THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2018-0425

EILEEN BLOOM

v.

CASELLA CONSTRUCTION, INC.

**RULE 7 MANDATORY APPEAL
OF BELKNAP COUNTY SUPERIOR COURT,
DECISIONS ON MOTIONS FOR SUMMARY
JUDGMENT**

BRIEF OF DEFENDANT-APPELLEE CASELLA CONSTRUCTION, INC.

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QUESTIONS PRESENTED

1. Whether the Trial Court properly granted summary judgment in favor of Defendant Casella Construction, Inc. ("Casella"), in finding that it owed no duty to Plaintiff Eileen Bloom ("Bloom") pursuant to the Snow Plowing Agreement (the "Agreement") entered into by Casella and Dartmouth Hitchcock Medical Center ("DHMC")?

2. Whether the Trial Court properly granted summary judgment in favor of Casella in finding that Section 324A of the Restatement (Second) of Torts did not impose liability on Casella for the injuries allegedly sustained by Bloom?

3. Whether the Trial Court properly granted summary judgment in favor of Casella in finding that public policy concerns raised by Bloom did not create a duty on the part of Casella?

STATEMENT OF THE CASE

On December 23, 2016, Bloom filed an action against Casella, alleging negligence in connection with a slip and fall accident (the "accident") that allegedly took place in a parking lot located at the Main Campus of DHMC on or about December 30, 2013. (App. 3-4).[1] At the time of the accident, Bloom was an employee of DHMC. (App. 3). At the time of the accident, Casella was under contract with DHMC to provide certain snow removal services at the DHMC Main Campus. (App. 23-32). The Agreement was executed on or about May 6, 2013. (App. 23). Casella was not responsible for all snow and ice removal services at the Main Campus. (App. 23-32). DHMC retained responsibility for several snow- and ice-related tasks. (App. 23-32). Bloom was not a party to the Agreement. (App. 23-32).

Bloom's Statement of the Case improperly states facts unsupported by the record, primarily as it pertains to the obligations of Casella and DHMC to sand and salt the parking lots at the DHMC Main Campus. Bloom's Statement of the Case states that "sand and salt were to be applied so as to meet the objectives of the 'Snow Removal Policy,'" but omits the fact that the Agreement clearly and unequivocally states that "[s]alting and sanding will be done by DHMC unless assistance is asked and direction given by the DHMC Grounds Supervisor or his designee," and further states that Casella "shall apply salt and/or sand only as directed by the DHMC Grounds Supervisor or his designee . . . ." (App. 31). Bloom's Statement of the Case implies that sanding and salting were the responsibilities of Casella, but the clear and unambiguous language of the Agreement provides that these services were the responsibility of DHMC. This was confirmed by Steven Cutter, the Director of Engineering Services at DHMC. (App. 35-36, 165-167).

On February 8, 2018, Casella moved for summary judgment on the grounds that it did not owe a duty to Bloom and, accordingly, was not liable for the accident and for Bloom's alleged injuries. (App. 10-20). Bloom objected to Casella's motion for

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[1] Citations to the Appendix to the Brief of Plaintiff-Appellant Bloom are made at "App ___."

summary judgment on March 12, 2018. (App. 86-100). On June 7, 2018, after hearing, Judge James D. O'Neill, III granted Casella's motion, finding that: (1) Casella owed no duty to Bloom on the date of the accident; (2) Section 324A of the Restatement (Second) of Torts did not impose liability on Casella for the accident; and (3) that public policy concerns raised by Bloom did not create a duty running from Casella to Bloom. (Br. 39-48).[2] Bloom moved for reconsideration on June 15, 2018 (App. 177-186), which was denied by the court on June 29, 2018 (Br. 49-50). This appeal follows.

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[2] Citations to the decisions and orders of the Trial Court, affixed to the end of Plaintiff-Appellee's Brief, are made as "Br. _____".

STATEMENT OF THE FACTS

1. The Complaint

In the Complaint, Bloom alleges that she sustained bodily injuries after she slipped and fell in the parking lot at DHMC's Main Campus, where she worked as a nurse. (App. 3-4). Bloom alleges that Casella "had a duty to employ reasonable care to maintain the premises in a reasonably safe condition for those such as the plaintiff . . . ." (App. 4). Bloom alleges that Casella breached the duty that it allegedly owed to Bloom by inadequately performing its contractual snow and ice removal services. (App. 3-4). Following the accident, Bloom received workers' compensation benefits from DHMC. (App. 93). Accordingly, Bloom is barred from bringing a negligence action against DHMC. (App. 93).

2. The Casella/DHMC Agreement

On or about May 6, 2013, Casella and DHMC executed the Agreement. (App. 23-32). Pursuant to Part 7, Responsibilities of Casella Construction, of the Agreement, Casella was required to "coordinate with [DHMC] to provide all services in accordance with Exhibit 'C.'" (App. 24). Pursuant to Exhibit C, sanding and salting was the responsibility of DHMC: "Salting and sanding will be done by DHMC unless assistance is asked and direction given by the DHMC Grounds Supervisor or his designee." (App. 31). Exhibit C further provided that "[Casella] shall apply salt and/or sand only as directed by the DHMC Grounds Supervisor or his designee . . . ." (App. 31). DHMC's primary responsibility for salting and sanding the parking lots (including where Bloom allegedly fell) at the time of the accident was confirmed by Steven Cutter, DHMC's Director of Engineering Services:

> Q. In 2013, did the hospital retain any responsibility for salting on its own and by that I mean, did the hospital's own employees sand and salt and parking lots or was that –
>
> A. Yes.
>
> Q. Okay. Who from the hospital did do that activity?

A. Any one of our maintenance crew could have done that. It depended on the area and time of day.

Q. The area where the plaintiff in this case fell, she has identified as lot 6, is that an area where the hospital's own maintenance crews would have salted on their own in 2013?

A. If they saw the conditions to be slippery.

Q. Suppose it were between a snowstorm and Dartmouth-Hitchcock's maintenance crews found a slippery area, for example, in parking lot 6, would they have had Casella come and address it, or would they have addressed it on their own?

A. They typically would have handled it on their own.

(App. 165-166).

Beyond sanding and salting, DHMC retained additional control over the snow removal services performed by Casella. For example, DHMC directed Casella where to pile snow: "Snow to be piled in designated areas only. When these areas are full it will be [DHMC's] responsibility to truck the snow offsite." (App. 32). DHMC also retained responsibility for inspecting the premises between storms and salting between storms if necessary. (App. 35-36). Simply stated, in the words of Mr. Cutter, "[Casella's] work was limited just to the scope in [the Agreement]." (App. 35).

SUMMARY OF THE ARGUMENT

1. The Trial Court correctly entered summary judgment in favor of Casella and found that it owed no duty to Bloom at the time of the accident. The Trial Court correctly determined that there was no privity of contract between Casella and Bloom, nor was Bloom a third-party beneficiary of the Agreement derived from the "mutuality of interests" between herself and DHMC. Further, the Trial Court correctly determined that the exception to the privity requirement outlined in Hungerford v. Jones, 143 N.H. 208 (1998), did not apply to Bloom's claim against Casella, because Casella's snowplowing services under the Agreement did not constitute "unreasonably dangerous conduct." This is consistent with several New Hampshire Superior Court decisions, all of which have stated that snowplowing services are not an unreasonably dangerous activity. See, e.g., McEneny v. Brady Sullivan Props., et al., Hillsborough Cty. Super. Ct., 216-2016-CV-00113 (Nov. 8, 2016) (Order, Brown, J.), at 4 (App. 38-42); Wood v. Springwise Facility Mgmt., Inc., et al., Strafford Cty. Super. Ct., 219-2016-CV-00034 (Sept. 23, 2016) (Order, Howard, J.), at 10 (App. 45-60); Powell v. Cameron Real Estate, Inc., et al., Hillsborough Cty. Super. Ct., 216-2016-CV-00074 (Oct. 3, 2016) (Order, Abramson, J.), at 5 (App. 62-70); Lavoie v. Bank of Am., Hillsborough Cty. Super. Ct., 218-2012-CV-0947 (Dec. 17, 2013) (Order, Delker, J.), at 6 (App. 72-78); Dunshee v. Burhoe, et al., Grafton Cty. Super. Ct., 215-2011-CV-526 (Nov. 2, 2012) (Order, Bornstein, J.), at 4 (App. 80-85). The cases cited by Bloom in her Brief, which purportedly stand for the proposition that Bloom can maintain the instant case against Casella, are distinguishable from the instant case.

2. The Trial Court correctly entered summary judgment in favor of Casella and found that Section 324A of the Restatement (Second) of Torts did not impose liability on Casella for the accident or for Bloom's alleged injuries. The undisputed factual record before the Court establishes that: (1) Casella's alleged failure to exercise reasonable care did not increase any risk of harm to Bloom; (2) Casella did not undertake to perform a duty owed by DHMC to Bloom; and (3) Bloom's alleged injuries did not arise out of her reliance on Casella's snow removal services. Accordingly, Casella

cannot be held liable for Bloom's alleged injuries under Section 324A of the Restatement (Second) of Torts.

3. The Trial Court correctly entered summary judgment in favor of Casella and found that the "public policy" concerns raised by Bloom did not impose a duty on Casella for Bloom's alleged injuries.

ARGUMENT

1. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF CASELLA BECAUSE IT DID NOT OWE A DUTY TO BLOOM AND THUS WAS NOT LIABLE FOR THE ACCIDENT OR FOR BLOOM'S ALLEGED INJURIES

A. Standard of Review

This court's review of the grant of summary judgment is a *de novo* review of the Trial Court's application of the law to the facts. Sabinson v. Trustees of Dartmouth College, 160 N.H. 452, 455 (2010). Summary judgment was properly granted in favor of Casella. Here, when all material facts are taken in the light most favorable to the non-moving party, there is no genuine issue of material fact that would affect the outcome of the litigation.

B. The Trial Court Properly Granted Summary Judgment in Favor of Casella Because it Owed No Duty to Bloom on the Date of the Accident

Bloom cannot prevail on her claim against Casella because she cannot clear the fundamental hurdle of each and every negligence action: that Casella owed a duty to her on the date of the accident. This Court has recognized that "with respect to negligence actions, it is necessary to adopt well-defined guidelines in order to prevent the imposition of remote and unexpected liability on defendants." Williams v. O'Brien, 140 N.H. 595, 599 (1995). "The policy considerations of avoiding both infinite liability and uncertainty in the law must be balanced against the 'need to compensate those plaintiffs whose injuries derive, however remotely, from the defendant's negligence.'" Id. at 599, quoting Nutter v. Frisbie Memorial Hospital, 124 N.H. 791, 795 (1984).

i. DHMC Owed a Non-Delegable Duty to Bloom

Under New Hampshire law, DHMC's duty to guard against foreseeable injuries related to snow and ice on its Main Campus was non-delegable. See Valenti v. NET Properties Mgmt., 142 N.H. 633, 635 (1998). Thus, as a matter of law, Bloom's negligence claim against Casella must fail, because the duty she alleges DHMC delegated to Casella is legally non-delegable.

ii. Bloom Lacked Contractual Privity with Casella

"Absent a duty, there is no negligence." Walls v. Oxford Management Co., 137 N.H. 653, 656 (1993). The New Hampshire Supreme Court has stated that, "[i]n general, the concept of duty arises out of a relationship between the parties and protection against reasonably foreseeable harm." Sintros v. Hamon, 148 N.H. 478, 480 (2002). "The existence and extent of that duty depends upon the nature of the relationship between the parties." Id. "While a contract may supply the relationship, ordinarily the scope of the duty is limited to those in privity of contract with one another." Sisson v. Jankowski, 148 N.H. 503, 505 (2002) (attorney does not owe a duty of care to a prospective will beneficiary to have the will executed properly). See also, 57A Am.Jur.2d *Negligence* § 113 (generally, no cause of action in tort can arise from the breach of a duty which exists by virtue of a contract unless there is privity of contract between the defendant and the injured person). Thus, a plaintiff whose negligence action is based upon the theory of a duty owed by the defendant as a result of a contract cannot establish that the defendant has breached a duty owed to him unless he is a party to the contract.

In the instant case, it is undisputed that Bloom was not a party to the Agreement. (App. 23-32). As a result, there is no argument (and none is raised by Bloom) that any express contractual privity existed between Bloom and Casella on the date of the accident. (App. 23-32). Rather, Bloom has argued that she shared a "mutuality of interests" with DHMC at the time of the accident such that privity was implied, but the Trial Court properly rejected that argument. (Br. 43). As the Trial Court noted, nothing in the Agreement indicates that DHMC's intent was to protect against workplace injuries, and no such inference can be made absent additional evidence. (Br. 43). Absent any evidence of intent to benefit third parties like Bloom, her "mutuality of interests" argument must fail as a matter of law, and any claims of implied privity were properly rejected by the Trial Court. Thus, absent the application of an exception to the privity requirement, Casella owed no duty to Bloom under the terms of the Agreement on the date of the accident.

iii. Casella's Snow Removal Services Did Not Constitute "Unreasonably Dangerous" Conduct, and, As Such, Did Not Create a Duty on the Part of Casella Under the Exception to the Privity Requirement

As discussed in Casella's motion for summary judgment (App. 10-20), there is an exception to the general rule in New Hampshire that a contractual duty cannot arise absent privity between the parties. See Hungerford, 143 N.H. at 208 (1998). In Hungerford, this Court held that "parties owe a duty to those foreseeably endangered by their conduct with respect to those risks whose likelihood and magnitude make the conduct unreasonably dangerous." Id. at 211 (emphasis added).

Here, it is undisputed that Bloom was not a party to the Agreement and lacked contractual privity with Casella. Bloom likewise lacked any "mutuality of interests" with DHMC through which a duty could be implied. As a result, Bloom can only establish a duty on the part of Casella if she can establish that Casella's conduct—routine snow removal services—posed such a risk of harm to Bloom that it was "unreasonably dangerous." While no New Hampshire appellate decision has considered whether routine snow removal services rise to the level of "unreasonably dangerous" conduct under Hungerford, several New Hampshire Superior Courts have issued orders in recent years on this very issue, and have ruled that snow removal services are not considered "unreasonably dangerous."

In McEneny, the Hillsborough County Superior Court Northern Division ruled that the plaintiff, who slipped and fell in a parking lot, was not a party to the contract between the property owner and the snowplow contractor, and thus lacked privity of contract with the snowplow contractor. (App. 40-41). Consequently, the court ruled that the snowplow contractor did not owe a duty to the plaintiff for the snow removal services specified in the subject contract. (App. 41). The court next considered whether the Hungerford exception applied to the activities of the snowplow contractor, and noted that "the conduct about which plaintiff complains—snow and ice removal—are not unreasonably dangerous activities." (App. 41). Because it determined that the

complained of activity was not unreasonably dangerous, the court ruled that "no exception to the privity requirement exists." (App. 41).

In Wood, the Strafford County Superior Court dismissed the plaintiff's claims arising from a slip and fall incident, declining to recognize a claim of negligence against a snowplow contractor that had contracted to provide snow removal services at several Rite Aid stores. After noting a lack of contractual privity between the plaintiff and snowplow contractor, the court in Wood noted that "the type of activity involved here is not unreasonably dangerous so as to implicate an exception to the privity requirement." (App. 54). For this and other reasons (which will be discussed more fully below), the court ruled that the snowplow contractor owed no duty to the injured plaintiff and granted the snowplow contractor's motion to dismiss. (App. 60).

In Powell, the Hillsborough County Superior Court Northern Division found that no privity of contract existed between the injured plaintiff and snowplow contractor, and further ruled that "the conduct about which plaintiffs complain—snow removal and salting and sanding of a parking lot—are not unreasonably dangerous activities. Therefore, no exception to the privity requirement exists." (App. 66). Absent privity of contract with the snowplow contractor, or the application of any privity exception, the court ruled that the snowplow contractor owed no duty to the plaintiff. (App. 70).

In Lavoie, the Rockingham County Superior Court granted a snowplow contractor's motion for summary judgment based upon the lack of a duty owed to the plaintiff, a non-party to the contract between the snowplow contractor and the maintenance contractor. (App. 72). In entering summary judgment in favor of the snowplow contractor, the court noted that the plaintiff was not an intended beneficiary of the contract (only the bank where the accident took place was), that the contractor did not owe a common law duty to the plaintiff independent of its contractual duties to the bank, and that the contractor did not have a common law duty to remove snow and ice. (App. 74-78). Finally, the court ruled that the privity exception did not apply because the plaintiff "fail[ed] to allege that plowing and salting is an unreasonably dangerous

activity." (App. 77). Accordingly, the court entered summary judgment in favor of the snowplow contractor. (App. 78).

In Dunshee, the Grafton County Superior Court granted a snowplow contractor's motion to dismiss, finding that it owed no duty to the plaintiff independent of its duty to perform the contractual obligations owed to the Town of Campton. (App. 80). After noting the lack of privity of contract between the plaintiff and the snowplow contractor, the court ruled that the exception to the privity requirement did not apply because the plaintiff's allegations "[did] not describe conduct that is unreasonably dangerous." (App. 83). In light of the fact that the plaintiff "[had] not identified any authority holding that a snow removal contractor owes a duty to a third party such as the plaintiff in the circumstances presented," the court granted the snowplow contractor's motion to dismiss. (App. 85).

The instant case is remarkably similar to the New Hampshire Superior Court cases discussed above. In every case discussed above—and in the instant case—the snowplow contractor had a contractual obligation to clear snow and/or ice for an individual/entity other than the plaintiff. In the Agreement at issue in the instant case, Casella did not assume any obligations to any third parties, including Bloom. Furthermore, as the above-referenced decisions make abundantly clear, Casella's activities—routine snow and ice removal—are manifestly not unreasonably dangerous activities in New Hampshire. They are likewise not unreasonably dangerous activities under the law of other states that experience the lengthy and harsh winters that are commonplace in New Hampshire. See, e.g., Davis v. RC & Sons Paving, Inc., 26 A.3d 787, 793 (Me. 2011) ("In determining the existence and scope of a duty in cases involving injuries sustained as a result of snow and ice conditions, we are informed by the annual risks created by the relatively harsh winters in Maine and recognize that requiring . . . non-possessors to fully protect against hazards created by snow and ice is simply impracticable"). Snow removal is an activity that occurs throughout the fall, winter, and spring in New Hampshire in nearly every part of the state. Beyond the legal reasons discussed above, simple common sense dictates that the routine snow removal performed by Casella could not possibly constitute

"unreasonably dangerous" conduct when it is commonplace in this State for over half of the year. For these reasons, the Trial Court correctly rejected Bloom's argument that Casella's snow removal activities constituted "unreasonably dangerous" conduct. Because Casella's conduct was not unreasonably dangerous, the exception to the privity requirement discussed in Hungerford does not apply, and summary judgment was properly entered in favor of Casella.

iv. Bloom's Interpretation of *Hungerford* Misconstrues the Supreme Court's Reasoning and Incorrectly Expands the Exception to the Privity Requirement

In her brief, Bloom argues that the Trial Court misinterpreted and misapplied this Court's holding in Hungerford in ruling that Casella's snow removal services did not constitute unreasonably dangerous conduct. According to Bloom, the relevant inquiry under Hungerford is not whether the likelihood and magnitude of certain risks (in Hungerford, being wrongfully and publicly accused of sexually abusing a child) arising out of particular conduct (in Hungerford, the psychiatric treatment of sexual abuse survivors) renders said conduct unreasonably dangerous. (App. 20-24). Rather, she claims that the relevant inquiry is whether said conduct was performed carelessly, with no regard to the inherent risk posed by the conduct (i.e., the inherent risks associated with diagnosing and treating victims of sexual abuse). (App. 20-24). Thus, according to Bloom, because she alleges that Casella carelessly performed its snow removal services, this, in and of itself, constitutes "unreasonably dangerous" conduct giving rise to an exception to the privity requirement. (App. 20-24).

Bloom's interpretation and application of Hungerford poses many problems. First, and most importantly, it is unsupported by any authority. Casella has cited to five Superior Court cases, all of which dealt with the precise issue before the Court in this case: whether a snowplow contractor owes a duty to an injured plaintiff who was not a party to the subject contract. In every case cited by Casella, the Superior Court discussed and interpreted Hungerford and concluded that snowplowing activities were not the type of "unreasonably dangerous" conduct contemplated by this Court in Hungerford.

Faced with these decisions, which are directly analogous to the instant case, Bloom argues that there are "numerous Superior Court orders allowing direct actions against contractors." (App. 26; cases located at App. 102-144). None of these cases, however, address the issue of "unreasonably dangerous" conduct or the exception to the privity requirement. While it is true that these cases technically permit a direct action against the contractor, they are largely distinguishable from the instant case. See, e.g., Riel v. JGE Enterprises, Inc., Hillsborough Cty. Super. Ct. Northern Div., Docket No. 216-2013-CV-114 (Dec. 3, 2014) (Order, Temple, J.) (denying motion to dismiss on grounds that snowplow contract contemplated risks of harm, including injuries to third parties) [3]; Wright v. Brady Sullivan Properties, et al., Hillsborough Cty. Super. Ct. Northern Div., Docket No. 216-2015-CV-00057 (June 13, 2016) (Order, Ruoff, J.) (denying motion to dismiss under broadly worded winter services contract) [4]; Schena v. Brooks Properties I, LLC, Rockingham Cty. Super. Ct., Docket No. 218-2015-CV-00560 (July 8, 2014) (Order, Wageling, J.) (denying motion to dismiss on grounds that snowplow contractor assumed primary responsibility for winter maintenance obligations under contract). [5] None of the cases cited by Bloom even discuss this Court's holding in Hungerford, let alone provide an alternative analysis under which Casella's conduct could be considered unreasonably dangerous. The facts of these cases are also largely distinguishable from this case, as the contracts at issue in those cases were generally far broader than the Agreement between Casella and DHMC. Simply stated, Bloom's reliance on these cases is misplaced and immaterial to the entry of summary judgment in favor of Casella.

Furthermore, Bloom's interpretation of Hungerford—that inquiry should be made into whether the complained of conduct was performed carelessly—stands to greatly expand the exception to the privity exception in ways that could not have been

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[3] A copy of Riel is included in App. 103-106.

[4] A copy of Wright is included in App. 118-124.

[5] A copy of Schena is included in App. 127-135.

contemplated by this Court. Under Bloom's proposed interpretation of Hungerford, standard, run-of-the mill activities (like snow removal) could be categorized as "unreasonably dangerous" conduct anytime it is alleged that such activities were performed carelessly. This is not possibly what this Court could have had in mind in its holding in Hungerford. Were this Court to adopt Bloom's interpretation of Hungerford, contractors like Casella would be overwhelmed with claims from unknown and unforeseen claimants, thus contravening the State's preference against imposing liability arising out of a contract in the absence of privity.[6] This Court's holding in Hungerford is intended to be an exception to this rule. It is not intended to be the rule. For the reasons discussed above, the facts of this case do not support the application of this exception, and, accordingly, summary judgment was properly entered in favor of Casella.

v. Policy Considerations Preclude Imposition of a Duty from Snowplow Contractors to Non-Contract Parties

Policy considerations also dictate against the imposition of a duty from snowplow contractors to non-contract parties. The terms of winter maintenance contracts, like the Agreement, vary widely depending upon several factors, including the particular needs of the property owner, the services that the contractor is willing and able to provide, and the property owner's willingness and ability to pay for various levels and types of services.

For example, a winter maintenance contract may only require the snowplow contractor to provide services when specifically called upon to do so by the property owner. Or the contract may only require the snowplow contractor to plow, but not salt or sand. A contract may only require the snowplow operator to provide services in the event of an accumulation of a specified number of inches of snow. There are countless arrangements under which such agreements are formed, and these contractual arrangements may be motivated by varying needs of the property owner.

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[6] In its order on Casella's motion for summary judgment, the Trial Court discussed the impracticality of Bloom's interpretation of Hungerford: "by the plaintiff's definition, nearly any activity, if carelessly performed, would pose a foreseeable risk of harm to others, and the Court disagrees that this was the intent of the Hungerford exception." (Br. 45).

A property owner's decisions with regard to the provisions of certain services by a snowplow contractor may be based on a number of factors specific to the property owner's individual needs. The property owner may choose to limit the services to be provided for financial reasons. A property owner may instruct the contractor not to apply salt for environmental reasons. The property owner may not want snow cleared down to the pavement in order to limit surface damage to the asphalt. In some cases, the owner or occupier of a property may restrict the hours during which services may be provided in order to minimize interference with business operations. In other words, a property owner may not authorize the snowplow contractor to provide the type and level of services that would meet a common law reasonable care standard. To impose an independent duty on snowplow contractors to third parties whenever icy conditions are alleged to result in injury would interfere with the freedom of property owners and snowplow contractors determine for themselves the circumstances under which they choose to operate.

In the instant case, the Agreement contained very specific terms and conditions as to the particular services requested by DHMC, as well as prohibitions against provisions of other services. As discussed above, DHMC retained responsibility for salting and sanding (the activities at issue in the instant case), directing where to pile snow, and inspecting the premises between snow storms for ice. (App. 23-32). Stated differently, Casella did not assume all of the responsibilities that DHMC had for its property. (App. 35). Rather, the Agreement entered into by Casella and DHMC was the exact type of arrangement discussed above, one in which the snowplow contractor was obligated to perform certain tasks, while the property owner retained certain tasks and responsibilities for itself. To impose a common law duty of care from Casella to Bloom in this case would short circuit DHMC's ability to contract for services as it sees fit. The Trial Court properly considered this issue, and the potential public policy consequences, in granting summary judgment in favor of Casella.

2. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF CASELLA IN FINDING THAT SECTION 324A OF THE RESTATEMENT (SECOND) OF TORTS DID NOT IMPOSE LIABILITY ON CASELLA

Section 324A of the Restatement (Second) of Torts has been "implicitly" adopted by the Supreme Court of New Hampshire. (Br. 46). Section 324A provides that 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 if: (a) his failure to exercise reasonable care increases the risk of such harm; or (b) he has undertaken to perform a duty owed by the other to the third person; or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. Restatement (Second) Torts, § 324A (Am. Law. Inst. 1965). In granting summary judgment in favor of Casella, the Trial Court correctly determined that none of the provisions of Section 324A imposed liability on Casella.

A. Casella Did Not Increase the Risk of Harm to Bloom

The Trial Court properly entered summary judgment in favor of Casella with regard to liability alleged under Section 324A(a) because Casella did not increase the risk of harm to Bloom. The summary judgment record before the Trial Court was devoid of any evidence of Casella's actions increasing the risk of harm to Bloom. On appeal, Bloom claims that Casella failed to sand and salt the area it plowed. (Br. 33-34). Bloom claims that this worsened the condition of the parking lot, thus exposing Casella to liability under Section 324A(a). (Br. 34). On these grounds, Bloom alleges that the Trial Court improperly entered summary judgment in favor of Casella.

Bloom's contention regarding Section 324A(a) is misplaced for several reasons. First, it ignores the clear and unambiguous language of the Agreement (App. 23-32) and the sworn testimony of Steven Cutter, both of which provide that sanding and salting were the responsibility of DHMC, not Casella. (App. 35). Second, she has failed to offer any evidence supporting her contention that the snowplowing services provided by

Casella in the parking lot resulted in the alleged accumulation of ice. A similar situation was contemplated by the Superior Court in McEneny, and it noted the following:

> Turning to plaintiff's argument regarding section 324A(a), the Court finds plaintiff has failed to allege any facts that would establish Hooksett's alleged failure to exercise care increased the risk of plaintiff's harm. The risk apparently existed as a result of the winter weather conditions. Plaintiff has not alleged in her complaint that Hooksett placed the snow in such a way to cause the natural world to become more [dangerous] nor did any other act that heightened the risk.

(App. 42). The United States District Court for the District of New Hampshire has likewise observed that "conduct [that] merely permitted the continuation of an existing risk, [is] an inadequate basis upon which to impose liability under section 324A(a)." Kirk v. United States, 604 F.Supp. 1474, 1484 (D.N.H. 1985). See also Canipe v. Nat'l Loss Control Serv. Corp., 736 F.2d 1055, 1062 (5th Cir. 1984) (noting Section 324A(a) requires some change in conditions that increase the risk of harm to the plaintiff over the level of risk that existed before the defendant became involved); Butler v. Advanced Drainage Sys., Inc., 698 N.W.2d 117, 126 (Wis. Ct. App. 2005) (concluding that under Section 324A(a), "the actor's failure to exercise reasonable care in performing the undertaking must increase the risk of harm over that which would have existed had the defendant not engaged in the undertaking at all").

The record before the Court is devoid of any credible factual allegations that the services provided by Casella increased the risk of harm to Bloom on the night of the accident. At the very worst, it could be argued (which Casella denies) that Casella's services did not improve the condition of the parking lot. This is very different from claiming that Casella worsened the condition of the parking lot, and Bloom has offered no evidence to support this claim. The fact also remains that Casella had no contractual obligation to salt or sand—this was the responsibility of DHMC. Considering all of these factors, the Trial Court properly disregarded Bloom's Section 324A(a) claim.

B. Casella Did Not Assume Any Obligations Beyond Those Delineated in the Agreement

The Trial Court likewise properly entered summary judgment in favor of Casella with regard to its purported liability under Section 324A(b) of the Restatement (Second) of Torts, because Casella did not assume any obligations beyond those delineated in the Agreement. In her brief, Bloom argues that the Trial Court erred in determining that Casella was not liable under Section 324A(b) because it had not completely subsumed or supplanted the duties of DHMC. Bloom contends that it makes no difference as a matter of law whether Casella's "assumption" of duties owed by DHMC was partial or complete, because that is not the determinative factor in imposing liability under Section 324A(b). Despite arguing that this issue of "completeness" is irrelevant under Section 324A(b), Bloom nevertheless argues that Casella completely assumed the duties owed to Bloom by DHMC, thus exposing it to liability under Section 324A(b). Bloom's contention not only mischaracterizes the factual record before the Court, but it is also incorrect as a matter of law.

While the New Hampshire Supreme Court has not interpreted the scope and validity of Section 324A(b), the Trial Court in this case, along with several other Superior Courts, have construed it narrowly. This is especially so in situations where the snowplow contractor (as was the case with Casella) did not assume all obligations related to snow/ice removal under the subject contract. For example, in Wood, the Strafford County Superior Court concluded that the snowplow contractor was not subject to liability under Section 324A(b), noting that it "does not agree that [the contractor's] limited undertaking created a special relationship between the parties sufficient to give rise to liability under Restatement section 324A(b)." (App. 54). Likewise, in Powell, the Hillsborough County Superior Court declined to impose a duty on the part of a snowplow contractor under Section 324A(b), noting that certain contractual provisions "clearly establishes [that the snowplow contractor] did not intend to completely assume [the owner's] duty to monitor the property." (App. 68). See also Davey v. Great N. Prop. Mgmt., Inc., Rockingham County Superior Court, No. 218-2015-CV-01038 (Jan. 27,

2016) (Order, Delker, J.), at 16 (concluding a contractor is liable under section 324A(b) only when it "agrees to entirely assume the property owner's duty"); Wallace v. Eastgate Apartment Assocs., LLC, Hillsborough County Superior Court, No. 216-2015-CV-00285 (Nov. 30, 2015) (Order, Nicolisi, J.), at 6 ("[A] special relationship exists under section 324A(b) only when a duty is assumed in its entirety").

Other courts across the United States have likewise narrowly construed Section 324A(b), and found that it imposes liability only in situations where one "intend[s] to completely subsume or supplant the duty of the other party." Plank v. Union Elec. Co., 899 S.W.2d 129, 131 (Mo. Ct. App. 1995); see also Hutcherson v. Progressive Corp., 984 F.2d 1152, 1156-57 (11th Cir. 1993) (holding that in order for liability to attach under Section 324A(b), one must undertake a duty "in lieu of, rather than a supplement to" the original party's duty); Blessing v. United States, 447 F. Supp. 1160, 1193-94 (E.D. Pa. 1978) ("[T]he Restatement provision seems to reach not the situation in which one undertakes to perform functions coordinate to or even duplicative of activities imposed on another by a legal duty, but rather the situations in which one actually undertakes to perform for the other legal duty itself."); 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.").

Bloom's brief fails to cite to any authority in support of her contention that Section 324A(b) should be broadly interpreted to impose liability on Casella. As the above-referenced case law makes abundantly clear, courts in New Hampshire and across the country narrowly interpret Section 324A(b) and impose liability only in situations where one has completely assumed the obligations of another. While Bloom incorrectly contends that this is not the standard to be applied in the instant case, she nevertheless argues that Casella did in fact completely assume the obligations for snow and ice removal at DHMC. (App. 31). This is patently untrue, and not supported by the factual record before the Court. As discussed above, the Agreement clearly and unequivocally provides that "[s]alting and sanding will be done by DHMC unless assistance is asked

and direction given by the DHMC Grounds Supervisor or his designee." (App. 31). The Agreement further provides that "[Casella] shall apply salt and/or sand only as directed by the DHMC Grounds Supervisor or his designee . . . ." (App. 31). The deposition testimony of Mr. Cutter provides further clarity to the clear and unambiguous language of the Agreement:

> Q. In 2013, did the hospital retain any responsibility for salting on its own and by that I mean, did the hospital's own employees sand and salt and parking lots or was that –
>
> A. Yes.
>
> Q. Okay. Who from the hospital did do that activity?
>
> A. Any one of our maintenance crew could have done that. It depended on the area and time of day.
>
> Q. The area where the plaintiff in this case fell, she has identified as lot 6, is that an area where the hospital's own maintenance crews would have salted on their own in 2013?
>
> A. If they saw the conditions to be slippery.
>
> Q. Suppose it were between a snowstorm and Dartmouth-Hitchcock's maintenance crews found a slippery area, for example, in parking lot 6, would they have had Casella come and address it, or would they have addressed it on their own?
>
> A. They typically would have handled it on their own.

(App. 165-166).

While Bloom contends that the "up-to-date and clarifying deposition testimony" of Mr. Cutter establishes liability on the part of Casella under Section 324A(b), the above-referenced testimony actually provides further evidence of the division of responsibilities between Casella and DHMC: Casella was responsible for snow removal and DHMC was responsible for sanding and salting. In other words, Casella did not completely assume all duties owed by DHMC. This is the exact type of situation in which the above-

referenced courts have declined to impose liability under Section 324A(b). Applying the above-referenced authority to these facts, the Trial Court correctly concluded that Casella had not completely assumed the duties owed by DHMC and, thus, was not liable to Bloom under Section 324A(b). As a result, the Court properly entered summary in favor of Casella.

C. Bloom Has Failed to Show Reliance on the Snow Removal Services Provided by Casella

Finally, the Trial Court properly entered summary judgment in favor of Casella and declined to impose liability under Section 324A(c) because Bloom offered no evidence of reliance on the snow removal services provided by Casella. While no New Hampshire appellate decision has interpreted the scope and validity of Section 324A(c), other courts have observed that it "provides that a defendant will be held liable if either the person to whom the defendant's undertaking was made, or the third person whose protection is the subject of the undertaking, suffers harm as a result of 'reliance . . . upon the undertaking.'" Doe 30's Mother v. Bradley, 58 A.3d 429, 460 (Del. Super. Ct. 2012). In order to establish reliance under Section 324A(c), a plaintiff "must show that she changed her position in reasonable reliance on the defendant's provision of protective services, and is thereby injured when the defendant fails to perform those services competently." Vaughan v. Eastern Edison Co., 48 Mass. App. Ct. 225, 231 (1999). "Reliance under section 324A(c) cannot be assumed." Bjerke v. Johnson, 742 N.W.2d 660, 680 (Minn. 2007). "Rather, for liability to be imposed under section 324A(c), there must be proof of actual reliance on a contractual undertaking or representations by the defendant that it resulted in acts or omissions by the party relying on the defendant's undertaking." Id. (internal quotations and citations omitted). The Wisconsin Court of Appeals has further noted that "case law applying this subsection generally focuses on reliance in the form of altering the precautions that might otherwise have been taken without the defendant's undertaking." Butler, 698 N.W.2d 117, 129 (Wis. Ct. App. 2005).

In her brief, Bloom argues that she sustained bodily injuries as a result of her reliance on the services provided by Casella at DHMC. Bloom contends that reliance in this case "can almost be presumed" because Casella was plowing parking lots where employees may have parked. This falls far of establishing reliance for the purposes of Section 324A(c). While it logically follows that Casella may have been aware that people may park in the parking lots that it plowed, this alone is insufficient to establish reliance under Section 324A(c). Under the authority discussed above, in order to establish reliance, Bloom must show that she acted or neglected to act in a certain way as a result of the services provided by Casella. The factual record is devoid of any such evidence. Rather, Bloom's reliance argument appears to be little more than a rehashing of her duty argument. Bloom's argument in support of her reliance claim—that Casella knew that it was plowing parking lots and, thus, should be responsible for injuries to pedestrians using the parking lots—is, in essence, the same argument she made in attempting to impose a duty on Casella in the absence of contractual privity. Bloom has failed to offer any credible evidence of reliance, and, accordingly, the Trial Court properly entered summary judgment in favor of Casella.

3. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF CASELLA IN FINDING THAT THE "PUBLIC POLICY" CONCERNS RAISED BY BLOOM DID NOT CREATE A DUTY ON THE PART OF CASELLA

A. The Worker's Compensation Exclusivity Issues Raised by Bloom are Immaterial to the Issues Before the Court

Bloom argues that insulating Casella from liability in the instant case will somehow frustrate the purposes of the State's worker's compensation exclusivity (RSA 281-A:13(1)(b)), prevent worker's compensation carriers from recovering on their liens, and result in increased premiums. Regardless of whether any of these claims are true (Bloom offers no support for these claims in her brief), they are immaterial to the issues before the Court. While Bloom is purportedly attempting to protect the interests of worker's compensation insurers and employers across the State, her true concern is the fact that she will be left with no other means of recovery if the Trial Court's decision is

affirmed. While Bloom may be dissatisfied with the fact that she is limited to seeking recovery from her employer's worker's compensation carrier, this frustration does not justify imposing liability on Casella when it owed no duty to Bloom and was otherwise not liable for her alleged injuries. This very issue was addressed by the Strafford County Superior Court in Wood. In that case, the plaintiff was injured in a slip and fall accident at her workplace, received worker's compensation benefits, and, thus, was barred from suing her employer. (App. 53). The plaintiff raised this issue in support of her claim against the snowplow contractor, with whom the plaintiff had no contractual or other relationship, and argued that societal interests compelled the court to permit her claim against the snowplow contractor to proceed. (App. 53). Rejecting this argument, the Superior Court noted as follows:

> Although in this case plaintiff . . . is likely barred from suing the landowner directly because she was injured in the scope of her employment, that result is only because the legislature has seen fit to preclude a cause of action in exchange for a comprehensive Worker's Compensation insurance program. She is not without a remedy; it is merely a remedy of a different kind. In this court's view, there is no other societal interest sufficient to warrant the creation of a legal duty in this context.

(App. 53).

The reasoning of the Superior Court in Wood is directly applicable to the instant case. Bloom was injured at her workplace, received worker's compensation benefits from DHMC's worker's compensation carrier, and is now barred from suing DHMC. While it is true that Bloom may have no other means of recovery at this time, this does not mean that she has been left without a remedy, because it is undisputed that she received worker's compensation benefits following the accident. The fact that Bloom is barred from pursuing further claims against her employer (which, as discussed above, retained responsibility for sanding and salting at DHMC) is of no moment to Casella, and should not result in the imposition of liability against Casella absent any contractual or other obligation to Bloom. Bloom's arguments regarding increased worker's compensation premiums and other tangential issues are immaterial to the issues raised in

this case. There is no societal interest sufficient to impose a duty on Casella in this case. Accordingly, the Trial Court properly rejected Bloom's "public policy" argument regarding worker's compensation and entered summary judgment in favor of Casella.

B. The "Limited Liability for Winter Maintenance" Arguments Raised by Bloom are Equally Unrelated to the Issues Raised in this Case

The arguments raised by Bloom regarding RSA 508:22, the "Limited Liability for Winter Maintenance" statute, are likewise unrelated to the issues raised in this case. The issue of whether Casella was a "certified" commercial operator on the date of the accident has no bearing on whether it owed a duty to Bloom under the Agreement. Any arguments raised by Bloom to the contrary are nothing more than an attempt to distract the Court from the fact that Casella owed no duty to Bloom under the Agreement or under New Hampshire law.

CONCLUSION

For the reasons outlined above, this Court should affirm the Trial Court's entry of summary judgment in favor of Casella.

Casella respectfully requests oral argument before the full court. Casella will be represented at oral argument by Brian A. Suslak.

RULE 16(3)(i) CERTIFICATION

Counsel for Defendant-Appellee certifies that the decision from which Plaintiff-Appellant appeals is in writing and is appended to the brief.

RULE 26(7) CERTIFICATION

Counsel for Defendant-Appellee certifies that the foregoing brief totals 7,716 words, exclusive of tables of content and authorities, and is therefore in compliance with the word limitation provided by Rule 16(11).

Respectfully submitted,

CASELLA CONSTRUCTION, INC.

By Its Attorneys,

MORRISON MAHONEY LLP

Dated: November 7, 2018

By: _____

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CERTIFICATE OF SERVICE AND STATEMENT OF COMPLIANCE

In accordance with Rule 16(10), I hereby certify that two copies of this Brief were served November 7, 2018 by first class mail, postage prepaid, direct to:

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NOTICE OF DECISION

File Copy

Case Name: **Eileen Bloom v Casella Construction, Inc.**
Case Number: **211-2016-CV-00305**

Enclosed please find a copy of the court's order of June 07, 2018 relative to:

Re: Motion for Summary Judgment

June 07, 2018

Abigail Albee
Clerk of Court

(480)

C: Brian C. Shaughnessy, ESQ; Joseph G. Yannetti, ESQ; Ashley Rae Theodore, ESQ

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. **SUPERIOR COURT**

Eileen Bloom

v.

Casella Construction, Inc.

Docket No.: 211-2016-CV-305

ORDER

Hearing held (4/18/18) on the defendant's Motion for Summary Judgment (filed 2/9/18) and the plaintiff's Objection to same (filed 3/12/18). Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on December 27, 2016 when the plaintiff, Eileen Bloom, filed a Complaint against the defendant, Casella Construction, Inc. ("Casella"), for negligence arising out of her alleged slip-and-fall on ice in the parking lot at Dartmouth-Hitchcock Medical Center in Lebanon, New Hampshire. At the time, Casella was under a written contract to provide certain snow and ice removal services at the premises. Casella now moves for summary judgment, and the plaintiff objects.

Factual Background

The following relevant facts are taken from the pleadings and exhibits filed in this case, and are undisputed unless otherwise noted. On the morning of December 30, 2013, the plaintiff drove to Dartmouth-Hitchcock Medical Center in Lebanon, New Hampshire ("DHMC"), where she worked as a nurse. She parked her vehicle in an employee parking lot, exited her vehicle, and took approximately two steps before she slipped and fell on ice. See (Pl.'s Obj. Def.'s Mot. Summ. J., Ex. B.) According to the plaintiff, there was "no sand [or] ice melt applied to the lot,"

despite that it snowed "maybe" a couple of inches the night before and some of the snow had melted and re-frozen overnight in the parking lot. (Id.; Bloom Dep. 25:20–23, 26:1–6, 10–13). As a result of her fall, the plaintiff suffered, among other things, significant injuries to both knees, which required surgery.

At the time of the plaintiff's injury, DHMC had a "Snow Plowing Agreement" with Casella, which the parties entered into in May of 2013 (the "Contract"). Under the Contract, Casella agreed to "provide certain services, including the equipment and labor for snow removal services, as explicitly set forth in [the Contract]." (Def.'s Mot. Summ. J., Ex. A.) These services were further described in the "Snow Plowing Guidelines" attached to the Contract. These guidelines stated, in relevant part, that "[s]alting and sanding will be done by DHMC unless assistance is asked and direction given by the DHMC Grounds Supervisor or his designee" and that Casella should "apply salt and/or sand only as directed by" DHMC. (Id.) It was DHMC's responsibility to provide "an ample supply of quality salt and sand unless otherwise specified." (Id.) Casella was instructed which locations on the DHMC campus to perform the snow plowing services, but was generally responsible to "monitor weather forecasts and conditions and respond accordingly." However, Casella was not obligated to "spontaneously" respond to a snow or ice event, nor was it required to return and assess the conditions between storms. (Cutter Dep., 22:3–4, 14–18.) On December 30, 2013, the day of the plaintiff's injury, Casella went to DHMC to perform services under the Contract. See (Pl.'s Obj. Def.'s Mot. Summ. J., Ex. F.)

In her Complaint, the plaintiff alleges that Casella, "[a]s an entity contractually obligated to provide winter maintenance to the parking lot," owed her a "duty to employ reasonable care to maintain the premises in a reasonably safe condition." (Compl., ¶ 9.) The plaintiff further alleges that Casella breached this duty by "failing to maintain the premises in a reasonably safe

condition, failing to make reasonable inspections to detect and remedy unsafe conditions, and failing to maintain the premises so that dangerous conditions would be alleviated." (Id., ¶ 10.) The plaintiff alleges she suffered injury and incurred losses as a result of Casella's negligence. (Id., ¶ 12.)

Legal Standard

Summary judgment will be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III; see also N.H. Ass'n of Counties v. State, 158 N.H. 284, 287–88 (2009). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006). In considering a party's motion for summary judgment, the Court examines the evidence submitted and makes all necessary inferences from that evidence in the light most favorable to the non-moving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002). The court may not "weigh the contents of the parties' affidavits and resolve factual issues[,]" but must simply determine "whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial." Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000).

When a motion for summary judgment is properly made and supported, "the adverse party may not rest upon mere allegations or denials of his pleadings, but [the] response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV; Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002). "To the extent that the non-moving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed

to be admitted for purposes of this motion." N.H. Div. of Human Servs. v. Allard, 141 N.H. 672, 674 (1997).

Discussion

Casella moves to dismiss the plaintiff's Complaint, arguing that it owed no duty to the plaintiff because she was not a party to the Contract and there is no privity of contract between them. Casella further argues that the current circumstances do not fit into the exception to the privity requirement because snow and ice removal is not an unreasonably dangerous activity. In support of its arguments, Casella cites to several New Hampshire Superior Court decisions that reached the same conclusion. Finally, Casella argues that it cannot be held liable because DHMC owed a non-delegable duty to protect against risk of harm on its property, and that policy considerations preclude the imposition of a duty of snowplow contractors to third parties.

The plaintiff objects, arguing that not being a party to the Contract is immaterial because she, as an employee of DHMC, shared a mutual interest in the avoidance of workplace injuries and therefore she may still be in privity of the Contract. The plaintiff further argues that the exception to the privity requirement applies under these circumstances because Casella's careless performance of snow and ice removal was foreseeably dangerous to others. Finally, the plaintiff asserts that Section 324A of the Restatement supports imposing a duty on Casella, as well as several policy considerations.

In order to recover on a negligence claim, a plaintiff must establish the defendant owed a duty to the plaintiff, and that the defendant's breach of that duty proximately caused the plaintiff's injury. England v. Brianas, 166 N.H. 369, 371 (2014). Absent a duty, a defendant cannot be liable for negligence and "whether a duty exists in a particular case is a question of law." Walls v. Oxford Mgmt. Co., 137 N.H. 653, 656 (1993). "Only after a court has

determined that a defendant owed a plaintiff a duty, and identified the standard of care imposed by that duty, may a jury consider the separate question of whether the defendant breached that duty." Id.

"A duty generally arises out of a relationship between the parties." Sisson v. Jankowski, 148 N.H. 503, 505 (2002). "While a contract may supply the relationship, ordinarily the scope of the duty is limited to those in privity of contract with one another." Id. However, the New Hampshire Supreme Court has recognized an exception to this general rule, stating that "[p]arties owe a duty to those foreseeably endangered by their conduct with respect to those risks whose likelihood and magnitude make the conduct unreasonably dangerous." Hungerford v. Jones, 143 N.H. 208, 211 (1998).

Upon review, the Court concludes that Casella did not owe a duty to the plaintiff under the Contract. Here, there is no dispute that the plaintiff was not a party to the Contract, and therefore no privity of contract exists between the plaintiff and Casella. The plaintiff argues that privity may be derived from the "mutuality of interests" between herself and DHMC given their relationship as employee and employer, which makes her an intended beneficiary of the Contract with Casella. However, nothing in the plain language of the Contract indicates that DHMC's intent was to protect its employees from workplace injuries, and the Court cannot infer such a purpose from the Contract. Moreover, even if that was DHMC's underlying intent, there is no indication that Casella was aware that a benefit to third parties was contemplated by DHMC, which would be required to impose liability on Casella for injury to third party beneficiaries. See Plourde Sand & Gravel Co. v. JGI Eastern Inc., 154 N.H. 791, 796 (2007) ("A third-party beneficiary relationship exists if a contract is so expressed as to give the promisor reason to

know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract.").

The plaintiff also points to the New Hampshire Supreme Court's expression of "disfavor for the [use of the] privity doctrine in personal injury cases." Spherex, Inc. v. Alexander Grant & Co., 122 N.H. 898, 903 (1982). However, despite this statement, our Supreme Court has reiterated in numerous cases that privity of contract is required to establish a duty arising out of a party's contractual obligations. See, e.g., Riso v. Dwyer, 168 N.H. 652, 654 (2016); Plourde, 154 N.H. at Sisson, 148 N.H. at 505; Simpson v. Calivas, 139 N.H. 1, 4 (1994); Robinson v. Colebrook Sav. Bank, 109 N.H. 382, 385 (1969); Bosse v. Wolverine Ins. Co., 88 N.H. 98, 101 (1936). As such, the Court is unpersuaded by the plaintiff's assertion that this Court should disregard the privity doctrine under the present circumstances, particularly when the basis for the plaintiff's claim of negligence against Casella is its contractual obligations to perform snow plowing services for DHMC.

As there is no privity of contract between the plaintiff and Casella, the Court must next determine whether the exception to the privity doctrine applies. Under this exception, Casella may owe a duty to those persons "foreseeably endangered by [its] conduct with respect to those risks whose likelihood and magnitude make the conduct unreasonably dangerous." Hungerford, 143 N.H. at 211. As noted by Casella, there are several New Hampshire Superior Court decisions stating that snow plowing services are not an unreasonably dangerous activity. See, e.g., McEneny v. Brady Sillivan Props., et al., Hillsborough Cty. Super. Ct., 216-2016-CV-00113 (Nov. 8, 2016) (Order, Brown, J.) at 4; Powell v. Cameron Real Estate, Inc., et al., Hillsborough Cty. Super. Ct., 216-2016-CV-00074 (Oct. 3, 2016) (Order, Abramson, J.) at 5; Lavoie v. Bank of Am., et al., Rockingham Cty. Super. Ct., 218-2012-CV-0947 (Dec. 17, 2013) (Order, Delker,

J.) at 6. The plaintiff argues these decisions misinterpret the exception set forth in Hungerford and asserts that the inquiry should focus on the foreseeable risk of harm posed by the careless performance of an activity, and not the inherent danger in the activity itself. However, by the plaintiff's definition, nearly any activity, if carelessly performed, could pose a foreseeable risk of harm to others, and the Court disagrees that this was the intent of the Hungerford exception.

Rather, the exception clearly meant to distinguish between activity that poses a general risk of harm and those that pose an *unreasonable* risk of harm. As such, while the Court agrees, to some extent, that an actor's careless performance of snow plowing could pose a foreseeable risk of harm to others, this risk is not unreasonable as contemplated by the privity exception in Hungerford. Given that snow and ice frequently occur during the winter months in New Hampshire, the risks associated with these conditions are commonplace and do not justify imposing a duty on Casella to protect unknown third parties from the risks associated with its performance of snow plowing services under the Contract. Cf. Davis v. RC & Sons Paving, 26 A.3d 787, 793 (Me. 2011) ("In determining the existence and scope of a duty in cases involving injuries sustained as a result of snow and ice conditions, we are informed by the annual risks created by the relatively harsh winters in Maine and recognize that requiring . . . non-possessors to fully protect against the hazards created by snow and ice is simply impracticable."). Accordingly, the Court concludes that Casella does not owe the plaintiff a duty pursuant to the Contract, and the exception to the privity requirement is inapplicable under these circumstances.

The Court shall next address the plaintiff's argument that Casella may be liable pursuant to Section 324A of the Restatement (Second) of Torts. While the Court notes this section has not been explicitly adopted by the New Hampshire Supreme Court, it has been applied and referenced in several cases. See Everitt v. Gen. Elec. Co., 159 N.H. 232, 238 (2009);

VanDeMark, 153 N.H. at 757–58; Williams v. O'Brien, 140 N.H. 595, 600 (1995); Corson v. Liberty Mut. Ins. Co., 110 N.H. 210, 214 (1970). As such, it appears that our Supreme Court has implicitly adopted this section of the restatement, and the Court shall therefore apply it to the present circumstances. Section 324A states the following:

> 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:
>
> (a) His failure to exercise reasonable care increases the risk of such harm, or
> (b) He has undertaken to perform a duty owed by the other to the third person, or
> (c) The harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, § 324A. With regard to subsections (a) and (c), the Court finds that there is no evidence Casella did anything to increase the risk of harm posed by snow and ice, and the plaintiff does not allege that her injury occurred because of reliance on Casella's performance of snow plowing services. As such, the Court shall focus its inquiry on subsection (b) of Section 324A.

With regard to subsection (b), other jurisdictions construe it narrowly to impose liability only where one "intend[s] to completely subsume or supplant the duty of the other party." Plank v. Union Elec. Co., 899 S.W.2d 129, 131 (Mo. Ct. App. 1995); see also 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."). While the New Hampshire Supreme Court has not offered its own interpretation of this subsection, at least two Superior Courts have chosen to construe it narrowly as well. See Davey v. Great N. Prop. Mgmt., Inc., Rockingham Cty. Super. Ct., No. 218-2015-CV-01038 (Jan. 27, 2016) (Order, Delker, J.) at 16; Wallace v. Eastgate Apartment Assocs., LLC, Hillsborough Cty. Super. Ct., 216-2015-CV-00285 (Nov. 30, 2015)

(Order, Nicolosi, J.) at 6. The plaintiff also did not provide any legal authority supporting a broader interpretation of subsection (b); rather, she generally argues that New Hampshire's recognition of apportionment of liability supports the notion that a tortfeasor may be held partially liable for a plaintiff's injuries. However, the issue of whether Casella owes the plaintiff a duty is a threshold question to be answered before determining whether, or to what percentage, Casella is liable for the plaintiff's injuries. As such, the Court finds the reasoning of the above-cited decisions persuasive and chooses to follow the narrow interpretation of subsection (b).

With this interpretation in mind, the Court concludes that Casella cannot be held liable for the plaintiff's injuries under Section 324A(b). The evidence in the record establishes that Casella did not "completely subsume or supplant" DHMC's duty to keep its property free from unreasonable risks of harm. In fact, the Contract is clear that Casella was only responsible for clearing snow in certain designated areas and was only to apply sand and/or salt to the extent directed by DHMC, otherwise DHMC was solely responsible for sanding and/or salting the premises. See (Def.'s Mot. Summ. J., Ex. A.) Further, Casella was not expected to "spontaneously" respond to a winter weather event, nor was it expected to inspect the DHMC property between visits. Based on this evidence, it is clear that Casella did not completely assume DHMC's duty to the plaintiff, as contemplated by subsection (b). Accordingly, the Court concludes that Casella may not be held liable for the plaintiff's injuries under Section 324A of the Restatement (Second) of Torts.

The plaintiff also raises public policy concerns that she purports "strongly militate" against Casella's position. More specifically, the plaintiff discusses provisions of the workers' compensation statutory scheme, which provide that injured workers who obtain third-party recovery are subject to a lien for the amounts paid in benefits by the insurer. The plaintiff

contends that barring recovery from Casella prevents the workers' compensation carrier from replenishing itself, which constitutes an "impairment to the bottom-line of the compensation carriers." The plaintiff further asserts that insulating Casella from the consequences of its actions "diminishes the natural deterrence imposed by the law of negligence and frees the blameworthy from the justice of compensation." The Court finds these arguments unavailing, and notes that neither position provides a sufficient basis to supplant the legal principles discussed above and impose a duty on Casella for the plaintiff's injuries. While the plaintiff may be limited to a workers' compensation claim as a remedy for her injuries, the Court finds these are not societal interests sufficient to warrant the creation of a legal duty in this context. See Wood v. Springwise Facility Mgmt, Inc., Strafford Cty. Superior Court, 219-2016-CV-00034 (Sep. 23, 2016) (Order, Howard, J.) at 9. As a final matter, while the plaintiff discusses RSA 508:22, entitled "Limited Liability for Winter Maintenance," the Court declines to address this issue in detail given the plaintiff's failure to provide any legal authority supporting the proposition that this statute was intended to override the common law principles of duty and negligence discussed above.

In sum, the Court concludes that Casella does not owe a legal duty to the plaintiff and therefore cannot be liable for the plaintiff's injuries. Accordingly, the defendant's Motion for Summary Judgment is GRANTED, consistent with the above.

SO ORDERED.

6/7/18
Date

J.D.O'N.III
James D. O'Neill, III
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Eileen Bloom v Casella Construction, Inc.**
Case Number: **211-2016-CV-00305**

Enclosed please find a copy of the court's order of June 29, 2018 relative to:

Re: Motion for Reconsideration

June 29, 2018

Abigail Albee
Clerk of Court

(480)

C: Brian C. Shaughnessy, ESQ; Joseph G. Yannetti, ESQ; Ashley Rae Theodore, ESQ

STATE OF NEW HAMPSHIRE

BELKNAP COUNTY SUPERIOR COURT

EILEEN BLOOM

V

CASELLA CONSTRUCTION INC

Docket No.: 16-CV-305

ORDER

Order in reference to the Plaintiff's "Motion for Reconsideration of This Court's Order on Summary Judgment" (filed 6-18-18). Subsequent to review of said Motion as well as the Defendant's Objection to same (filed 6-28-18), the Court renders the following determination(s).

The Court finds that the Plaintiff has not provided, with particular clarity, sufficient points of law or fact that the Court either overlooked or misapprehended in rendering the earlier Order (dated 6-7-18). Accordingly, the Plaintiff's Motion for Reconsideration is DENIED. The provisions of the earlier above-said Order shall remain in full force and effect.

SO ORDERED.

6/29/18
Date

James D. O'Neill III
Presiding Justice