to and did not define the State's injury." The court reasoned:

> The State presented substantial evidence that the damage to its waters had already been done, MTBE had already been imported **[*265]** into the State, and this is the presentation of evidence that the jury accepted by its verdict. The mere fact that the State characterized part of its damages figure as that for future testing and remediation does not mean that it did not suffer the loss of use of these monies prior to the jury's verdict in this case. Further, had these monies been available during the last decade when litigation was pending, arguably, the cost to test and remediate would be lesser now.

On appeal, Exxon argues that the trial court erred "by awarding prejudgment interest on the total judgment amount, or $236,372,664, when $195,243,134 of those damages ... were for the State's claims for investigating, testing, characterizing, and treating alleged MTBE contamination in New Hampshire's private wells and future costs for site investigation and remediation." According to Exxon, "[p]rejudgment interest on those future costs fails to serve the compensatory purpose of *RSA 524:1-b* and thus should not have been **[***101]** awarded." The State argues that Exxon "makes no effort to square its argument with [the statute's] text," and that "*RSA 524:1-b* has dual purposes: to accelerate settlement and provide compensation for the loss of use of money damages." (Quotation and emphasis omitted.) The State asserts that "[a]warding prejudgment interest to all of the State's damages satisfies the objective of accelerating settlement, regardless of when the money underlying the damages is spent," and that "because the contamination occurred in the past, ongoing treatment and testing does not, as Exxon claims, represent 'future harms' or damages the State has yet to incur." (Quotation, brackets, and citation omitted.)

NH[38][↑] [38] ***HN34***[↑] "Ordinarily, upon a verdict for damages and upon motion of a party, interest is to be awarded as part of all judgments." *State v. Peter Salvucci Inc., 111 N.H. 259, 262, 281 A.2d 164 (1971).* ***HN35***[↑] Pursuant to *RSA 524:1-b*, in all civil

proceedings, other than an action on a debt,

> in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added ... to the amount of damages interest **[***102]** thereon from the date of the writ or the filing of the petition to the date of judgment.

RSA 524:1-b; see RSA 524:1-a (2007).

The interpretation of a statute is a question of law, which we review *de novo*. In the Matter of Liquidation of Home Ins. Co., 166 N.H. 84, 88, 89 A.3d 165 [*266] (2014). We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Id.* We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. *Id.* Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *Id.*

NH[39,40] [39, 40] HN36 The purpose of the legislature in enacting RSA 524:1-b was "to clarify and simplify the existing law and to make plain that in all cases where the trial court awarded money to the party entitled to be compensated, interest at the legal rate is to be added to the award." *Id. at 89* (quotation omitted). **[**310]** Even assuming, without deciding, that the damages award included some amount for "future" costs, the plain language of the statute does not distinguish between past and future damages. Rather, the statute mandates the award of prejudgment interest "to the amount of damages." Thus, the plain language of the statute **[***103]** provides no support for Exxon's argument differentiating past and future damages for purposes of calculating and awarding prejudgment interest. *See* Starr v. Governor, 151 N.H. 608, 610, 864 A.2d 348 (2004) (we will not add words to a statute that the legislature did not see fit to include). Accordingly, we hold that the trial court did not err in awarding prejudgment interest as to all of the State's damages.

XIII. State's Cross-Appeal

The State cross-appeals from the trial court's order imposing a trust upon approximately $195 million of the damages award. Before trial, Exxon moved "to establish a court supervised trust fund for any monies the State recovers in this litigation" and for "an accounting for all settlement proceeds the State has received to date." Exxon argued that the need for a trust fund was necessary "given the speculative nature of the State's future damages," and that a "'pay-as-you-go' fund ... would effectively limit the State's recovery to those future testing, monitoring, treatment, and remediation costs the State actually incurs." The State objected, and the trial court deferred ruling until after trial.

Following the verdict, Exxon renewed its motion, asserting that "[t]he need for a court-supervised trust is proven by **[***104]** the recent press coverage indicating that the New Hampshire Legislature intends to divert funds awarded in this litigation away from MTBE remediation," and that, in two recent Maryland cases, the court had required court-supervised trust funds in medical monitoring cases involving alleged MTBE exposures. The State objected, arguing, among other contentions, that, because the trial court had already determined that "the underlying causes of action do not require the State to prove how it will spend damages, there is no basis for **[*267]** imposing a court-supervised trust requiring the State to establish how the money will be spent as a prerequisite to obtaining the damages for which Exxon was found liable." In addition, the State argued that Exxon "has not cited a single case, statute, or other authority that would allow [the trial court] to establish a trust fund for monies received by the State pursuant to a jury award in a products liability case," and that Exxon's reliance upon the Maryland cases was misplaced.

The trial court granted Exxon's motion in part, agreeing that "a trust is necessary to protect the *res* of the jury damage award." The trial court reasoned that "because the State brought **[***105]** this case in its *parens patriae*/trustee capacity," the "State's obligation to remediate contaminated water exists independent of Exxon's interest in the damages figure the jury awarded the State," and the State "must ensure it has adequate resources to test and treat New Hampshire's waters in the future." The court declined to impose a trust upon the amount of damages designated for past cleanup costs, reasoning that "those monies must be available upon final judgment" for the State to reimburse itself. However, the court imposed a trust upon the amount of damages designated for 228 high-risk sites, sampling private drinking water wells, and treating drinking water wells contaminated with MTBE at or above the maximum contaminant level. The court rejected Exxon's request for an order compelling the State to disclose

how it would proceed with testing and remediation, **[**311]** but noted that "to the extent Exxon has a legal interest in a trust as a beneficiary at the termination of the trust, it may file a proposed procedure for how the trust should function." The trial court deferred deciding whether the trust would be court-supervised, and a hearing date was set for the court "to consider each **[***106]** party's proposal for the administrative details of a trust."

Before the scheduled hearing date, the State moved for reconsideration of the trial court's order, Exxon filed this appeal, and the State filed its cross-appeal. We subsequently issued an order staying the appellate proceedings to allow the trial court to issue a final decision on the State's motion for reconsideration. The trial court thereafter denied the motion. The court noted at the outset that "it would be inefficient for the Court to decide all the relevant details of a trust now, if the Supreme Court is being asked to decide whether the existence of a trust is permissible. As such, this Court interprets the Supreme Court order to require a ruling on imposition of a trust but not the details." The trial court rejected the State's arguments that, among other things, the court conflated *parens patriae* and the public trust doctrine, failed to comply with RSA 6:11, III (Supp. 2014), and violated separation of powers. The trial court also rejected the State's argument that Exxon lacked standing, stating that "the Court specifically **[*268]** left open the question of whether Exxon has standing" and that "Exxon's standing was irrelevant to the **[***107]** Court's determination to impose the trust."

On appeal, the State argues that the trial court's imposition of a trust was erroneous for several reasons, including that no common law precedent or statute provides for the imposition of a trust over the State's damages award. Exxon argues that trial courts have "broad and flexible equitable powers," which include the power to establish a trust over the damages awarded in this case. (Quotation omitted.)

NH[41][↑] [41] Although we recognize that "[t]he propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court," Libertarian Party of N.H. v. Sec'y of State, 158 N.H. 194, 196, 965 A.2d 1078 (2008), this principle does not apply to the remedy in this case. HN37[↑] The common law remedy for a tort law cause of action is lump-sum damages. *See* Reilly v. United States, 863 F.2d 149, 169 (1st Cir. 1988) (under the common law rule, "a court's authority to award damages for personal injuries is limited to making lump-sum judgments"); *see also* In re Methyl Tertiary Butyl Ether ("MTBE"), 56 F. Supp. 3d 272, 273, 275 (S.D.N.Y. 2014) (declining to impose a reversionary trust on damages awarded for Exxon's liability on claims of public nuisance, negligence, trespass, and products liability for failure to warn, because the remedy for a traditional tort law cause of action is lump-sum damages). Thus, in the absence **[***108]** of a statute or an agreement between the parties, when a tortfeasor loses at trial it must pay the judgment in one lump sum. *See* Reilly, 863 F.2d at 170; *see also* Vanhoy v. United States, 514 F.3d 447, 454-55 (5th Cir. 2008) (court refused to deviate from a conventional lump-sum award and create a reversionary trust over damages in the absence of any applicable statutory or precedential requirement); Frankel v. Heym, 466 F.2d 1226, 1228-29 (3d Cir. 1972) ("courts of law had no power at common law to enter judgments in terms other than a simple award of money damages"; thus, "court should not make other than lump-sum money judgments" in case brought under Federal Tort Claims Act "unless and until Congress shall authorize a different type of award").

[312]** NH[42,43][↑] [42, 43] The trial court reasoned that a trust was required because the State brought this action in its *parens patriae* capacity. HN38[↑] *Parens patriae*, however, is simply a standing doctrine. *See* Hess, 161 N.H. at 431-32. As we explained in *Hess*, "[t]he public trust doctrine, from which the State's authority as trustee stems, and the *parens patriae* doctrine are both available to states seeking to remedy environmental harm." Id. at 431. "While the public trust doctrine is its own cause of action, *parens patriae* is a concept of standing, which allows the state to protect certain quasi-sovereign interests." Id. at 431-32 (quotations omitted). **[***109]** "*Parens patriae* **[*269]** does not provide a cause of action, but may provide a state with standing to bring suit to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources." Id. at 432. Accordingly, we are not persuaded that the fact that the State was allowed to proceed under *parens patriae* standing authorizes the imposition of a trust over the money damages awarded for Exxon's torts. In the absence of statutory or precedential support, we decline to deviate from the conventional lump-sum damages award and, accordingly, reverse the trial court's imposition of a trust as erroneous as a matter of law.

Affirmed in part; and reversed in part.

HICKS, J., and VAUGHAN, J., retired superior court justice, specially assigned under RSA 490:3, concurred.

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Virgin v. Fireworks of Tilton, LLC

Supreme Court of New Hampshire

June 6, 2019, Argued; August 6, 2019, Opinion Issued

No. 2018-0526

Reporter
172 N.H. 484 *; 215 A.3d 892 **; 2019 N.H. LEXIS 164 ***; 99 U.C.C. Rep. Serv. 2d (Callaghan) 910; 2019 WL 3583038

JAMES M. VIRGIN v. FIREWORKS OF TILTON, LLC *& a.*

Prior History: **[***1]** Belknap.

Disposition: Remanded.

Core Terms

breach of warranty, parties, fault, manufacturer, apportionment, warranty, seller, chain, quotation, strict liability, Fireworks, injuries, damages, buyer, cause of action, apportion, implied warranty, several liability, entities, cases

Case Summary

Overview

HOLDINGS: [1]-*RSA 507:7-e*, governing apportionment of damages in tort cases, did not apply to claims for personal injuries that alleged a breach of the implied warranty of merchantability under RSA 382-A:2-314, and thus did not permit defendants, a seller of fireworks and a distributor of fireworks, to apportion fault to the manufacturer of the fireworks, a non-litigant.

Outcome
The court answered the interlocutory question and remanded the case.

LexisNexis® Headnotes

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

***HN1*[↓] Warranties, Implied Warranty of Merchantability**

With regard to whether *RSA 507:7-e* (2010) applies to claims for personal injuries that allege a breach of the implied warranty of merchantability under RSA 382-A:2-314 (2011), thus permitting a named defendant to apportion fault to a non-litigant, the New Hampshire Supreme Court answers the question in the negative.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

***HN2*[↓] Standards of Review, De Novo Review**

When resolving an issue requires the court to engage in statutory interpretation, review is de novo. In matters of statutory interpretation, the New Hampshire Supreme Court is the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. The court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. The court construes all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, the court does not consider words and phrases in isolation, but rather within the context of the statute as a whole. This construction enables the court to better discern the legislature's intent and to interpret statutory language in

light of the policy or purpose sought to be advanced by the statutory scheme.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN3 **Multiple Defendants, Distinct & Divisible Harms**

For purposes of apportionment under *RSA 507:7-e*, the term "parties" includes settling parties. In DeBenedetto, the New Hampshire Supreme Court further concluded that the term "parties" included not only settling parties, but extended to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN4 **Multiple Defendants, Distinct & Divisible Harms**

When the New Hampshire Supreme Court has considered *RSA 507:7-e* in its entirety, the court has concluded that it applies only to tort actions.

Commercial Law (UCC) > General Provisions (Article 1)

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

HN5 **Commercial Law (UCC), General Provisions (Article 1)**

Claims brought under the implied warranty provision of RSA 382-A:2-314 sound in contract and are expressly created by the statute. The statutory provisions of the Uniform Commercial Code are designed to provide a complete remedy.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN6 **Multiple Defendants, Distinct & Divisible Harms**

The legislature's purpose in enacting the 1989 amendment to *RSA 507:7-e*, which made defendants who are less than 50 percent at fault severally liable only to the extent of their fault, was to discourage injured parties from bringing suit against "deep pocket" defendants whose fault played only a minimal role in causing a plaintiff's injuries.

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Fitness

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

HN7 **Warranties, Implied Warranty of Fitness**

Unlike in the fault-based tort context, where liability is predicated upon the culpable conduct of each person responsible for an injury, the purpose of the implied warranties established under the Uniform Commercial Code is to establish liability on the part of all parties involved in the commercial sale of a defective product that causes injury without regard to fault, and to insure that an injured consumer has the ability to secure compensation for his or her injuries from whichever entity in the chain of distribution can most conveniently be held accountable.

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Fitness

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

HN8 **Warranties, Implied Warranty of Fitness**

The New Hampshire Legislature removed both horizontal and vertical privity as defenses to implied warranty claims with the enactment of U.C.C. § 2-318.

Commercial Law (UCC) > ... > General Provisions > Policies & Purposes > Supplemental Principles of Law

Torts > Products Liability > Theories of Liability > Breach of Warranty

Torts > Procedural Matters > Multiple Defendants > Indemnity

HN9[] **Policies & Purposes, Supplemental Principles of Law**

A party liable for breach of warranty may later seek indemnification under the general rule that a seller suffering and paying a judgment against him by an injured person in a warranty action is entitled to indemnity from a manufacturer who sold the product to him with a similar warranty. Indeed, nothing in the Uniform Commercial Code displaces this common law principle. Common law principles supplement the Code unless displaced.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Torts > Joint Liability

With regard to whether the statute governing apportionment of damages in tort cases applies to claims for personal injuries that allege a breach of the implied warranty of merchantability under the Uniform Commercial Code, thus permitting a named defendant to apportion fault to a non-litigant, the court answers the question in the negative. Accordingly, defendants, a seller of fireworks and a distributor of fireworks, could not apportion fault to the manufacturer of the fireworks, a non-litigant. RSA 382-A:2-314; 507:7-e.

NH2.[] 2.

Torts > Joint Liability

For purposes of apportionment of damages, the term "parties" includes settling parties. In *DeBenedetto*, the court further concluded that the term "parties" included not only settling parties, but extended to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court. *RSA 507:7-e*.

NH3.[] 3.

Torts > Joint Liability

When the court has considered the statute governing apportionment of damages in its entirety, the court has concluded that it applies only to tort actions. *RSA 507:7-e*.

NH4.[] 4.

Sales > Warranties > Generally

Claims brought under the implied warranty provision of the Uniform Commercial Code (UCC) sound in contract and are expressly created by the statute. The statutory provisions of the UCC are designed to provide a complete remedy. RSA 382-A:2-314.

NH5.[] 5.

Torts > Joint Liability

The legislature's purpose in enacting the 1989 amendment to the statute governing apportionment of damages, which made defendants who are less than 50 percent at fault severally liable only to the extent of their fault, was to discourage injured parties from bringing suit against "deep pocket" defendants whose fault played only a minimal role in causing a plaintiff's injuries. *RSA 507:7-e*.

NH6.[] 6.

Sales > Warranties > Generally

Unlike in the fault-based tort context, where liability is predicated upon the culpable conduct of each person responsible for an injury, the purpose of the implied warranties established under the Uniform Commercial Code is to establish liability on the part of all **[*485]** parties involved in the commercial sale of a defective product that causes injury without regard to fault, and to insure that an injured consumer has the ability to secure compensation for his or her injuries from whichever entity in the chain of distribution can most conveniently be held accountable.

NH7.[⬇] 7.

Sales > Warranties > Generally

The New Hampshire Legislature removed both horizontal and vertical privity as defenses to implied warranty claims with the enactment of § 2-318 of the Uniform Commercial Code. RSA 382-A:2-314.

NH8.[⬇] 8.

Torts > Products Liability > Actions Predicated on Breach of Warranty

A party liable for breach of warranty may later seek indemnification under the general rule that a seller suffering and paying a judgment against him by an injured person in a warranty action is entitled to indemnity from a manufacturer who sold the product to him with a similar warranty. Indeed, nothing in the Uniform Commercial Code displaces this common law principle. Common law principles supplement the Code unless displaced.

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Wadleigh, Starr & Peters, PLLC, of Manchester (*Joseph G. Mattson* and *Stephen Zaharias* on the brief, and *Mr. Zaharias* orally), for defendant Fireworks of Tilton, LLC.

Devine, Millimet & Branch, P.A., of Manchester (*Jonathan M. Eck* on the brief), and *Brooke | Stevens, P.C.*, of Muncie, Indiana (*John H. Brooke* and *John Stevens* on the brief, and *Mr. Brooke* orally), for defendant Foursquare Imports, LLC d/b/a AAH Fireworks, LLC.

Judges: LYNN, C.J. HICKS, BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

Opinion by: LYNN

Opinion

[894]** *NH1*[⬆] [1] LYNN, C.J. In this interlocutory appeal from the Superior Court (*O'Neill*, J.), we are asked to determine *HN1*[⬆] whether *RSA 507:7-e* (2010) applies to claims for personal injuries that allege a breach of the implied warranty of merchantability under *RSA 382-A:2-314* (2011), thus permitting a named defendant to apportion fault to a non-litigant. We answer the question in the negative and remand.

The relevant facts recited in the interlocutory appeal statement are as follows. On March 24, 2016, the plaintiff, James M. Virgin, filed the instant action seeking compensation for personal injuries **[***2]** against the defendants, Fireworks of Tilton, LLC (Fireworks of Tilton) and Foursquare Imports, LLC d/b/a AAH Fireworks, LLC (Foursquare). As pertinent to this appeal, the complaint alleges breach of the implied warranty of merchantability for damages purportedly sustained as a result of an incident involving fireworks sold by Fireworks of Tilton, and distributed by Foursquare. On May 10, 2017, Foursquare made a *DeBenedetto* disclosure pursuant to the case structuring order identifying a Chinese company as the manufacturer of the fireworks that allegedly caused the plaintiff's injuries. *See* ***DeBenedetto v. CLD Consulting Eng'rs, 153 N.H. 793, 803-04, 903 A.2d 969 (2006)***; *see also* **[*486]** *State v. Exxon Mobil Corp., 168 N.H. 211, 259, 126 A.3d 266 (2015)* ("Pursuant to *RSA 507:7-e* and *DeBenedetto*, defendants may ask a jury to shift or apportion fault from themselves to other nonparties in a case."). The plaintiff moved to strike the disclosure arguing, among other things, that apportionment of fault does not apply to breach of warranty claims. The trial court denied the motion, but later granted the plaintiff's request to file an interlocutory appeal, which we accepted. *See* SUP. CT. R. 8.

RSA 507:7-e. I, provides:

In all actions, the court shall:

> (a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against **[***3]** each defendant in accordance with the proportionate fault of each of the parties; and
>
> (b) Enter judgment against each party liable on the basis of the rules of joint **[**895]** and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.
>
> (c) *RSA 507:7-e. I(b)* notwithstanding, in all cases where parties are found to have knowingly pursued

or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.

RSA 507:7-e, I. The defendants argue that the phrase "in all actions" plainly shows that the statute is intended to cover all actions and not just those sounding in tort. The plaintiff posits that, taken as a whole, the statute was intended to cover only tort actions, and argues that this interpretation comports with New Hampshire jurisprudence recognizing the distinction between tort and contract actions.

HN2[↑] "Resolving this issue requires us to engage in statutory interpretation, and, therefore, our review is *de novo*." N.H. Housing Fin. Auth. v. Pinewood Estates Condo. Ass'n, 169 N.H. 378, 382, 149 A.3d 282 (2016). In matters of statutory interpretation, we are the final arbiter **[***4]** of the intent of the legislature as expressed in the words of the statute considered as a whole. Olson v. Town of Grafton, 168 N.H. 563, 566, 133 A.3d 270 (2016). We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Zorn v. Demetri, 158 N.H. 437, 438, 969 A.2d 464 (2009). We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* We construe all parts of a **[*487]** statute together to effectuate its overall purpose and avoid an absurd or unjust result. *Id.* Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. *Id. at 438-39*. This construction enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id. at 439*.

NH[2][↑] [2] "RSA 507:7-e was enacted in 1986 as part of the legislature's unified and comprehensive approach to comparative fault, apportionment of damages, and contribution." Ocasio v. Fed. Express Corp., 162 N.H. 436, 442, 33 A.3d 1139 (2011) (quotation omitted). "The 'Act Relative to Tort Reform and Insurance,' Laws 1986, 227:2, closely modeled the Uniform Comparative Fault Act, 12 U.L.A. 38-49 (Supp. 1987), in its treatment of **[***5]** comparative fault and apportionment of damages." *Id.* (quotation omitted). "As originally enacted in 1986, RSA 507:7-e required that judgment be entered against 'each party liable' on the basis of joint and several liability." **DeBenedetto, 153 N.H. at 798** (quotation omitted). In 1989, the legislature amended the statute by adopting a several liability approach "for those parties less than 50 percent at fault," after rejecting the initial proposal to create a pure several liability scheme that would have provided that defendants in a personal injury action "could only be held liable for their percentage of the damages." **Id. at 799** (quotations omitted). In Nilsson v. Bierman, 150 N.H. 393, 839 A.2d 25 (2003), we held that HN3[↑] for purposes of apportionment under the statute, the term "parties" included settling parties. *Id. at 396*. In *DeBenedetto*, we further concluded that the term "parties" included not only settling parties, but extended "to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." **DeBenedetto, 153 N.H. at 804**.

NH[3][↑] [3] **[**896]** Thus, while we have addressed the scope of RSA 507:7-e with regards to named and unnamed parties in a personal injury action, we have not had the occasion to consider the question before us in this appeal: whether the statute extends **[***6]** to breach of warranty actions. Relying on the statute's use of the phrase "in all actions," the defendants contend that the statute clearly extends to contract claims. In the defendants' view, had the legislature desired to limit the statutory scope to tort actions, it would have done so explicitly. The defendants' interpretation, however, reads the statute in isolation and neglects to consider the statutory scheme as a whole. *See* Zorn, 158 N.H. at 438-39. Indeed, HN4[↑] when we have considered the statute in its entirety, we have concluded that it applies only to tort actions.

In Jaswell Drill Corp. v. General Motors Corp., 129 N.H. 341, 529 A.2d 875 (1987), we were asked to consider the meaning of the phrase "causes of action," as used in the newly enacted tort reform statute, Laws 1986, 227:2, to **[*488]** determine whether the case would be governed by the statute or the common law. *Id. at 343*. In that case, the plaintiff sued Jaswell "for negligence, breach of contract, and breach of warranty for damages allegedly arising from the purchase and operation of a Jaswell drilling rig." *Id.* Jaswell filed a third-party complaint against General Motors Corporation, alleging that any damages sustained by the plaintiff were directly attributable to a defective component part supplied by General Motors. *Id.* The trial **[***7]** court dismissed Jaswell's third-party claim against General Motors because the "claim was actually an action for contribution," *id.* (quotation omitted), and the "traditional common-law rule prohibit[ed] contribution, a partial shifting of liability, among joint tortfeasors," Consol. Util.

Equipment Serv's, Inc. v. Emhart Mfg. Corp., 123 N.H. 258, 260, 459 A.2d 287 (1983). After the trial court's decision, and while the case was pending on appeal, the legislature enacted The Act Relative to Tort Reform and Insurance, which superseded the common law, adopted "the rule of contribution among tortfeasors and allow[ed] apportionment of damages," and applied " 'to causes of actions arising on or after July 1, 1986.' " Jaswell Drill Corp., 129 N.H. at 343 (quoting Laws 1986, 227:22). Contrary to Fireworks of Tilton's assertion, the specific question before us in *Jaswell Drill Corp.* was limited in scope: that is, whether the phrase "causes of action" should be construed as referring to causes of action for contribution or to the underlying causes of action in tort. *Id.* If "causes of action" included those for contribution, Jaswell's claim could proceed; if not, the trial court's decision was correct. *Id.* After considering the phrase "in conjunction with section 2 of the Act, codified as RSA 507:7-d to -i," **[***8]** we concluded that it was "clear that 'causes of action' refers to causes of action sounding in tort." *Id. at 345*. The statute, therefore, did not apply, and Jaswell's claim for contribution was barred by the common law. *Id. at 345-46*. We noted, however, that there existed the possibility that "Jaswell w[ould] be found liable for breach of warranty ... although it [wa]s not found negligent." *Id. at 347*. In that scenario, Jaswell could have been "entitled to indemnity from [General Motors] under the general rule that a seller suffering and paying a judgment against him by an injured person in a warranty action is entitled to indemnity from a manufacturer who sold the product to him with a similar warranty." *Id.* (quotation omitted). Thus, in the statute's infancy, we interpreted it **[**897]** to apply only to torts.[1] *Id. at 345*. **[*489]** Given that we defined "causes of action" under the Act to mean those sounding in tort, it would be illogical to now interpret the phrase "all actions," as used in the same statute, to apply to a broader class of cases.

Notwithstanding this history, Fireworks of Tilton argues that we have already expanded the statute to cover "all actions." However, the cases it relies on to support this **[***9]** argument are readily distinguishable. To start, *Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978)*, was decided before the statute was amended. *See* Laws 1986, 227:22 (noting effective date of statute). Second, none of the cases cited dealt with breach of warranty claims; rather, they dealt solely with negligence and strict liability. *See Exxon Mobil Corp., 168 N.H. at 220*; *Trull v. Volkswagen of America, 145 N.H. 259, 260, 262, 264-65, 761 A.2d 477 (2000)*; *Thibault, 118 N.H. at 805-06*. Warranty actions differ from claims based on strict liability, and, in fact, "the multiple difficulties encountered in obtaining relief under [the Uniform Commercial Code's] warranty provisions gave birth to the remedy of strict liability."[2] *Moulton v. Groveton Papers Co., 112 N.H. 50, 54, 289 A.2d 68 (1972)*; *see, e.g., Thibault, 118 N.H. at 806* (explaining that before the adoption of strict liability, a consumer's only recourse was an action "based either on the negligence of the manufacturer or, additionally or alternatively, on breach of warranty" (quotation omitted)); *Elliott v. Lachance, 109 N.H. 481, 484-85, 256 A.2d 153 (1969)* (recognizing generally the adoption of the remedy of strict liability); *Buttrick v. Lessard, 110 N.H. 36, 38, 260 A.2d 111 (1969)* (noting that a plaintiff may proceed on both an implied warranty claim and one for strict liability).

Third, neither *Trull* nor *Exxon Mobil* involved the apportionment of liability only to an entity also in the supply chain. *Trull* concerned "the scope of liability of a manufacturer to the situations in which the construction or design of its **[***10]** product has caused separate or enhanced injuries in the course of an initial accident brought about by an independent cause." *Trull, 145 N.H. at 261* (quotation omitted). In *Trull*, the issue before us was whether a "manufacturer should be liable for th[e]

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[1] To the extent that Fireworks of Tilton argues that *Goudreault v. Kleeman, 158 N.H. 236, 965 A.2d 1040 (2009)*, stands for the proposition that *RSA 507:7-e* applies to all actions — and not just actions in tort — it is mistaken. In that case, we plainly stated that "*RSA chapter 507* is a broad framework governing comparative fault and apportionment of *tort liability*," and that *sections 7-d* and *7-e* establish "a system for contribution among *tortfeasors* and reinstituted joint and several liability ... for each party liable." *Id. at 253* (quotation omitted) (emphasis added).

[2] We recognize that our case law has, at times, used the term strict liability to include all products liability cases. We note, however, that products liability is the umbrella term for multiple different types of recovery because "[a] products liability claim may be brought under several theories, including strict liability, breach of warranty, and negligence." 63 Am. Jur. 2d *Products Liability* § 5, at 37 (2010). "The adoption of strict liability [did] not replace the action for breach of implied warranty under the Uniform Commercial Code, since breach of implied warranty and strict tort liability are alternative remedies." *Id.* § 523, at 504 (footnotes omitted). Put another way, "[s]trict liability and implied warranty are parallel theories of recovery, one in tort and the other in contract, with each theory having its separate elements and procedural conditions for recovery." *Id.* § 522, at 501.

portion of the damage or injury caused by [a] defective design over and above the damage or injury that probably **[**898]** would have occurred as a result of the impact or collision absent the defective design." *Id. at 262* (quotation omitted). In *Exxon **[*490]** Mobil*, the defendant sought to apportion liability to "several thousand non-litigants, including ... gasoline suppliers, gasoline importers, foreign refiners, domestic refiners, distributors, trucking companies, and persons with leaking underground storage tanks." *Exxon Mobil, 168 N.H. at 256*. Although the defendant apparently attempted to apportion liability to some third-party actors downstream from it in the supply chain of its own products, we had no occasion to focus on the propriety of its doing so because the trial court had permitted the apportionment issue to be presented to the jury, which found that no apportionment was warranted. *See id. at 257-58*. Thus, none of these cases squarely address the issue of whether a defendant who is subject to liability **[***11]** without fault based either on strict liability or breach of warranty theories of recovery may ask the fact finder to apportion liability between entities *in the supply chain*.

NH[4][↑] [4] ***HN5***[↑] Claims brought under the implied warranty provision of *RSA 382-A:2-314* sound in contract and are expressly created by the statute. *Sheehan v. Liquor Comm., 126 N.H. 473, 476, 493 A.2d 494 (1985)*. As we have explained, the statutory provisions of the Uniform Commercial Code are designed to provide a complete remedy. *Stephan v. Sears Roebuck & Co., 110 N.H. 248, 250, 266 A.2d 855 (1970)*. Although the defendants are correct that we held in *Stephan* "that contributory negligence is a defense to an action for breach of warranty under *RSA 382-A:2-314* in the same manner as in actions based on strict liability," our conclusion was based purely on the language of the Code. *Id. at 251* (relying on comments from various Code provisions). For example, we relied on Comment 13 to *Section 2-314*, which explains that in actions for breach of the implied warranty of merchantability, "an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense," including establishing that the buyer conducted "an examination of the goods which ought to have indicated the defect" alleged in the action. *RSA 382-A:2-314* cmt. 13 (1961); *accord RSA 382-A:2-314* cmt. 13 (2011). **[***12]** The same point is made within the other comments upon which we relied. *See RSA 382-A:2-316* cmt. 8 (1961) ("Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty."); *RSA 382-A:2-715* cmt. 5 (1961) ("Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of 'proximate' cause turns on whether it was reasonable for the buyer to use the goods without such inspection," and if "it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty."). Whatever **[*491]** parallels we drew to tort law in *Stephan*, our reasoning was squarely based on the language of the Code itself. But it does not follow that, based on our decision in *Stephan*, apportionment under *RSA 507:7-e* applies with equal force to warranty actions under the Code, and the defendants have pointed to no comparable Code provision supporting such an application.

If we were to accept the defendants' position that *DeBenedetto* apportionment **[***13]** applies to breach of warranty claims between entities in the supply chain, the practical result would be that, in order to guard against "the empty chair defense," **[**899]** with its resultant apportionment of liability to parties not before the court, an injured plaintiff would be forced to join all potentially liable parties, including remote upstream manufacturers or suppliers, in a single lawsuit to obtain a complete recovery for his or her injuries. Imposing such a requirement would be at odds with one of the primary purposes of implied warranties that are applicable to *all* sellers of products — to enable a consumer injured by an unmerchantable product to obtain complete relief from whichever merchant in the chain of distribution can most conveniently be brought into court. *See* 3 DAVID FRISCH, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-314:467, at 640 (3d ed. 2013) (noting that "[t]he ability to sue prior sellers does not exonerate, or free from liability, the buyer's immediate seller," and "[e]ven though the buyer may sue the remote manufacturer of the goods, the buyer may still sue its immediate seller, and the fact that the immediate seller may not be entitled to indemnity from the **[***14]** manufacturer does not bar direct suit by the buyer against the seller"); *cf. Bylsma v. R.C. Willey, 2017 UT 85, 416 P.3d 595, 601-02 n.10 & 604 (Utah 2017)* (rejecting defense of passive immunity for retail seller of defective product because one of the goals of strict liability and breach of warranty doctrines is to "impose[ ] ... liability on every 'seller' of the product — manufacturers, wholesalers, retailers, and any other party involved in the product's chain of distribution — in order to ensure that a plaintiff will have a meaningful

remedy"); *id. at 606* ("By holding each seller of a defective product equally and strictly liable, a plaintiff is guaranteed that at least one party — most likely the local retailer — will be known to the plaintiff, amenable to suit, and likely solvent at the time of judgment."); 67A AM. JUR. 2D *Sales* § 625, at 31 (2003) (noting that the general purpose of implied warranties is "to protect the buyer from loss where" the goods purchased are below commercial standards or are unfit for the buyer's purpose).

NH[5,6][↑] [5, 6] We recognize that ***HN6***[↑] the legislature's purpose in enacting the 1989 amendment to *RSA 507:7-e*, which made defendants who are less than 50 percent at fault severally liable only to the extent of their fault, was to discourage injured parties from bringing suit against "deep **[***15]** pocket" **[*492]** defendants whose fault played only a minimal role in causing a plaintiff's injuries. *See* ***DeBenedetto, 153 N.H. at 807***. We further recognize that our decision today holding that ***DeBenedetto*** apportionment does not apply to breach of warranty actions between persons or entities in the supply chain for liability predicated on the same warranty has the potential to encourage the filing of law suits against persons in the supply chain, such as retailers and distributors or other "middlemen," who played little or no role in the creation of the condition that constitutes the breach of warranty, that responsibility most often lying with the manufacturer of the product. But ***HN7***[↑] unlike in the fault-based tort context, where liability is predicated upon the culpable conduct of each person responsible for an injury, *see Restatement of Torts (Second) § 5*, at 9-12 (1965) (discussing the term "subject to liability" for purposes of tort law), the purpose of the implied warranties established under the Uniform Commercial Code is to establish liability on the part of all parties involved in the commercial sale of a defective product that causes injury without regard to fault, and to insure that an injured consumer has the ability to secure compensation for **[***16]** his or her injuries from whichever entity in the chain of distribution can most conveniently be held accountable, *see* Frisch, *supra* § 2-314:467, at 640. Because in this case the only absent party to whom the defendants seek to apportion liability is the manufacturer **[**900]** of the fireworks, we have no occasion to consider whether defendants in the supply chain of a product may seek to apportion liability for an injury to some third party *outside* of the supply chain whose conduct is alleged to have wholly or partially contributed to cause a plaintiff's injuries, or to a third party within the supply chain whose liability is predicated on a basis other than the sale of an unmerchantable product. *See Bylsma, 416 P.3d at 611-12*.

NH[7,8][↑] [7, 8] Our holding does not mean, as Foursquare suggests, that an upstream manufacturer is completely shielded from liability. As we have recognized in the past, ***HN8***[↑] "the New Hampshire Legislature removed both horizontal and vertical privity as defenses to implied warranty claims" with the enactment of Section 2-318 of the Uniform Commercial Code. *See Dalton v. Stanley Solar & Stove, Inc., 137 N.H. 467, 470, 629 A.2d 794 (1993)*; *accord RSA 382-A:2-318* (2011). Applying that principle here, the plaintiff could have sued the allegedly liable Chinese company even though he did not purchase the product directly from it and was therefore **[***17]** not in contractual privity. Moreover, as we explained in *Jaswell*, ***HN9***[↑] a party liable for breach of warranty may later seek indemnification under "the general rule that a seller suffering and paying a judgment against him by an injured person in a warranty action is entitled to indemnity from a manufacturer who sold the product to him with a similar warranty." **[*493]** *Jaswell Drill Corp., 129 N.H. at 347* (quotation omitted). Indeed, nothing in the Code displaces this common law principle. *See* 67A AM. JUR. 2D *Sales*, *supra* § 797, at 199 (noting that common law principles supplement the Code unless displaced).[3]

Because we conclude that *RSA 507:7-e* does not extend to breach of warranty actions under the circumstances presented here, we answer the interlocutory question in the negative and remand to the trial court.

Remanded.

HICKS, BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

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[3] We disagree with the defendants' claim that Comment 13 to *Section 2-314* applies in this case. Comment 13 speaks only of a seller's defense as it relates to events *following* delivery. *See RSA 382-A:2-314* cmt. 13. The defendants here, however, seek to apportion liability to the upstream manufacturer based on its conduct *prior* to delivery of the fireworks to Foursquare.

Sevigny v. Quesada

Superior Court of New Hampshire, Hillsborough County

August 26, 2009, Decided

07-C-0422

Reporter
2009 N.H. Super. LEXIS 110 *

JOHN AND HEIDI SEVIGNY v. EDUARDO W. ***QUESADA***, M.D., AMOSKEAG ANESTHESIA, P.L.L.C. AND ELLIOT HOSPITAL

Core Terms

plaintiffs', fault, injuries, parties, present evidence, deadline, damages

Judges: **[*1]** Philip P. Mangones, Presiding Justice.

Opinion by: MANGONES

Opinion

ORDER

This case arises out of injuries said to have been sustained by plaintiff Heidi Sevigny in connection with the birth, via emergency cesarean section, of her son. Specifically, the plaintiffs allege that the defendants were medically negligent in that they had failed to properly assess and timely treat Mrs. Sevigny's intracranial hemorrhage, resulting in her suffering a stroke shortly after her son was born. Presently before the Court is "Defendants Eduardo W. ***Quesada***, M.D. and Amoskeag Anesthesia, PLLC's Motion to Appoint Out-of-State Commissioner for Taking Videotape Testimony/Depositions of Plaintiffs' Obstetrical Experts," the plaintiffs' Objection thereto, and several other related pleadings. After consideration of the pleadings, arguments made at the July 28, 2009 hearing, and the applicable law, the Court finds and rules as follows.

Defendants Eduardo W. ***Quesada***, M.D. ("***Quesada***") and Amoskeag Anesthesia, P.L.L.C. ("PLLC") seek to depose, via an out-of-state commissioner, three expert witnesses ("the experts"). The experts had been originally disclosed by the plaintiffs, who had listed the experts in connection with the plaintiffs' **[*2]** claims against Dr. Wayne L. Goldner, M.D., ("Goldner") who had earlier been a defendant in this action. In their January 23, 2009 Preliminary Expert Disclosure, ***Quesada*** and PLLC "reserve[d] the right to elicit expert testimony from all of the plaintiffs' experts."

The plaintiffs have settled their claims against Goldner, and therefore do not intend to call the experts at trial. The plaintiffs argue that, because they have settled their claims against Goldner, testimony from the experts would be irrelevant to these proceedings. Citing *RSA 507:7-e* (1997) and *DeBenedetto v. CLD Consulting Engineers, Inc., 153 N.H. 793, 903 A.2d 969 (2006)*, ***Quesada*** and PLLC argue that the experts' testimony remains relevant to these proceedings because ***Quesada*** and PLLC are entitled to present evidence concerning liability of other individuals in order to reduce the extent to which they are held liable for the plaintiffs' injuries. The plaintiffs argue that, because ***Quesada*** and PLLC failed to list Goldner as "a person or party alleged to be at fault" for the plaintiffs' injuries by the July 15, 2008 deadline set forth in the Court's January 10, 2008 Structuring Conference Order (*McGuire*, J.), ***Quesada*** and PLLC are foreclosed **[*3]** from presenting evidence of Goldner's liability, and the experts' testimony is therefore irrelevant.

RSA 507:7-e provides, in relevant part,

> I. In all actions, the court shall: (a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and (b) Enter judgment against each party liable on the basis of the rules of joint and several liability,

> except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

In *DeBenedetto*, the New Hampshire Supreme Court interpreted RSA 507:7-e, holding that the terms "party" and "parties" include "all parties to the transaction or occurrence giving rise to a plaintiff's injuries," and were not limited to named parties in a particular litigation. 153 N.H. at 803-04. Indeed, the liability of individuals who were never part of the pending litigation, as well as that of individuals who were at one time part of the litigation but have since been released from liability or otherwise **[*4]** taken out of the litigation, may be considered in apportioning liability under RSA 507:7-e. *See* Nilsson v. Bierman, 150 N.H. 393, 396, 839 A.2d 25 (2003); DeBenedetto, 153 N.H. at 803-04. However, a defendant asserting another party's liability bears the burden of establishing that party's liability. *See* DeBenedetto, 153 N.H. at 804.

> Under the rule of joint and several liability, a defendant who is only partly responsible for a plaintiff's injuries may be held responsible for the entire amount of recoverable damages. This allows a plaintiff to sue any one of several tortfeasors and collect the full amount of recoverable damages. As a result, numerous jurisdictions, including New Hampshire, have enacted legislation seeking to ameliorate the inequities suffered by low fault, deep pocket defendants.
>
> Under New Hampshire's statutory scheme, liability is joint and several for each party fifty percent at fault or greater. However, where any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

Goudreault v. Kleeman, 158 N.H. 236, 252, 965 A.2d 1040 (2009) **[*5]** (citations, quotations, brackets, and ellipses omitted).

Where a defendant raises an apportionment defense, that defendant "essentially becomes another plaintiff who must seek to impose liability on" the party or person defendant alleges to be liable. *See* id. at 256. "Where the defendant seeks to reduce or eliminate the plaintiffs recovery by apportioning professional liability, it is only fair that he or she carry the plaintiff's burden or proof outlined in RSA 507-E:2." *Id.* Consistent with the notion that defendants alleging the liability of others as a means of reducing their own liability carry the burden of proving what is, essentially, an affirmative defense, New Hampshire Superior Courts have begun imposing deadlines, via Structuring Conference Orders, by which a defendant must give notice of any and all claims of third-party, *DeBenedetto* liability. The New Hampshire Supreme Court has "long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." Figlioli v. R.J. Moreau Co., Inc., 151 N.H. 618, 626, 866 A.2d 962 (2005). Thus, where a party fails, without good cause, to comply with the deadlines set forth in **[*6]** a Structuring Conference Order, evidence related to that missed deadline is inadmissible. Id. at 626-27 (finding an abuse of discretion where the trial court permitted expert testimony that had not been properly disclosed by the deadline set forth in the applicable Structuring Conference Order).

In this case, the Court's January 10, 2008 Structuring Conference Order (*McGuire*, J.) had specifically directed: "Pursuant to *DeBenedetto vs. 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." ***Quesada*** and PLLC do not assert that they formally identified any such person or party. Rather, they submit that, because their "expert disclosure timely provided notice that [they] reserved the right to elicit testimony from plaintiffs' experts," Def.'s Reply, ¶ 3, and Goldner was a co-defendant at the time the July 15, 2008 Structuring Conference Order deadline passed, they are entitled to elicit expert testimony from the plaintiffs' former experts in order to present evidence of Goldner's liability to the jury.

The plaintiffs argue that, because ***Quesada*** and PLLC failed to comply with the terms of the Court's Structuring **[*7]** Conference Order, they are foreclosed from presenting evidence of Goldner's liability to the jury, and testimony from the experts is therefore irrelevant to these proceedings. In support of their position, the plaintiffs allege that they relied on ***Quesada*** and PLLC's failure to identify any persons or parties alleged to be at fault for the plaintiffs' injuries when they settled their claims against Goldner. The plaintiffs allege that, if they had known that that ***Quesada*** and PLLC intended to attempt to reduce the plaintiffs' recovery via a *DeBenedetto* claim relative to Goldner, the plaintiffs would not have settled with Goldner.

Based on the foregoing, and under the circumstances of this case, the Court finds that, by failing to list any persons or parties alleged to be at fault for the plaintiffs' injuries by the July 15, 2008 deadline contained in the Court's January 10, 2008 Structuring Conference Order,

Quesada and PLLC have forgone their right to present evidence to the jury relative to any other party's liability in this case. While the Court does not discount the meaning of *RSA 507:7-e* or *DeBenedetto*, or the importance of a defendant's right to reduce his or her liability by presenting **[*8]** evidence regarding the liability of others, the Court, upon review of these issues, does not discount the importance of orderly rules that everyone must follow while asserting their substantive rights. Litigants may waive their substantive rights by failing to properly assert them. *See Figlioli, 151 N.H. at 626-27* (prohibiting plaintiff from presenting relevant expert testimony based on her failure to comply with court-imposed deadlines); *see also State v. Cromlish, 146 N.H. 277, 283, 780 A.2d 486 (2001)* (holding that a criminal defendant may waive a fundamental right through his or her own inaction).

Here, although ***Quesada*** and PLLC had been entitled, pursuant to *RSA 507:7-e* and *DeBenedetto*, to present evidence of the liability of others in order to limit their own liability, they did not preserve that right by asserting it by the Court's July 15, 2008 deadline. Although ***Quesada*** and PLLC imply that the plaintiffs had been on notice of their *DeBenedetto* claims, that argument is not supported by the record. In Paragraph 8 of their Special Plea and Brief Statement of Defenses, ***Quesada*** and PLLC "reserve[d] the right to assert that the plaintiff's (sic) injuries were caused by third parties, either acting **[*9]** reasonably or in a negligent fashion." This "reservation" did not sufficiently specify persons or parties alleged to be at fault for the plaintiffs' injuries. Similarly, although ***Quesada*** and PLLC's expert disclosure had reserved the right to elicit testimony from the plaintiffs' experts, this "reservation" did not sufficiently identify any persons or parties alleged to be at fault for the plaintiffs' injuries.

The Court's Structuring Conference Order provided for a specific identification of any such individuals. Indeed, the Order required that ***Quesada*** and PLLC identify "every individual" alleged to be at fault for the plaintiffs' injuries, even if such individuals were parties to the litigation. ***Quesada*** and PLLC did not identify any such individuals prior to the July 15, 2008 deadline, and have not alleged sufficient cause for not complying with that directive. Although "[t]he trial court has broad discretion in determining whether to waive its rules," *Donnelly v. Eastman, 149 N.H. 631, 633, 826 A.2d 586 (2003)*, the Court will not waive the mandates of a Court Order where, as here, it would result in actual prejudice to the plaintiffs. In this case, the plaintiffs relied on ***Quesada*** and PLLC's failure **[*10]** to list Goldner as a "person or party alleged to be at fault" in deciding to settle their claims against Goldner, and would therefore be prejudiced if ***Quesada*** and PLLC were permitted to reduce their liability by presenting evidence of Goldner's alleged fault to the jury. Accordingly, ***Quesada*** and PLLC are foreclosed from presenting evidence of fault relative to any other "person or party" through plaintiffs' former experts. *See Figlioli, 151 N.H. at 626-27*.

Quesada and PLLC's pending Motion is denied. The Court notes that, although ***Quesada*** and PLLC cannot present evidence of fault relative to any other "person or party" at trial, in the event the plaintiffs receive an award against ***Quesada*** and PLLC in this case, ***Quesada*** and PLLC would be entitled to a reduction of such an award consistent with the amount of any relevant settlements. *See RSA 507:7-h* (1997).

SO ORDERED.

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

Brooke Rallis, et al

v.

Wendy Gladstone, MD, et al

Docket No: 09-C-0598

ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION REGARDING DEBENEDETTO DISCLOSURE

On November 9, 2009 the Court issued a Structuring Conference Order containing the usual language with respect to the so-called DeBenedetto Disclosure. The language as contained in the Order is as follows: "If defendant claims that unnamed parties are at fault, defendant shall disclose the identity of every such party and the basis of the allegation of fault."

On March 4, 2010 the plaintiffs filed a Motion to Amend the Structuring Conference Order so as to add the phrase "named parties" as well as "unnamed parties" that appears in the DeBenedetto Disclosure language on the Structuring Conference Order. The plaintiffs argued that fundamental fairness demands a DeBenedetto Disclosure for both named and unnamed parties so that the plaintiffs can make an educated decision, if circumstances so warrant, to settle with a named party prior to trial. The plaintiffs express concern that they are reluctant to make a decision as to settlement with a named party unless they know the specifics of any other named defendants claims of fault against any potential settling defendant. In support of their position the plaintiffs argue that just as it would be unfair to allow a plaintiff alleging fault on the part of any defendant to hide his intention until trial, it is similarly unfair to allow a defendant to remain silent about his

intention to seek a DeBenedetto apportionment against a named but settling defendant until the time of trial.

The defendants objected to the plaintiffs' Motion to Amend the language of the DeBenedetto Disclosure on both procedural and substantive grounds. Procedurally the defendants argue that the specific language chosen the for the DeBenedetto Disclosure in the Structuring Conference Order was as a result of Court approval and therefore that language should not be tampered with. Substantively the defendants claim that the plaintiffs are not prejudiced by the strict language of the existing DeBenedetto Disclosure. They note that the plaintiffs have already disclosed experts critical of all of the co-defendants and further by their own disclosures against each of the defendants, the plaintiff are effectively put on notice of claims against each named defendant by every other defendant. Thus the defendants argue that any motion to amend the approved DeBenedetto Disclosure language should be denied. By Order dated March 11, 2010, the Court adopted the defendants' reasoning in this regard and denied the plaintiffs' Motion to Amend.

The plaintiffs have now filed a Motion for Reconsideration. Their pleadings contain the following rationale:

> "If Dr. Voss wants to take advantage of the DeBenedetto ruling to shift a portion of the blame for Brooke Rallis' injuries onto his co-defendants at trial, he should be required to state explicitly whom he intends to blame and the basis for his allegations of fault against each co-defendant. There is nothing unfair about making him take a position on these issues at the time of his expert disclosure. As noted above, Dr. Voss does not articulate any harm that he will suffer if he is required to disclose his allegations of fault against his co-defendants."

In their objection to the plaintiffs' Motion for Reconsideration the defendants set forth their reasoning as follows:

> "There is no reason why the plaintiffs should be allowed to name co-defendants, bring suit against those co-defendants, articulate legal theories against the co-defendants, identify experts against co-defendants, disclose expert opinion letters against co-defendants, settle out with co-defendants, and then hide the theories against the co-defendants from the jury. The plaintiffs cannot be permitted to present a case to the jury shielding the jury from knowledge of the plaintiffs' own theories of liability against co-defendants who are no longer in the case."

For the past couple of decades the Superior Court has modified several of its discovery rules so as to assure openness and prevent trial ambush. Having that trend in mind in considering the plaintiffs' Motion for Reconsideration, the Court does not understand the defendants' prejudice objection to the plaintiffs' request. If the Court granted the Motion to Amend the DeBenedetto Disclosure, the plaintiffs would not be able to shield the jury from knowledge of their theories of liability against co-defendants who are no longer in the case. Should the plaintiffs elect to settle out with a co-defendant before trial, the remaining defendants can inquire of the plaintiff on any of her witnesses whether or not there was a claim of negligence made against a settling co-defendant and inquire as to the specifics of that claim.

The plaintiffs' concern, as the Court understands it, is that an existing defendant, although setting forth its own defenses, may not have made any allegations against a co-defendant until the time of trial. Thus unless the plaintiff is aware of the specific position of an existing defendant against a settling co-defendant it cannot assess the reasonableness of electing to settle with that co-defendant. Therefore any prejudice that would exist if the plaintiffs' Motion to Amend is denied lies against the plaintiff not the defendant. 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 so 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.

For all the reasons set forth herein, the plaintiffs' Motion for Reconsideration is granted as is the plaintiffs' Motion to Amend the Structuring Conference Order to include the phrase "named parties" as well as "unnamed parties" in the DeBenedetto Disclosure language.

So Ordered.

DATED: May 4, 2010

Kenneth R. McHugh
Presiding Justice

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

AZRA OMANOVIC

v.

NANCY PARISER, MD, ET AL

Docket No.: 218-2017-CV-00229

ORDER ON PLAINTIFF'S MOTION TO STRIKE DEBENEDETTO DISCLOSURES

On March 6, 2017, Plaintiff Azra Omanovic commenced this medical negligence action against Defendants Nancy Pariser, MD ("Pariser"), Dartmouth Hitchcock Clinic d/b/a Dartmouth-Hitchcock Manchester ("DHC"), Elizabeth Angelakis, MD ("Angelakis"), Southern New Hampshire Radiology Consultants, P.C. ("SNHRC"), Dartmouth-Hitchcock Medical Center ("DHMC"), and Evelyn L. Fleming, MD ("Fleming"). On May 24, 2017, Fleming and DHMC were voluntarily non-suited with prejudice. See Doc. # 15. On June 20, 2018, Plaintiff filed a motion to strike the remaining Defendants' DeBenedetto disclosures. Those Defendants have objected. For the reasons that follow, Plaintiff's motion to strike is **GRANTED**.

Analysis

"Pursuant to RSA 507:7-e and DeBenedetto, defendants may ask a jury to shift or apportion fault from themselves to other nonparties in a case." State v. Exxon Mobil Corp., 168 N.H. 211, 259 (2015). RSA 507:7-e, I, provides:

> I. In all actions, the court shall:
>
> (a) Instruct the jury to determine . . . the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and

> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

RSA 507:7-e, I. "For apportionment purposes under RSA 507:7-e, the word 'party' refers not only to 'parties to an action including settling parties,' but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." Exxon Mobil Corp., 168 N.H. at 259 (quotation omitted).

"A defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." Id. (quotation and brackets omitted). "A civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense." Id. (quotation omitted, emphasis in the original). "Apportionment under RSA 507:7-e requires proof of fault[,]" and "the defendant carries the burdens of production and persuasion." Id. at 256, 259 (quotation omitted). In other words, "a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." Id. at 259 (quotation omitted). Moreover, where, as here,

> the defendant seeks to reduce or eliminate the plaintiff's recovery by apportioning professional liability, it is only fair that he or she carry the plaintiff's burden of proof outlined in RSA 507-E:2. That statute requires 'affirmative evidence which must include expert testimony of a competent witness,' of the standard of reasonable care, breach thereof and proximate causation of damages.

Goudreault v. Kleeman, 158 N.H. 236, 256 (2009) (quoting RSA 507-E:2, I-I(a)-(c)). Thus, a sufficient DeBenedetto disclosure requires a defendant to specifically identify the nonparty and to briefly state the basis for believing such nonparty to be at fault." Exxon Mobil Corp., 168 N.H. at 257. "Furthermore, the notice must allege sufficient facts to satisfy all the elements of at least one of the [plaintiff's] claims." Id.

Turning now to the facts of this case, on May 23, 2018, Angelakis and SNHRC submitted a joint DeBenedetto disclosure to Plaintiff. The disclosure said the following: "For our DeBenedetto disclosure, we list any and all defendants ever sued by the Plaintiff in this action." See Doc. #27, Ex. 3. On June 1, 2018, Pariser and DHC also submitted a joint DeBenedetto disclosure to Plaintiff. The disclosure said the following:

> This letter serves as notice of the preliminary DeBenedetto disclosure for defendants, [Pariser] and [DHC].
>
> In particular, these 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. To the extent the party to the litigation is a corporation, any individuals for whom the corporation is responsible are included in this disclosure. The basis of the allegation of fault is set forth in Plaintiffs' [sic] complaint. It is expected that the DeBenedetto claims will be supported by the plaintiff's experts in this matter. Further, [Pariser] and DHC will rely on the plaintiffs' [sic] experts to maintain DeBenedetto claims against any settling or nonsuited defendants in this action.
>
> As discovery is ongoing, we reserve the right to supplement this disclosure should additional information become available.

See Doc. # 23, Ex. A.

Plaintiff argues that these DeBenedetto disclosures are inadequate. The Court agrees. Both disclosures fail 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. Put simply, the Court cannot glean from these disclosures who

Defendants seek to shift liability to, and on what legal basis they may shift the same. See Goudreault, 158 N.H. 256.[1] For this reason, the Court finds that Defendants have failed to meet their burden of production by not submitting an adequate DeBendetto disclosure. Accordingly, Plaintiff's motion to strike is GRANTED.

So Ordered.

August 6, 2018
Date

Marguerite L. Wageling
Presiding Justice

[1] The Court is unpersuaded by Defendants' argument that the parties that were non-suited are nevertheless named parties not subject to adequate DeBenedetto disclosures. The Court finds that Fleming and DHMC were non-suited (and thus ceased to be named parties) approximately one year before Defendants' DeBenedetto disclosures were due. Compare Doc. # 15 (Plaintiff's motion for voluntary non-suit submitted on May 24, 2017), with Doc. # 13 (the case structuring order requiring disclosure of unnamed parties by June 1, 2018); see also Doc. # 27 (Angelakis and SNHRC's objection to Plaintiff's motion to strike, which does not name Fleming and DHMC as parties in the caption).

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Carolyn Coskren

v.

Dellene Watt

No. 2016-CV-00407

ORDER

Plaintiff Carolyn Coskren ("Coskren") has brought a personal injury action against the Defendant, Dellene Watt ("Watt") alleging that she was struck by Watt's automobile while she was a pedestrian participating in the Bow Police Association 5K race on November 28, 2013.She has moved to strike a DeBenedetto disclosure filed by the Defendant on the ground that it is inadequate. For the reasons stated in this Order, the Motion is GRANTED.

In DeBenedetto v. CLD Consulting Engineers, 153 N.H. 793 (2006) the New Hampshire Supreme Court held that RSA 507:7-c allows a jury to apportion fault to nonparties. Since DiBenedetto, the Superior Court's case structuring and ADR orders require that defendants identify nonparties by a specific date.

In State v. Exxon Mobil Corporation, 168 N.H. 211, 256-260 (2015), the Supreme Court addressed the specificity necessary in such disclosures and affirmed the Superior Court's pre-and post-verdict rulings on DiBenedetto issues. In that case the Superior Court required defendants to not only provide identifying information but also to state why the nonparty is at fault. The New Hampshire Supreme Court held that defendant

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must set forth allegation of sufficient facts "to satisfy all the elements of at least one of the State's claims". Id. at 257. Since the decision in State v. Exxon Mobil Corp., 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. McEnerney v. Spare Time Family-Fun Center, No.216-2016-CV-00113 (March 17, 2017 (Hillsborough County Superior Court, Northern District) (Brown, J.); Joselow, et al v. MNH Mall, Inc., No. 2016-2016-CV-00575 (May 2, 2017) (Hillsborough County Superior Court, Northern District) (Abramson, J.); Reynolds v. Advanced Diagnostic Imaging, LLC,et al, No. 218-20168 CV-00457 (Rockingham County Superior Court) (Anderson J.)

The DiBenedetto notice in this case merely states:

> 4. 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 ("Turkey Trot") so as to prevent runners from being in the way of traffic. (Emphasis supplied).

As a matter of language, the notice is a conclusion, and not an assertion of facts. The underlying facts upon which the defendant would rely to show that the Bow Police Department "fail[ed] to properly organize" the race are not alleged. It is obvious that the Defendant has not set forth an allegation of sufficient facts to satisfy the elements of one of its claims. State v. Exxon Mobil Corporation, (supra). The defendant has not set forth the basis for 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.

It follows that the Motion to Strike must be, and is GRANTED.

SO ORDERED

1/8/13
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Joni Reynolds, et al.

v.

Alexander Raslavicus, M.D., et al.

218-2016-CV-457

Order on Motion to Strike

Plaintiff moves to strike Defendants' *DeBenedetto* disclosures on the basis that they do not identify anyone in particular but rather a potential category of people: any non-party that would later be identified by Plaintiff's experts at their depositions as being responsible for Plaintiff's injuries. Defendants object, stating that the challenged disclosures were merely an attempt to put Plaintiff on notice that they would seek to add any such person identified by Plaintiff's experts, a likelihood that both sides view as remote. For the reasons stated below, Plaintiff's motion is GRANTED.

Plaintiff filed suit on April 19, 2016 claiming that Defendants negligently interpreted mammography results in 2010 and 2012 and negligently failed to recommend a biopsy in both years. She claims that a missed diagnosis of cancer in both 2010 and 2012 caused her to suffer from metastatic breast cancer.

On September 1, 2016, the parties submitted a proposed Case Structuring and ADR Order, which the Court approved on September 2, 2016. Under this order, so-called *DeBenedetto* disclosures were due February 1, 2017.

According to Plaintiff's motion to strike, on February 1, 2017, Defendants sought

a 30 day extension of the *DeBenedetto* deadline, presumably because Defendants were scheduled to depose Plaintiff on February 17, 2017. Plaintiff agreed to that extension. On March 2, 2017, nearly two weeks after Plaintiff's deposition, Defendants sent their *DeBenedetto* disclosure to Plaintiff. In these documents, Defendant did not identify names but rather listed "unnamed parties who may yet be identified by disclosed experts in this case as negligent." Disclosure of Raslavicus and Advanced Diagnostic Imaging, PLLC. Core Physician, LLC's disclosure was similar. On March 30, 2017, Plaintiff moved to strike these disclosures, arguing that the listing of a category of unnamed individuals is inadequate.

In *DeBenedetto v. CLD Consulting Engineers*, 153 N.H. 793, 804 (2006), the New Hampshire Supreme Court held that New Hampshire's apportionment statute, RSA 507:7-e, allows the jury to apportion fault to non-parties. In the wake of *DeBenedetto*, the superior court has required defendants as part of the Case Structuring and ADR Order to identify these non-parties by a specified date.

In *State v. Exxon Mobil Corp.*, 168 N.H. 211, 256-60 (2015), the supreme court affirmed the superior court's (Fauver, J.) pre and post-verdict rulings on *DeBenedetto* issues. With respect to *DeBenedetto* disclosures, the superior court required defendants to not only provide "identifying information" but also a brief statement of why the non-party was at fault including an allegation of sufficient facts "to satisfy all elements of at least one of the State's claims." *Id.* at 257. Similarly, the standard Case Structuring Order and ADR Form in this and other cases requires parties to disclose the "identity" of every identified non-party as well as the "basis of the allegation of fault" against that individual or entity.

Against that backdrop, it is clear that Defendants' March 2, 2017 disclosures

were inadequate because they neither identified particular non-parties at fault nor provided a basis for their alleged fault. For that reason, the Court agrees with Plaintiff that the March 2, 2017 disclosures were not in compliance with the Case Structuring Order and ADR form.

Defendants acknowledge these issues but suggest that they are beside the point. They are not claiming that their disclosures would be adequate were this case on the eve of trial. Rather they are seeking to use their March 2, 2017 disclosures as a placeholder of sorts, one they could rely on in the unlikely event that one of Plaintiff's experts points a finger at a non-party. In that event, however, Defendants' proper course would be to seek leave to file a late disclosure, noting the date on which the expert cast blame at a non-party and asking the Court to allow the late disclosure on that basis.

While the Court understands the purpose behind the inadequate disclosures (including the ability to argue down the road that both Plaintiff and this Court were aware on March 2, 2017 that Defendant may seek to name *DeBenedetto* parties depending on the testimony of Plaintiff's experts), that does not justify clearly inadequate disclosures and, as just noted, Defendants are not without a remedy if they subsequently learn from Plaintiff's experts the identity of someone who could be listed on a *DeBenedetto* disclosure.

Accordingly, the Court GRANTS Plaintiff's motion to strike the March 2, 2017 disclosures.

So Ordered.

Mar 25, 2017
Date

David A. Anderson
Associate Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2016-CV-00587

Sandra Shepard

v.

Stephen Keskinen *d/b/a* Stephen Marx Hair Salon

ORDER ON PLAINTIFF'S MOTION IN LIMINE

The plaintiff, Sanda Shepard, filed this action against the defendant, Stephen Keskinen *d/b/a* Stephen Marx Hair Salon, seeking damages related to a slip and fall. The defendant seeks to apportion fault to a non-party in the case, KGL Landscape Construction, LLC ("KGL"), pursuant to DeBenedetto v. CLD Consulting Eng'rs, Inc., 153 N.H. 793 (2006). The plaintiff has since filed a motion in limine in which she requests the Court to strike the DeBenedetto disclosure. The defendant objects. For the reasons set forth herein, the Court finds and rules as follows.

The Court briefly recites the relevant facts. The plaintiff is an independent hair stylist. She rented a booth at the defendant's hair salon in Milford. On April 8, 2015, the plaintiff left the salon after she finished working. As she exited the building, she slipped on ice that had accumulated on a handicapped ramp and suffered injuries. The plaintiff has since brought this negligence action against the defendant, who is the owner of the premises. The plaintiff alleges that the defendant owed her a duty to maintain the premises in a reasonable manner, and breached that duty by failing to clear the ramp of ice.

On February 24, 2017, the defendant filed a DeBenedetto disclosure, in which he asserted that "there was a snow plow contract in effect between KGL[ ] and the

[d]efendant." (Def.'s DeBenedetto Disclosure at 1.) The defendant maintains that, pursuant to the contract, KGL was "responsible for snow and ice removal [on] the ramp, walkways, and [the] parking lot" at the salon. (Id.) As such, the defendant "intends to request that the trier-of-fact in this matter apportion liability to KGL [,] for causing or contributing to the incident alleged in the [,] complaint." (Id.)

The plaintiff now moves to strike the disclosure, asserting that "KGL's liability is irrelevant under existing case law." (Pl.'s Mot. Limine at 1.) Specifically, the plaintiff argues that, pursuant to Valenti v. NET Props. Mgmt., 142 N.H. 633 (1998), the defendant owed her a non-delegable duty, and therefore "the only party that can be liable is the property owner, Stephen Keskinen." (Pl.'s Mot. Limine ¶¶ 14, 15.) In response, the defendant claims that, pursuant to Valenti, "KGL is immune to liability," and the case law permits a jury to apportion fault to an immune party. (Id.)

In the Court's view, neither party has interpreted Valenti correctly. Valenti stands for the proposition that "one who holds his premises open to the public for business purposes" has a non-delegable duty to maintain the premises in a reasonable manner. 142 N.H. at 635. Therefore, even if the premises owner hires an independent contractor to maintain the property, the premises owner remains liable for any negligence flowing from the failure to maintain the premises. Id. Valenti, however, does not in any way indicate that the independent contractor is immune from liability, nor does it suggest that the injured party would be prohibited from bringing a negligence action directly against the independent contractor. The New Hampshire Supreme Court, in fact, has never addressed to what extent, if any, a snow plowing contractor, such as KGL, owes a duty to third parties who may be foreseeably endangered by its

failure to exercise reasonable care in performing its contractual duties. Indeed, there is a significant split on this issue among New Hampshire Superior Courts[1] as well as other state supreme courts.[2] Therefore, both parties in this case misread Valenti as holding that KGL is immune and/or not directly liable. Depending on how the New Hampshire Supreme Court ultimately decides this issue, it is possible that the plaintiff could maintain a direct negligence action against KGL.

Although it *may* be possible for the plaintiff to seek to hold KGL directly liable for its own negligence, which would make KGL a joint tortfeasor, she has not. The Court does not find that KGL is a proper DeBenedetto party in this premises liability case. DeBenedetto and the relevant statutory scheme apply when there are multiple tortfeasors and the Court must determine the proper way to apportion damages amongst them. However, in this case, the apportionment of fault is largely immaterial due to the court's holding in Valenti. For instance, if the jury finds KGL to be 100% at

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[1] Compare, e.g., Wright v. Brady Sullivan Props., Hills. Cnty. Super. Ct. N. Div., No. 216-2016-CV-00057 (June 13, 2016) (Order, Ruoff, J.) (contractor owed duty); Lyna v. Merrimack Sch. Dist./SAU 26, Hills. Cnty. Super. Ct. S. Div., No. 226-2015-CV-00155 (June 6, 2016) (Order, Colburn, J.) (same); Graham v. Home Depot U.S.A., Inc., Carroll Cnty. Super. Ct., No. 212-2014-CV-00074 (Apr. 7, 2016) (Order, Temple, J.) (same); Depoy v. Saint's Landscaping & Irrigation, LLC, Hillsborough Cty. Super. Ct. S. Div., 226-2014-CV-00452 (Dec. 3, 2014) (Order, Temple, J.) (same); Ramirez v. Etchstone Props., Inc., Hillsborough Cnty. Super. Ct. S. Div., No. 226-2012-CV-00695 (Sept. 19, 2013) (Order, Colburn, J.) (same); with Townsend v. Edmar Mgmt., LLC, Rockingham Cnty. Super. Ct. No. 218-2016-CV-00028 (Oct. 14, 2016) (Order, Anderson, J.) (duty owed only if contractor agreed to completely assume premises owner's duty); Pinkham v. Nassar Landscape & Irrigation, Inc., Rockingham Cnty. Super. Ct., No. 218-2015-CV-00878 (Jul. 18, 2016) (Order, Anderson, J.) (same); Braley v. PR Rests., LLC, Rockingham Cnty. Super. Ct., No. 218-2015-CV-01337 (July 12, 2016) (Order, Wageling, J.) (same); Schena v. Brooks Props., LLC, Rockingham Cnty. Super. Ct., No. 218-2015-CV-00560 (July 7, 2016) (Order, Wageling, J.) (same); Davey v. Great N. Prop. Mgmt., Inc., Rockingham Cnty. Super. Ct. No. 218-2015-CV-01038 (Jan. 27, 2016) (Order, Delker, J.) (same); with Wood v. Springwise Facility Mgmt., Inc., Strafford Cnty. Super. Ct., No. 219-2016-CV-00034 (Sept. 23, 2016) (Order, Howard, J.) (no duty).

[2] Compare Gazo v. City of Stamford, 765 A.2d 505, 509 (Conn. 2001) (duty owed); Perry v. Green Mt. Mall, 857 A.2d 793, 795 (Vt. 2004) (duty owed); Urban Servs. Grp., Inc. v. Royal Grp., Inc., 671 S.E.2d 838, 841 (Ga. App. 2008) (duty owed); Kostidis v. Gen. Cinema Corp. of Ind., 754 N.E.2d 563, 567–68 (Ind. Ct. App. 2001) (duty owed); Boland v. Rivanna Plnrs., 69 Va. Cir. 308, 312 (2005) (duty owed) with Davis v. R.C. & Sons Paving, Inc., 25 A.3d 787, 789 (Me. 2011) (no duty); Fultz v. Un-Commerce Assocs., 683 N.W.2d 587, 592 (Mich. 2004) (no duty); Espinal v. Melville Snow Contrs., 773 N.E.2d 485 (N.Y. 2002) (no duty).

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 KGL on a jury verdict form in this case. KGL is not a party to this action and there are no claims against it. If anything, it seems that attributing fault to KGL would only prolong the trial, confuse the jury, and require unnecessary litigation as to whether KGL even owed the plaintiff a duty of care in the first instance. For these reasons, the plaintiff's motion in limine is GRANTED.

So ordered.

Date: May 9, 2017

Hon. Jacalyn A. Colburn,
Presiding Justice

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Frances McEneny

v.

Brady Sullivan Properties, Corley Associates, GSXN Realty, LLC, Spare Time Family Fun Center, and Stadium Way Condominium Association

Docket No. 216-2016-CV-00113

ORDER

Plaintiff, Frances McEneny, brought this action against the above-named defendants for damages arising out of her alleged slip-and-fall on ice in the parking lot located at 216/222 Maple Street in Manchester, New Hampshire (the "Premises"). At the time of plaintiff's fall, Hooksett Paving Co., Inc. ("Hooksett") was under a written contract with Brady Sullivan Properties, LLC ("Brady Sullivan") to perform snow and ice removal at the Premises. On December 12, 2016, the Court GRANTED Hooksett's motion to dismiss, finding it did not owe plaintiff a duty to maintain the Premises. Currently before the Court are defendants, Corley Associates ("Corley"), Stadium Way Condominium Association ("Stadium Way"), and Bowl New England, d/b/a Spare Time Family Fun Center ("Spare Time") DeBenedetto disclosures, noticing their intent to apportion fault to Hooksett by introducing evidence that Hooksett was responsible—under the above contract—to provide snow and ice removal services at the Premises, and failed to properly maintain it. Brady Sullivan also submits its DeBenedetto disclosures,[1] noticing

[1] Brady Sullivan also names other defendants in its disclosure; however, plaintiff only moves to strike Hooksett and Velagal Estates from the disclosure.

its intent to apportion fault to Hooksett, for the above reasons, and Velagal Estates ("Velagal"). Plaintiff now moves to strike defendants' DeBenedetto disclosures.

Analysis

"[F]or apportionment purposes under RSA 507:7-e, the word 'party' refers not only to parties to an action, including settling parties, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." DeBenedetto, 153 N.H. at 804 (quotation, ellipsis, and citation omitted). "[A] defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." Id. "[A] civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense." Goudreault v. Kleeman, 158 N.H. 236, 256 (2009). Accordingly, "the defendant carries the burdens of production and persuasion." Id. Moreover, "a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." Id. (quotation and brackets omitted); see Wyle v. Lees, 162 N.H. 406, 413 (2011) (trial court implicitly concluded that the defendants failed to prove their allegations of comparative negligence for purposes of apportionment of damages).

Applying the foregoing principles, a DeBenedetto disclosure must be sufficiently detailed to explain the theory of liability of the non-litigant parties and the allegations upon which that liability is based. State v. Exxon Mobil Corp., 126 A.3d 266, 302–05 (2015). This is because, as noted above, defendants are acting as plaintiffs for

purposes of maintaining their apportionment claims against Hooksett—a non-party. Thus, in order to survive plaintiff's motion to strike, defendants must allege sufficient facts to establish Hooksett's liability using the same basis for a cause of action as if plaintiff had sued Hooksett directly.

I. Hooksett

In the instant case, defendants' DeBenedetto disclosures are insufficient to state a cause of action against Hooksett. Corley, Spare Time, and Stadium Way's disclosures allege Hooksett failed to provide adequate winter weather maintenance services. Brady Sullivan's disclosure bases its theory of Hooksett's liability on "the theories of liability asserted by the plaintiff . . . in addition to other theories of liability as may be determined through the course of discovery." (Brady Sullivan's Mot., ¶ 2.) Plaintiff argues defendants' disclosures raise no new allegations or claims against Hooksett, which she did not raise in her second amended complaint, and therefore because her complaint was insufficient as a matter of law to hold Hooksett liable, defendants' disclosures fail for the same reason. The Court agrees with plaintiff. As stated above, defendants seeking an apportionment defense "become[] another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." Goudreault, 158 N.H. at 256. Here, the Court has already found that Hooksett did not owe plaintiff a duty to maintain the Premises. As such, defendants' apportionment allegations fail as a matter of law.

While defendants argue Hooksett's "status as a 'dismissed party' is analogous to a party that may be immune from liability or otherwise not before the Court," the Court is

unpersuaded. (Corley & Stadium Ways Obj. ¶ 4.)[2] 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. As stated above, Hooksett does not owe plaintiff a legal duty and defendants have failed to allege any new facts that create such a duty.[3]

Accordingly, because defendants have failed to allege sufficient facts to state a cause of action against Hooksett, plaintiff's motions to strike Hooksett from defendants' DeBenedetto disclosures are GRANTED.[4]

II. Velagal Estates

As stated above, Brady Sullivan also noticed its intent to add Velagal for apportionment purposes. Brady Sullivan alleges that Velagal owns 41% of the condominium association, which in turn owns the office building located at the Premises. Brady Sullivan further alleges the condominium association owns, manages, and controls the common area where plaintiff's alleged fall occurred, and therefore, as an owner, is subject to liability. While it is true that an owner or occupier of land owes its invitees a non-delegable duty to maintain the premises in a reasonably safe manner,

[2] Defendants Spare Time and Brady Sullivan also make this argument.

[3] The Court notes its findings are consistent with the majority view among Connecticut Superior Courts who have dealt with this issue. See Roberts v. C&M Corp., 2002 WL 31758445, at *1 (Conn. Super. Ct., Sept. 16, 2002) ("The majority view rejects apportionment in slip and fall cases where a landowner seeks to apportion liability to a snow removal contractor."). Even under the minority view in Connecticut, defendants would not be able to disclose Hooksett for apportionment purposes, as those Courts only allow an apportionment claim "if the plaintiff would be able to assert a direct cause of action against the [snow plow contractor]"—which, as noted above, plaintiff in the instant case cannot do. Gulisano v. Nat'l Amusements, Inc., 1999 WL 595728, at *2 (Conn. Super. Ct., July 29, 1999).

[4] The Court also notes its decision does not foreclose defendants from holding Hooksett accountable for its actions or inactions. Defendants could have timely filed a cross-claim against Hooksett pursuant to Superior Court Rule 10 or can file a separate action for breach of contract or indemnification.

see Valenti v. NET Properties Mgmt., Inc., 142 N.H. 633, 636 (1998) (citing Stevens v. United Gas & Elec. Co., 73 N.H. 159 (1905)), Brady Sullivan has provided no evidence that Velagal was an owner or occupier of the Premises at the time of plaintiff's accident. To the contrary, plaintiff alleges Maple Valley Manchester Partners, LLC ("Maple Valley") and Corley were the owners of the condominium association at the time of plaintiff's accident, and only after plaintiff's accident did Velagal buy or assume Maple Valley's interest in the condominium association. (Pl.'s 2nd Amend. Compl. ¶ 5.) Therefore, absent evidence that Velagal owned the Premises at the time plaintiff's injuries occurred or assumed Maple Valley's existing liabilities, Brady Sullivan has failed to allege sufficient facts for apportionment purposes. As such, plaintiff's motion to strike Velagal from Brady Sullivan's DeBenedetto disclosures is also GRANTED.

SO ORDERED.

3/16/17
Date

K.C. Brown
Kenneth C. Brown
Presiding Justice

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Lee Joselow and Wane Joselow, M.D.

v.

MNH Mall, LLC d/b/a Mall of New Hampshire and
Simon Management Associates, LLC

Docket No. 216-2016-CV-00575

ORDER

Plaintiffs, Lee and Wane Joselow, have brought this action against the above-named defendants for injuries allegedly sustained by Mrs. Joselow in a slip-and-fall accident at the Mall of New Hampshire (the "Mall"). Pursuant to RSA 507:7-e and DeBenedetto v. CLD Consulting Engineers, Inc., 153 N.H. 793 (2006), defendants have noticed their intent (the "DeBenedetto disclosure") to seek apportionment against Crown Building Maintenance Co. d/b/a Able Building Maintenance ("Able")—an entity under contract with defendants at the time of Mrs. Joselow's fall tasked with performing janitorial and cleaning services at the Mall.

Currently pending before the Court is plaintiffs' motion to strike that disclosure or, in the alternative, to add Able as a defendant. The Court held a hearing on the foregoing on April 26, 2017, at which it heard arguments from both parties. After consideration of the parties' arguments and pleadings and the applicable law, the Court finds and rules as follows.

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Factual Background

The following facts are taken from plaintiffs' complaint, defendants' DeBenedetto disclosure, and documents the authenticity of which are not disputed by the parties. See Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010) (internal citations and ellipses omitted); see also Kukesh v. Mutrie, 168 N.H. 76, 81 (2015).

After accessing the Mall through an entrance located adjacent to the Red Robin Restaurant, Mrs. Joselow promptly slipped and fell on an accumulation of water on the ceramic tile flooring inside. (Pls.' Compl. ¶ 4.) Mrs. Joselow sustained a fractured elbow in the fall, which subsequently resulted in Mr. Joselow experiencing loss of her consortium. (Id. ¶ 5.) Plaintiffs thereafter brought the instant action, alleging, in relevant part, that defendants owed Mrs. Joselow a duty to properly maintain the Mall premises in a safe condition, which they breached by failing to eliminate or warn of the accumulation of water she slipped and fell upon. (See id. ¶¶ 5–12.)

At the time of Mrs. Joselow's fall, Able was under contract with defendants to provide a number of specific janitorial and cleaning services at the Mall (the "contract"). (See Defs.' DeBenedetto Disclosure Ex. A.) Contending that Able's obligations under the contract included the responsibility to "inspect" and "remedy" wet spots throughout the Mall, defendants' DeBenedetto disclosure notices their intent to produce evidence regarding the same at trial so that a jury may apportion negligence to Able accordingly. In response to the foregoing, plaintiffs assert defendants' disclosure fails to set forth a sufficient basis to establish Able owed a cognizable duty to them and, therefore, must be stricken. For the reasons below, the Court agrees.

Analysis

"[F]or apportionment purposes under RSA 507:7-e, the word 'party' refers not only to 'parties to an action, including settling parties,' but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." DeBenedetto, 153 N.H. at 804 (quotation, ellipsis, and citation omitted). "[A] defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." Id. "[A] civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense." Goudreault v. Kleeman, 158 N.H. 236, 256 (2009). Accordingly, "the defendant carries the burdens of production and persuasion." Id. Moreover, "a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." Id. (quotation and brackets omitted); see Wyle v. Lees, 162 N.H. 406, 413 (2011) (trial court implicitly concluded that the defendants failed to prove their allegations of comparative negligence for purposes of apportionment of damages).

Accordingly, defendants' DeBenedetto disclosure must be sufficiently detailed to explain the theory of liability of the non-litigant party—Able—and the allegations upon which that liability is based. State v. Exxon Mobil Corp., 168 N.H. 211, 255–60 (2015). This is because, as noted above, defendants are acting as plaintiffs for purposes of asserting their apportionment claims against Able. Thus, in order to survive plaintiffs'

motion to strike, defendants must have alleged sufficient facts to establish Able's liability using the same basis for a cause of action as if plaintiffs had sued Able directly.

Though defendants' DeBenedetto disclosure is vague, it appears from their supplemental pleading and argument at the hearing on the instant matter that they proceed under a negligence theory based on Section 324A(b) of the Restatement (Second) of Torts, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . (b) he has undertaken to perform a duty owed by the other to the third person.

See Carignan v. N.H. Int'l Speedway, Inc., 151 N.H. 409, 413 (1995) (recognizing Section 324A); Walls v. Oxford Mgmt. Co., 137 N.H. 653, 659 (1993) (same).

While acknowledging they owed Mrs. Joselow a non-delegable duty to maintain the Mall in a safe condition as the owners and operators thereof, see Valenti v. Net Prop. Mgmt., Inc., 142 N.H. 633, 635 (1998), defendants argue Able nevertheless undertook to perform a portion of this duty to Mrs. Joselow and other entrants—the duty to inspect and remedy accumulations of water throughout the Mall—by virtue of its contractual obligations.[1] As such, defendants contend that, to the extent plaintiffs can

[1] It is apparent from the contract that Able did not contract to undertake the entirety of defendants' duty as landowners and operators to maintain the Mall in a safe condition. See Valenti, 142 N.H. at 634. Rather, Able contracted only to provide certain janitorial and cleaning services. Nevertheless, "[s]ubsection (b) comes into play as along as the party who owes the plaintiff a duty of care has delegated to the defendant *any particular part* of that duty." See Canipe v. Nat'l Loss Control Serv. Corp., 736 F.2d 1055, 1062–63 (5th Cir. 1984). Accordingly, the Court analyzes defendants' DeBenedetto disclosure by considering the narrow duty at issue—the duty to inspect and remedy accumulations of water throughout the Mall. The Court further notes that defendants' application of Valenti to the instant matter is misguided. Valenti merely stands for the principle that one who holds his or her business premises open to the public is subject to liability for the negligence of an independent contract hired to maintain that premises based upon the non-delegable duty involved. 142 N.H. at 635–36. Nowhere in its decision did the New Hampshire Supreme Court indicate it would have reached a different outcome had the independent contractor engaged in misfeasance as opposed to nonfeasance in maintaining the premises. As noted in

establish Mrs. Joselow's fall was the result of negligence, Able's liability therefor may be properly considered by a jury for apportionment purposes. The Court is unpersuaded.

Several Superior Courts of this State, including this one,[2] have recently concluded that "[t]he 'undertaking' sufficient to trigger liability under Section 324A(b) is narrower than the rule's plain language might suggest." Davey v. Great N. Prop. Mgmt., Inc., Rockingham Cty. Super. Ct., No. 218-2015-CV-01038, at 6 (Jan. 27, 2016) (Order, Delker, J.). Indeed "[a] superficial reading of subsection (b) would lead one to believe that any endeavor to help another in the performance of its duty to protect a third person would lead directly to liability." Plank v. Union Elec. Co., 899 S.W.2d 129, 131 (Mo. Ct. App. 1995). "However, it is clear that this broad and superficial reading was not intended by the drafters of the Second Restatement." Id.; see Restatement (Second) of Torts § 324A cmt. d (1965) (describing a managing agent incurring liability for negligent repairs when he "takes charge" of a building for the owner). "Upon reading the comments and illustrations accompanying subsection (b), it becomes apparent that merely assisting another in the performance of his duty to a third person is not enough to trigger liability." Plank, 899 S.W.2d at 131.

Valenti, while the owner or operator of a premises cannot escape liability in such instances, he or she is free to seek indemnification or contribution from the independent contractor. Id. at 636. Thus, the initial question in the instant matter centers upon whether Able merely owed contractual duties to defendant, and therefore is subject only to a claim of indemnification by defendants, or whether Able owed a tort duty to Mrs. Joselow and other entrants born out of this contractual duty, and therefore is subject to apportionment under DeBenedetto. Whether Able acted or failed to act is immaterial to this analysis, as such conduct only speaks to whether Able breached its contractual duties to defendant if the former is the case, or breached its legal duty to Mrs. Joselow if the latter is the case.

[2] See, e.g., McEneny v. Brady Sullivan Properties, et al., Hillsborough Cty. Super. Ct. N. Dist., No. 216-2016-CV-00113 (Nov. 8, 2016) (Order, Brown, J.); Powell v. Cameron Real Estate Inc., et al., Hillsborough Cty. Super. Ct. N. Dist., No. 216-2016-CV-00074 (October 3, 2016) (Order, Abramson, J.); Wallace v. Eastgate Apartment Assocs., LLC., et al., Hillsborough County Super. Ct. N. Dist., No. 216-2015-CV-00285 (Nov. 30, 2015) (Order, Nicolosi, J.); Lavoie v. Bank of Am. Nat'l Ass'n, et al., Rockingham Cty. Super. Ct., No. 218-2012-CV-00947 (Order, Delker, J.); see also Wood v. Springwise Facility Management, Inc. et al., Strafford Cty. Super. Ct., No. 216-2016-CV-00034 (Sept. 13, 2016) (Order, Howard, J.); Anderson v. Demoulas Supermarkets, et al., Cheshire Cty. Super. Ct., No. 04-C-0050, 05-C-0008 (July 1 2005) (Order, Arnold, J.).

"Rather, one must intend to completely subsume or supplant the duty of the other party in order to incur liability for nonperformance of that duty[,] [and] [i]t is not enough merely to intend to supplement the duty of the other party." Id.; see Hutcherson v. Progressive Corp., 984 F.2d 1152, 1156 (11th Cir. 1993) ("[F]or liability to be imposed under section 324A(b), a party 'must completely assume a duty owed by [another] to [the third person].'"); Ricci v. Quality Bakers of Am. Coop. Inc., 556 F. Supp. 716, 721 (D. Del. 1983) ("In order to prevail under section 324A(b), plaintiff must establish that the one who undertook a duty to inspect supplanted and not merely supplemented another's duty to inspect."); Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus, 801 N.W.2d 193, 202 (Minn. Ct. App. 2011) ("[T]o impose liability under section 324A(b), one who undertakes a duty owed by another to a third person must completely assume the duty.").

Applying the foregoing principles to the instant matter, the Court finds defendants' DeBenedetto disclosure fails to set forth a sufficient basis to establish Able "completely assumed" the asserted duty to Mrs. Joselow and other entrants under Section 324A(b). Though defendants contend Able was responsible "for inspecting and remedying wet spots" under the terms of the contract, they point to no term, provision, or clause therein to support this contention. Contrary to the foregoing, the contract largely imposes specifically delineated daily, weekly, and monthly obligations centered upon cleaning the Mall—i.e. picking up trash, vacuuming, cleaning and polishing walls, pillars, windows, doors, floors, etc. To the extent it imposes any obligation on Able with respect to the Mall's floor, the contract specifies that floors are to be cleaned once per

shift or round, and in no way requires regular or continuing inspection or monitoring of the same. (See Defs.' DeBenedetto Disclosure Ex. A.)

In a similar vein, neither the contract, nor the duties it imposes, evinces that Able's services were contracted for with the intent that Able would ensure the Mall premises, or any part thereof, remained in a safe condition for entrants.[3] Cf. Pinkham v. Nassar Landscape & Irrigation, Inc., Rockingham Cty. Super. Ct., 218-2015-CV-00878, at *2, 6 (July 18, 2016) (Order, Wageling, J.) (finding allegations sufficient to establish snowplow contractor completely assumed landowner's duty of care where, in pertinent part, the contract between the two required the contractor to conduct "on-going ice patrol" and inspect the property on a "frequent basis."). Rather, as indicated above, the intent appears to be based upon ensuring the Mall's cleanliness and sanitation.

Accordingly, for the foregoing reasons, the Court finds defendants engaged Able's services *at the most* to supplement, and *not* to wholly supplant, its duty as landowner to inspect for and remedy wet spots throughout the Mall. Under these circumstances, while Able may have owed certain contractual duties to defendants, it owed no tort duty to third party entrants such as Mrs. Joselow. See Carignan, 151 N.H.

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[3] The Court is equally unpersuaded by defendants' reliance on the following excerpt from plaintiffs' automatic disclosure in support of its position that Able completely assumed the asserted duty:

> As we came in to the Mall . . there were mats that were soaking wet. As soon as I stepped off the mat. I slipped on the ceramic tile flooring. The floor was wet. There was a warning cone ahead of us and to the left of where I fell but I did not see it as we entered the Mall because I was walking behind my Husband and Daughter. I did not see the cone until after I fell while I was lying on the floor.

(See Defs.' DeBenedetto Disclosure Ex. A.) Citing the foregoing, defendants contend Able voluntarily undertook to address the water accumulation leading to Mrs. Joselow's fall and to warn of the same by placing warning signs in the area of her fall and therefore owed a duty. First, the Court notes that there is no allegation, nor evidence, to substantiate that Able, as opposed to another entity, placed the signs in this location. Second, even assuming it did, this act alone does not necessitate a finding that Able "completely assumed" defendants' duty If the mere discharge of a contractual duty was in and of itself sufficient to give rise to a tort duty to third parties, the principles embodied in Section 324A would be unnecessary.

at 412 ("Absent the existence of a duty, a defendant cannot be liable for negligence.") Consequently, defendants' DeBenedetto disclosure lacks sufficient allegations to establish a basis for Able's liability to plaintiffs for apportionment purposes and therefore plaintiffs' motion to strike is GRANTED. In light of the foregoing, plaintiffs' motion to add Able as a defendant, and defendants' objection thereto, are MOOT.

SO ORDERED.

5/1/17
Date

Gillian L. Abramson
Presiding Justice

The State of New Hampshire

CARROLL COUNTY **SUPERIOR COURT**

Jeremiah E. Adinolfi

v.

Lakeview Neurorehabilitation Center, Inc

Docket No.: 212-2014-CV-00043

and

Jessica Moody

V

Lakeview Neurorehabilitation Center, Inc

Docket No.: 212-2014-CV-00044

and

Juli Commerford

v

Lakeview Neurorehabilitation Center , Inc

Docket No.: 212-2014-CV-00045

ORDER

This is a consolidated civil action alleging wrongful termination and associated actions brought by the plaintiffs, Jeremiah Adinolfi, Jessica Moody and Juli Commerford, against the defendant, Lakeview Neurorehabilitation Center. The defendant filed DeBenedetto disclosures with the Court on January 7, 2015. The plaintiff moved to strike the DeBenedetto disclosures on January 21, 2015. The Court held a hearing on the

plaintiff's motions to strike DeBenedetto disclosures on March 13, 2015. The court grants the motions to strike DeBenedetto disclosures for the reasons set forth in this order.

The parties agree that this case is governed by DeBenedetto v CLD Consulting Engineers, Inc., 153 N.H. 793 (2006). Importantly, the Supreme Court ruled in this seminal case that for apportionment purposes under RSA 507:7-e, the word "party" refers to all parties contributing to the occurrence giving rise to an action, including those not before the Court. Id. at 804. The Supreme Court noted "that a defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury may consider it for fault apportionment purposes." Id. In essence, a jury can only apportion fault to a non-litigant after it is convinced that the defendant has established that the non-litigant caused or contributed to the plaintiff's injuries.

The Supreme Court's interpretation and construction of RSA 507:7-e has continued to develop over the years. In Goudreault v Kleeman, 158 N.H. 236, 256 (2009), the Court explicitly stated "that a civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense." Additionally, the court indicated "the defendant carries the burdens of production and persuasion". Finally, "the defendant who raises a non-litigant apportionment defense essentially 'becomes another plaintiff who must seek to impose liability on a non-litigant just as [a] plaintiff seeks to impose it on him.'" Id.

Both DeBenedetto and Goudreault relied upon Gust v Jones, 162 F.3d 587, 593 (10th Cir. 1998). In this case, the Tenth Circuit Court construed Kansas's non-litigant statute noting "allegations that a nonparty's negligence caused a plaintiff's harm must be supported by adequate evidence before the negligence of that person may be argued to the jury or before the Judge may instruct the jury to compare the nonparty's fault." Id.

DeBenedetto expressly adopted this principle of law. However, the Kansas courts do not allow defendants to simply submit evidence regarding non-litigant fault at trial; instead, the Kansas courts require that non-litigant fault must be "adequately raised in the pleadings" and "supported by substantial competent evidence..." Glenn v Flemming, 732 P.2d 750, 753 (Kan.1987); also see State of NH v Hess Corporation, et al., Merrimack County Super. Ct., 03-C-0550 (November 1, 2011) (Order, Fauver, J.). In essence, the defendant must allege specific acts on the part of the non-litigant to adequately raise such a defense. Id.; also see Antolovich v Brown Group Retail, Inc., 183 P.2d 582, 591 (Colo. App. 2008) (citing C.R.S. § 13-21-111.5(3)(b)(2006)).

Proper notice in the DeBenedetto and Goudreault context requires that the defendant provide the plaintiff with "identifying information for the nonparty in addition to a 'brief statement of the basis for believing such nonparty to be at fault'". Antolovich, 183 P. 2d at 591 . Further, the notice under DeBenedetto must allege sufficient facts to connect the non-litigant's fault with the established elements of the plaintiff's claims. Id.; also see Redden v SCI Colorado Funeral Serv., Inc., 38 P.3d 75, 81 (Colo. 2001).

The Defendant provided the following DeBenedetto disclosure to the plaintiffs in this case:

> "2. The Plaintiff was aided and abetted in the conduct which resulted in the termination of his employment by other individuals who were present at the time to wit:
>
> a. Juli Commerford; and,
> b. John-Luger Gauthier."

DeBenedetto disclosures, paragraph 2. 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 fails to connect the alleged facts with the elements of the plaintiffs' wrongful termination claims. Redden, 38 P. 3d at 81. 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 as it relates to the underlying causes of action. The defendant has failed to carry its burden of production through an adequately plead DeBenedetto notice in violation of the standards set forth in DeBenedetto and Goudreault. The court cannot glean from the DeBenedetto disclosure how the defendant seeks to impose liability on the listed non-litigants. Goudreault, 158 N.H. at 256.

The defendant is not permitted to easily shift fault to other parties under RSA 507:7-e. DeBenedetto, 153 N.H. at 804.; also see Wyle v Lees, 162 N.H. 406, 413 (2011). The court will not allow the defendant to shift fault to other parties through an insufficient pleading that fails to identify the factual and legal basis for civil liability as it relates to the non-litigants. For all the reasons stated in this order, the Plaintiff's Motion to Strike Defendant's DeBenedetto Disclosure Re: Nonparties is granted.

So Ordered.

DATED: 3/18/15

Charles S. Temple, Presiding Justice

The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

No. 220-2014-CV-48

DAVID CUMMINGS

v.

MMG INSURANCE COMPANY, *et al.*

ORDER ON MOTION *IN LIMINE* (COMPARATIVE FAULT)

The issue raised by this motion is whether MMG Insurance Company should be barred from presenting evidence of comparative fault on the part of a third party non-litigant, when it did not give notice of this claim in its Answer or identify potentially liable non-litigants (the so-called *DiBenedetto* disclosure) as required by the case structuring order.

In order to remove a deer from the roadway, David Cummings and Adam Pysz stepped out of a van insured by MMG Insurance Company. They were promptly struck by a vehicle driven by Benjamin Watkins. Pysz died from his injuries, but Cummings survived. The Pysz Estate and Cummings brought insurance coverage actions against MMG, which were joined for purposes of discovery only. Cummings sought and won a declaratory ruling that he was an insured under the MMG policy for purposes of its underinsured motorist coverage. The Pysz Estate settled its case with MMG, but a bench trial on

Cummings's claim is scheduled for March, 2017. An issue for trial is what MMG owes Cummings under the policy.

Police accident investigation reports purportedly place blame for the accident on Allan Claflin, who was the driver of the van from which Cummings alighted. The investigators concluded that Claflin bore responsibility for Watkins striking his passengers and his vehicle, because he did not activate his hazard lights and pull the van off the road and into the breakdown lane completely.

MMG alleged in its answer to the Pysz complaint that someone other than Watkins was at fault, but it did not do so in its answer to Cummings. A consolidated case structuring order in the Cummings and Pysz matters directed MMG to disclose to Cummings by January 1, 2015, the identity of any non-litigant it claimed was at fault and the basis for the allegation. MMG made no such disclosure. Cummings moves to bar a claim of comparative fault by Claflin on the basis that the failure to give notice amounts to a waiver of the defense.

Affirmative defenses not identified in a defendant's answer are deemed waived. SUPER.CT.CIV.R. 9(d). The United States Court of Appeals for the First Circuit said by way of dictum that comparative fault is an affirmative defense in New Hampshire, *see Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 175–76 (1st Cir. 1998), but the State Supreme Court has not said so explicitly. In *Brann v. Exeter Clinic, Inc.*, 127 N.H. 155, (1985), the Court noted that "a defendant who seeks to prove negligence should first *allege* it." *Id.* at 159. In

Goudreault v. Kleeman, 158 N.H. 236, 256 (2009) the Court called a claim that fault should be apportioned to a non-litigant, "*something in the nature of* an affirmative defense." (emphasis added.)

It is not necessary to decide whether comparative fault is an affirmative defense subject to waiver under the rule, because MMG was subject to a case structuring order that required it to disclose potentially liable third parties by January 2015. MMG does not say it complied with this order, and exclusion of evidence is a possible sanction. *State v. Cromlish*, 146 N.H. 277, 280 (2001).

MMG argues that formal notice was not necessary because the case for Claflin's fault was apparent from the accident investigation reports obtained by Cummings. MMG discussed the content of these reports in its objection to Cummings's motion for summary judgment on the coverage question. Beyond that, it says that through discovery of documents and discussions among counsel, it was well-known to all parties that Allan Claflin was accused of bearing at least some responsibility for the collision. But all this shows is that MMG had a basis for pleading and giving notice of a comparative fault claim. By not giving notice that it *would* attribute fault to Claflin, Cummings had no reason to prepare to meet that claim.

MMG asserts as well that it was under no obligation to plead Claflin's negligence as a defense, because the general denial of liability in its answer "serves as '. . . a traverse of the facts alleged in the [Cummings'] pleadings.'" Def. Obj., ¶ 4 at p. 5. In other words,

evidence of Claflin's negligence is simply a way of refuting Cummings's claim that Watkins's negligence caused his injuries. *Id.* (citing *Meaney v. Rubega*, 142 N.H. 530, 532 (1997)).

"[A] distinction may be drawn ... between the introduction of evidence in support of an affirmative defense and the introduction of the same evidence to refute the plaintiff's allegations of causation raised in the complaint and denied in the answer." *Marino v. Otis Engineering Corp.*, 839 F.2d 1404, 1408 (10th Cir. 1988) (trial court properly "refused to permit the evidence in question to be considered for any purpose other than the refutation of the plaintiff's prima facie case.") However, "[a] defense that the defendant did not cause the plaintiff's injuries is not equivalent to the designation of a non-party because it cannot result in apportionment of liability, but rather is a complete defense if successful." *Redden v. SCI Colorado Funeral Services, Inc.*, 38 P.3d 75, 81 (Colo. 2001).

When a defendant contends there is comparative fault by a non-party, it must do more than simply refute the plaintiff's claim that it (or the party in whose shoes it stands) was negligent. In seeking to apportion liability, it "carries the burdens of production and persuasion" and "essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." *State v. Exxon Mobil Corp.*, 168 N.H. 211, 259 (2015) (quotation omitted). The cases cited earlier establish the defendant's responsibility to give formal notice when it intends to claim a third party is at fault. There is also the matter of the case structuring order, which specifically directed MMG to disclose

blameworthy non-litigants by a certain date. As a result of the omission to give notice, Cummings's motion to bar MMG from proving Allan Claflin's comparative fault (document no. 16) is GRANTED.

Trial is not until March 2017, and a party may always move to file a late *DiBenedetto* notice or amend its answer. *See Brann*, 127 N.H. at 160. If MMG does so, it should explain why Cummings is not prejudiced by the late disclosure.

SO ORDERED.

DATE: SEPTEMBER 23, 2016

Brian Tucker

BRIAN T. TUCKER
PRESIDING JUSTICE

NEW HAMPSHIRE BAR ASSOCIATION

Conflicts Arising from *DeBenedetto* Disclosures

Ethics Committee Advisory Opinion #2017-18/2

ABSTRACT:

Under the New Hampshire Supreme Court's opinion in *DeBenedetto v. C.L.D. Consulting Engineers, Inc.*, 153 N.H. 793 (2006), a civil defendant who intends to request apportionment of fault to a nonparty must disclose the identity of any such nonparty ("DeBenedetto party") prior to trial. Although the mere fact of this disclosure does not result in the DeBenedetto party becoming a party to the pending litigation, a concurrent conflict of interest under Rule 1.7(a) will arise if the defendant's lawyer also represents a potential DeBenedetto party. This is because the defendant and the DeBenedetto party are directly adverse to one another, and because the joint representation of both the defendant and the DeBenedetto party creases a significant risk that the lawyer's responsibility to one client will materially limit the lawyer's representation of the other client.

The Ethics Committee was unable to reach a consensus as to whether conflicts arising from DeBenedetto disclosures could ever be waived under Rule 1.7(b). All members of the Committee agree that there are some cases in which such conflicts are nonwaivable because, under the particular facts and circumstances of the case, no lawyer could form an objectively reasonable belief that he or she could provide competent and diligent representation to each affected client. Some on the Committee believe that there are no circumstances in which an attorney can develop that objectively reasonable belief. Other members of the Committee believe that it would be inappropriate to endorse a per se rule barring such waivers and believe that waiver can be appropriate in DeBenedetto situations if the clients are sophisticated and knowingly make an informed choice to waive the conflict. In any case, members of the bar should proceed with caution when encountering such situations, ensuring that they have fully complied with their obligations under the Rules of Professional Conduct and do not run afoul of Rule 1.7.

ANNOTATIONS:

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.

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.

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.

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.

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.

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.

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.

BACKGROUND

In 1989, New Hampshire passed a law adopting several liabilities for those parties "less than 50 percent at fault." *See* RSA 507:7-e, I(b). In 2006, the New Hampshire Supreme Court held that a defendant may request that the jury apportion fault for the plaintiff's injuries to a person or entity not before the court. *DeBenedetto v. C.L.D. Consulting Engineers, Inc.*, 153 N.H. 793 (2006).

A defendant who intends to request such apportionment, however, must disclose the identity of any nonparty to whom it hopes to apportion fault ("DeBenedetto party") in advance of trial. Since it may require investigation and discovery to determine the identity of a DeBenedetto party, the court will ordinarily allow the defendant a number of months before the disclosure is due.

The mere fact of the disclosure does not result in the DeBenedetto party becoming a party to the pending litigation (although the plaintiff may later seek to amend the complaint to add a disclosed DeBenedetto party as a defendant). After naming a DeBenedetto party, a defendant bears the burden of establishing that the DeBenedetto party caused or contributed to the plaintiff's injuries; if the defendant presents sufficient evidence at trial, the jury may be asked to

determine the percentage of fault attributable to the DeBenedetto party. This apportionment alone, however, does not result in any financial liability on the part of the DeBenedetto party.

While DeBenedetto parties are frequently identified at the outset of litigation, the identity of a potential DeBenedetto party is sometimes not known until the defense attorney has invested a significant amount of time in the case. Sometimes, the potential DeBenedetto party may turn out to be an existing client of the defense attorney or the attorney's firm in an unrelated matter.

This opinion will tackle two questions. First, if an attorney who represents a defendant in ongoing litigation identifies a potential DeBenedetto party that is another current client, does that create a concurrent conflict of interest under Rule 1.7(a)? Second, if that does create a concurrent conflict of interest, is that conflict waivable under Rule 1.7(b)?

ANALYSIS

I. CONCURRENT CONFLICT OF INTEREST

NHRPC Rule 1.7(a) provides the definition of concurrent conflicts.

> A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The language of NHRPC Rule 1.7(a) is identical to the Model Rules of Professional Conduct (ABA 2004) ("Model Rules"). These two alternative avenues by which a concurrent conflict may arise are frequently referred to as "direct adversity" and "material limitation" conflicts, respectively.

Both direct adversity and material limitation conflicts arise due to the nature of a DeBenedetto apportionment defense. Comment 6 to the Model Rules provides some assistance in determining whether the representation of the original defendant is directly adverse to the DeBenedetto party under Rule 1.7(a)(1). In particular, Comment 6 provides in part:

> Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

In naming a DeBenedetto party, a lawyer is not seeking some relief from (or seeking to avoid giving damages or other relief to) the DeBenedetto party. Yet it is unquestionable that the lawyer who names a DeBenedetto party in ongoing litigation becomes "an advocate" against that party. As the New Hampshire Supreme Court has explained, "a defendant who raises a non-litigant

apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." *State v. Exxon-Mobil Corp.*, 168 N.H. 211, 259 (2015) quoting *Goudreault v. Kleeman*, 158 N.H. 236, 256 (2009).

The naming of a current client as a DeBenedetto party also raises "material limitation" conflicts under Rule 1.7(a)(2), since the lawyer's duty of loyalty to the DeBenedetto party/client will frequently "materially limit" that lawyer's ability to pursue a DeBenedetto apportionment defense on behalf of the lawyer's litigation client.

The Committee found only one other state ethics opinion that addressed DeBenedetto-type conflicts, Arizona Ethics Opinion 03-04 (2003). That opinion dealt with a different version of Rule 1.7. It concluded:

> If the applicable statute of limitations has run, identifying a client as a non-party at fault in another client's litigation, pursuant to Ariz. R. Civ. P. 26(b)(5), does not necessarily establish a conflict of interest under ER 1.7 because a non-party at fault cannot be assessed liability. A.R.S. § 12-2506(B). However, if the statute of limitations has not run, naming a client as a non-party at fault does create a conflict under ER 1.7, because it identifies the client as a potential defendant to other parties, who may then amend the complaint to add the client as a party.
>
> Whether the conflict is waivable under ER 1.7(b) will depend on such facts as whether the statute of limitations has run, the legal sophistication of the affected client, and the ancillary effects of naming the client as a non-party at fault. If the conflict is waivable, then pursuant to ER 1.7(b)(2), the client named as a non-party at fault must give informed consent to the waiver.

This Committee does not agree that the absence of potential liability (due to the running of the statute of limitations for example) disposes of the broader conflict question. When seeking to deflect fault by apportionment to the DeBenedetto party, "the defendant carries the burdens of production and persuasion." *State v. Exxon-Mobil Corp.*, *supra*. Thus, even if the DeBenedetto party is not joined as a formal defendant by the plaintiff or is immune from liability, the lawyer must anticipate the need to pursue litigation that is adverse to the interests of the DeBenedetto party in other ways.

The lawyer may, for example, need to cross examine the DeBenedetto party/client in order to establish the apportionment defense. As discussed in comments to the ABA model rules, this can lead to direct adversity conflicts under NHRPC 1.7(a)(1):

> ... [A] directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

ABA Comment 6 to NHRPC Rule 1.7. These circumstances can also give rise to a "material limitation" conflict under NHRPC 1.7(a)(2), since the lawyer's ability to cross-examine the DeBenedetto client aggressively on behalf of his or her litigation client may be undermined by his or her concurrent fiduciary duties to (and desire to maintain an amicable relationship with) the DeBenedetto client.

To carry the burden of proof under RSA 507-7:e and successfully argue that liability should be apportioned to a non-party client, trial counsel will also likely be required to seek third-party discovery from that client, forcing the client to incur the costs of responding to written discovery. Seeking discovery from that client can also present the very same situation alluded to in the ABA commentary cited above, requiring the attorney to cross-examine his or her non-party client on behalf of the other client. *Cf.* ABA Standing Comm. on Ethics & Prof'l Resp., *Lawyer Examining a Client as an Adverse Witness, or Conducting Third Party Discovery of the Client*, ABA Formal Op. 92-367, at 5-6 (Oct. 16, 1992) (discussing nature of conflicts presented by this situation). And if the non-party client does not want to relinquish that discovery, the attorney may have to seek court intervention to obtain it — in the process becoming a direct litigation opponent of that client.

In addition, to apportion liability successfully to a DeBenedetto party, an attorney will frequently need to develop and disclose expert testimony regarding the DeBenedetto client's liability for, and causation of, the injuries at issue in the litigation. The DeBenedetto party will likely suffer damage, such as lost time for its employees and expenses for representation, and may even suffer damage to reputation in certain cases. For all these reasons, the Committee has concluded that the two clients will be directly adverse under NHRPC Rule 1.7(a)(1), and that the litigation lawyer will often have a "material limitation" conflict under NHRPC Rule 1.7(a)(2) due to his or her conflicting responsibilities to the client that is targeted through the DeBenedetto defense and the client asserting that defense. *See also Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981) ("specific adverse effect need not be demonstrated to trigger [the predecessor of Rule 1.7] if an attorney undertakes to represent a client whose position is adverse to that of a present client").

Accordingly, this Committee concludes that the representation of the original defendant in the pursuit of a DeBenedetto apportionment defense will create concurrent conflicts of interest that must be resolved before the representation is undertaken and/or continued.

II. Waiver Of Conflict

The existence of the concurrent conflict of interest does not necessarily end the analysis. NHRPC Rule 1.7(b) provides an explicit exception to such conflicts.

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Because the pursuit of a DeBenedetto defense against a current client will create concurrent conflicts under Rules 1.7(a)(1-2), both the litigation client and the DeBenedetto client would have the power to refuse to waive the concurrent conflicts and thereby prohibit the representation. Before reaching the mechanics of a valid waiver, however, the Ethics Committee devoted substantial time to the preliminary and more difficult question of whether the lawyer may even, consistent with Rule 1.7(b), seek conflict waivers from both clients that would allow the attorney to undertake or continue the litigation.

The Committee was unable to reach consensus as to whether DeBenedetto conflict waivers are permissible. Some members of the Committee felt strongly that in a DeBenedetto scenario, a lawyer could not reasonably conclude that he or she could "provide competent and diligent representation to each affected client," and that waivers of such conflicts therefore must be categorically barred under Rule 1.7(b)(1). Other members of the Committee felt equally strongly that it would be inappropriate to endorse a per se rule barring such waivers. All members of the Committee agreed, however, that at least in some situations, DeBenedetto conflicts are nonwaivable.

A. At Least In Some Situations, The Conflicts Inherent in The Pursuit of a DeBenedetto Defense on Behalf of One Client Against Another Client Will Not Be Waivable.

As set forth in NHRPC Rule 1.7(b)(1), a lawyer may seek informed consent from each of the affected clients for continued representation under a concurrent conflict of interest only if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client". The ABA's comments to Model Rule of Professional Conduct 1.7, Rule 1.7(b)(1) explain that continued representation is prohibited if "in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation (to each affected client)". ABA Model Rules of Professional Conduct 1.7, cmt. 15. In such circumstances, "the lawyer involved cannot properly ask for" a client to waive the conflict "or provide representation on the basis of the client's consent." *Id.* cmt. 14.

The Committee recognizes that conflicts can arise in a wide variety of factual circumstances, and the general rule is that determining waivability of a conflict requires a case-by-case analysis of the particular circumstances presented by each case. *See* NHRPC Rule 1.7, Ethics Committee Comment. However, the Committee cautions attorneys facing DeBenedetto conflicts that there are certain types of situations where pursuit of a waiver of a DeBenedetto conflict will not be possible (and will frequently be unwise from a risk-management perspective).

In this regard, the Committee's opinion is guided by the "harsh reality" test that has been applied in New Hampshire in this Committee's previous ethics opinions for almost thirty years. *Id.* This test is a rigorous one, calling for an attorney's decision to continue representation in the face of a concurrent conflict to be scrutinized retrospectively after something goes wrong in the litigation. Under this test, the subjective belief of an attorney that he or she could provide competent, diligent representation to both clients, although required under Rule 1.7(b)(1) before seeking a waiver, does not determine the viability of the waiver if challenged by either client after-the-fact (in malpractice litigation or disciplinary proceedings, for example). Rather, the court, jury or Professional Conduct Committee must "look back at the inception of the representation" and determine whether a "disinterested lawyer" would "seriously question the wisdom of . . . requesting the client's consent to [the] representation or question whether there had been full disclosure to the client prior to obtaining the consent." *Id.*, quoting from N.H. Ethics Opinion 1988-89/24. The test, therefore, is one of objective reasonableness.

Some on the Committee believe that there are no circumstances in which an attorney can develop the objectively reasonable belief necessary to request conflict waivers in order to develop a DeBenedetto apportionment case on behalf of one of his or her current clients against another current client. As discussed previously, the areas of adversity and antagonism that can arise in such situations are wide-ranging, involving compelling the DeBenedetto party client to incur litigation fees, the pursuit of adverse discovery against the DeBenedetto party, the development of expert witnesses to testify against the DeBenedetto party on issues of liability and causation, questions concerning the use of protected or confidential information against the DeBenedetto party, the potential for motions to disqualify the litigation attorney by lawyers retained by the DeBenedetto party, reputational harm to the DeBenedetto party, and litigation exposure if the plaintiff chooses to add the DeBenedetto party as a co-defendant. Given these and other significant areas of potential adversity, which create both "direct adversity" and "material limitation" conflicts for the trial attorney, some members of the Ethics Committee believe that a "disinterested lawyer" would seriously question an attorney's decision to undertake or continue the representation of a civil defendant in a case in which a meritorious *DeBenedetto* claim against another current client is available—and that a waiver of the conflict cannot and should not be sought, i.e. that the conflicts are non-waivable.

Further, even if the objectively reasonable belief necessary to approach clients for conflict waivers can be formed, it is frequently difficult to predict the types of conflict that may arise in the future as the DeBenedetto apportionment defense is pursued. When conflict waivers are

challenged, it can often be the case that the conflict that has caused harm has not been set forth and explained in the conflict waiver letter—undermining the lawyer's argument that "informed consent" was obtained.

As discussed in more detail in the following section, however, others on the Committee differ significantly and believe that waiver can be appropriate in DeBenedetto situations, as well as other direct adversity conflict cases, if the clients are sophisticated and knowingly make an informed choice to waive the conflict.

B. THE VIEW THAT UNDER LIMITED CIRCUMSTANCES, INFORMED CONSENT WAIVERS MAY BE PERMISSIBLE.

Some on the Committee believe that there may be circumstances in which a lawyer may, consistent with Rule 1.7(b), seek a waiver of DeBenedetto concurrent conflicts, and undertake or continue in the litigation if informed consent is provided by both clients. They point to the language of NHRPC Rule 1.7(b), which explicitly allows an attorney to seek waiver, provided the requirements set forth in the Rule are satisfied.

Those members of the Committee argue that there are many circumstances that could lead rational DeBenedetto parties and litigation clients to consent to waiver. As the leading treatise on professional responsibility states:

> Many clients do consent in these [direct adversity] situations. One reason is simply that it is not worth the trouble to object, where no real detriment appears. A large business may have dozens or hundreds of cases pending at one time, and they are handled as a matter of business routine. If the law firm seeking consent is denied consent, some other law firm will quickly step in, and little will have been gained for significant interests of the company. … Another reason is that a company that has had good experience dealing with a law firm as its counsel may conclude that it is better to be sued by lawyers who are competent and trustworthy than unknown entities who might use questionable litigation tactics or be unreasonable during settlement negotiations. Of course, this relaxed attitude on the part of clients is unlikely to hold in major "bet the company" litigation, or where fraud or other serious wrongdoing is alleged.

Hazard, Hodes and Jarvis, *The Law of Lawyering* (4th ed.), § 12.32, p. 12-87 (Wolters Kluwer 2018).

The Restatement also suggests that there are situations where waiver is permissible:

> Decisions holding that a conflict is nonconsentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict. Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.

Restatement (Third) of the Law Governing Lawyers § 122, comment g(iv) (references to other comments omitted).

While the use of independent, outside counsel to advise either client on the significance of the concurrent conflicts may be an effective means of ensuring that the clients provide "informed consent", it does not eliminate the lawyer's independent responsibility under Rule 1.7(b)(1) to analyze the conflicts he or she faces and determine whether "competent and diligent representation" of each affected client is possible.

Some on the Committee also felt that a per se rule barring any waiver in such situations could interfere unnecessarily with the rights of lawyer and client. The following case summarizes the concerns shared by those members of the Committee:

> [An] inflexible application of a professional rule is inappropriate because frequently it would abrogate important societal rights, such as the right of a party to his counsel of choice and an attorney's right to freely practice her profession. A court must take into account not only the various ethical precepts adopted by the profession but also the social interests at stake. Among the factors that we have considered in the past are "whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case."

FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995).

C. EVEN IF WAIVER IS PERMISSIBLE UNDER RULE 1.7(B)(1), AN ATTORNEY SHOULD EXERCISE CAUTION.

To determine if a waiver is permissible under Rule 1.7(b), the lawyer must carefully comply with all four sections of the rule. Section (b)(2), barring waivers that are "prohibited by law," will not apply in most cases. Section (b)(3), barring waivers of conflicts that arise among parties to "the same litigation or proceeding," will not be implicated as long as the lawyer does not offer representation to the DeBenedetto party if that party is brought into the current litigation by the plaintiff. The other two sections will be dealt with separately below.

INFORMED CONSENT. Section 1.7(b)(4) requires that the client give informed consent in writing. "A precise definition of 'informed consent' and 'full disclosure' is difficult, necessitating a case-by-case factual analysis." *Celgene Corp. v. KV Pharm. Co.*, 2008 U.S. Dist. LEXIS 58735, 26-27 (D.N.J. 2008) (holding an advance waiver ineffective). Courts and treatises have set demanding standards for obtaining informed consent.

> Determining whether a client provided adequate informed, written waiver of a representational conflict is a fact-specific inquiry, and the courts consider, among other things, the breadth of the waiver, whether it waived a current conflict or whether it was

> intended to waive all conflicts in the future, the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict, the sophistication of the client, and the interests of justice. The requirements for full disclosure, for purposes of a client's consent to a conflict, turn on the sophistication of the client, whether the lawyer is dealing with inside counsel, the client's familiarity with the potential conflict, the longevity of the relationship between the client and the lawyer, the legal issues involved, and the ability of the lawyer to anticipate the road that lies ahead if the conflict is waived.

32 Am. Jur. 2d Federal Courts § 157.

REASONABLE BELIEF. In addition to the need for informed consent, Section 1.7(b)(1) requires that the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client. Under this section, as discussed above, there will clearly be some conflicts that are nonconsentable. ABA Model Rule 1.7, Comment 14.

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to both clients.

Id., Comment 15.

The Restatement offers a similarly cautious view of consentability.

> Concern for client autonomy generally warrants respecting a client's informed consent. In some situations, however, joint representation would be objectively inadequate despite a client's voluntary and informed consent. ... The general standard stated in Subsection (2)(c) assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either client and that it not adversely affect the representation of either client. In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is non-consentable.

Restatement, *supra*, at comment g(iv).

HARSH REALITY. The Restatement's standard is akin to the Harsh Reality Test, described above. *See* Ethics Committee Formal Opinion #1988-89/24. The Committee wishes to underscore that while pursuit of waivers may be permissible in limited circumstances, New Hampshire courts and disciplinary authorities will likely assess the adequacy of the explanation and disclosure of

the concurrent conflicts retrospectively under the "harsh reality test" — a test that may be difficult to meet if the conflicts ultimately are the arguable cause of either an unsatisfactory result, or unexpected injuries, for the litigation client or the DeBenedetto client.

Since in practice, it can be difficult to determine whether a lawyer can meet the requirements of Rules 1.7(b)(1) and 1.7(b)(4), one commentator has suggested a test.

> An informed conflict waiver must be rejected as incompetent if limitations on the means or procedures by which the attorney pursues the matter caused by the conflict of interest are likely to defeat the client's objectives for the representation. In the subsections that follow, we will elaborate on the core elements of the proposed test: (1) the identification of client objectives; (2) the limits on the means that can be undertaken by counsel as a result of the conflict; and (3) the "likely to defeat" standard.

What Conflicts Can Be Waived? A Unified Understanding of Competence and Consent, 65 Rutgers L. Rev. 109, 138 (2012). *See also When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflicts Law*, 33 Willamette L. Rev. 145 (1997).

III. CONCLUSION

As set forth above, this Committee concludes that a concurrent conflict of interest under Rule 1.7(a) arises when an attorney, representing one client in civil litigation, attempts to apportion liability to another current client under RSA 507:7-e and *DeBenedetto*.

All members of the Committee agree that, at least in some circumstances, these types of conflicts are nonwaivable under Rule 1.7(b). Some members of the Committee take an even broader view: they would conclude that such conflicts could never be waived. Others on the Committee conclude that there may be circumstances in which the pursuit of informed consent is permissible, including situations in which the client(s) receive independent counsel or advice prior to a decision on waiver of the concurrent conflicts; cases where the party waiving is sophisticated in legal matters or business issues; cases in which liability/damages apportioned to the DeBenedetto party/client is not likely to be significant; cases in which the DeBenedetto claim is unlikely to require discovery, depositions or litigation costs for the DeBenedetto party; and other similar situations.

Ultimately, the areas of disagreement among the Committee's members should not detract from the central message of this Opinion: DeBenedetto conflicts are real and serious. When encountering them, members of the bar should proceed with caution, ensuring that they have fully complied with their obligations under the Rules of Professional Conduct and do not run afoul of Rule 1.7.

NH RULES OF PROFESSIONAL CONDUCT:

NHRPC 1.7(a)(1)
NHRPC 1.7(a)(2)

NHRPC 1.7(b)

SUBJECTS:

Concurrent Conflicts of Interest
Waivability of Conflicts of Interest

- **By the NHBA Ethics Committee**
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