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 PLAINTIFF/APPELLANT, EILEEN BLOOM

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

OTHER MATERIALS *Pages*

QUESTIONS PRESENTED FOR REVIEW

1. Is a Snow Removal Contractor Under a Duty to Pedestrians to Exercise Reasonable Care in its Operations, if Negligence by the Contractor Will Result in Risks Whose Likelihood and Magnitude Make the Conduct Unreasonably Dangerous?

Raised: Plaintiff's Objection to Casella's Motion for Summary Judgment, Appendix at 89-91 [and elsewhere].

2. In Determining Whether a "Relationship" Exists Adequate to Impose a Duty to Pedestrians on the Part of a Snow Removal Contractor, are the Policies Underlying Workers' Compensation Exclusivity as well as the State's Liability Statute for "Winter Maintenance," Supportive of Finding a Duty?

Raised: Plaintiff's Objection to Casella's Motion for Summary Judgment, Appendix at 92-96 [and elsewhere].

3. Does Section 324A of the Second Restatement of Torts, Setting Forth Three Provisos Under Which an Actor Performing a Service Necessary for the Protection of Others Is Liable for Negligence in that Performance, Apply to a Snow Removal Contractor Obligated Under a Seasonal Contract?

Raised: Plaintiff's Objection to Casella's Motion for Summary Judgment, Appendix at 91-93 [and elsewhere].

TREATISES AND STATUTES

Section 324A, Restatement (Second) of Torts (1965)

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 perform 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.

STATEMENT OF THE CASE

This appeal stems from a negligence action brought by Plaintiff Eileen Bloom after a slip and fall injury occurring on the parking premises of her employer, Dartmouth-Hitchcock Medical Center. Her Complaint alleged that the fall was due to an untreated icy accumulation on the surface of the area where she had parked, and named as the Defendant Casella Construction, Inc., which had a contract with Dartmouth-Hitchcock for snow and ice removal. No claim was made against Dartmouth Hitchcock, since her employer enjoyed statutory immunity for workplace injuries. Casella moved for summary judgment, contending that it owed "no duty" to the plaintiff, as there was no contractual relationship between the parties, and the circumstances did not permit application of the rule of liability set forward in Hungerford v. Jones, 143 NH 208 (1998), or the similar rule of Section 324A of the Second Restatement of Torts. The Superior Court (O'Neill, J.) agreed that no legal duty was owed and granted the Motion for Summary Judgment.

1. The Accident Circumstances.

According to Casella's statement of "Undisputed Facts" in its Motion for Summary Judgment, the plaintiff slipped and fell in the parking lot at Dartmouth-Hitchcock, where she worked as a nurse. Appendix at 10. Ms. Bloom testified at deposition that the weather was cold and that it had lightly snowed the night before her arrival. Appendix at 153. She recalled that everything "had like refrozen." Id. She recalled that there were no snow removal crews active at the site where she arrived. Id. at

154. She exited her vehicle by planting both feet on the ground. Id. The time was just after 6:00 AM. Appendix at 147. After closing her car door, the plaintiff took approximately 2 steps towards the back of her vehicle and her "feet slid out sideways from under me, causing me to come crashing down on the icy pavement on my knees," landing "full force on my knees." Id. The Plaintiff testified by Interrogatory that large mounds of snow had been piled between parking lot levels, apparently then melted, and pooled in the lot in which she had parked. Id. The frozen precipitation had not been treated with either sand or "ice melt," depriving her of foot traction. Id.

2. The DHMC/Casella Contract.

The contractual relationship between DHMC and Casella is set forth in a 6-page "Snow Plowing Agreement" and 3 attached "exhibits." Appendix at 23-32. Of particular interest here is the third exhibit, entitled "Snow Plowing Guidelines." Appendix at 31-32.

Under the Snow Plowing Guidelines, it was Casella's "responsibility to monitor weather forecasts and conditions and respond accordingly." Sand and salt were to be applied so as to meet the objectives of the "Snow Removal Policy." The Plowing Guidelines provide that the snow removal plan is meant to provide for bare pavement on roads, walks, and parking lots "as soon as possible after a storm." Employee lots were to be plowed as clear as possible and accessible at the start of each shift change. Salt was to be applied prior to or at the start of a storm and after storm cleanup. Salt was to be mixed with sand in a ratio of 1 to 4. For all of the above, *see* Appendix at 31-32.

Casella took the deposition of Steven Cutter, the person at DHMC with the responsibility for overseeing snow removal. He resolved several of the ambiguities which might be present if one were to rely on the Snow Plowing Guidelines alone. He stated that decisions on salting and sanding are not made "per storm"; rather, an understanding is reached before the season begins. Appendix at 164. When the contractor is on-site, sanding and salting is done automatically. Id. DHMC would not assist. Id. Casella is required to monitor the weather in the area and respond at the beginning of a snow event. Id. at 168-69. The degree of snowfall requiring the presence of the contractor is a matter resolved between the contracting parties prior to the beginning of the season. Id. at 169.

In its Motion for Summary Judgment, Casella contended that imposing 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 to determine for themselves the circumstances under which they choose to operate." Appendix at 19. This appeal to freedom of contract appears misplaced, as the plaintiff has never argued or claimed that Casella had removal obligations other than those it freely undertook in making its contract with DHMC. The plaintiff claims in this case only that Casella negligently performed certain of the duties it freely undertook by contract.

3. Characterizing Casella's Snow-Removal Role with Respect to DHMC.

As noted above, Casella has sought Summary Judgment on the ground that it owed no duty to Eileen Bloom, and its particular snow removal conduct on December 30 is seemingly irrelevant to this appeal. However, as to one source of liability – namely Section 324A(b) of the Second Restatement of Torts) -- the Superior Court held that liability turned on whether Casella could be said to "completely subsume or supplant" DHMC's duty to keep its property reasonably safe. Superior Court Opinion, Brief at 46-47. Thus, as to this source of liability, it is relevant to assess the contractual relationship between Casella and DHMC.

In support of its opinion that Casella had not "completely" subsumed or supplanted the landowner's duty, the Superior Court cited to the propositions that Casella's responsibilities were limited to "designated areas" and was only to "to apply sand and/or salt to the extent directed by DHMC." Superior Court Opinion, Brief at 47. Further, the Court cited to the proposition that Casella was not expected to "spontaneously" respond to a winter weather event. Id.

The Court did not cite to important provisions of the Snow Plowing Guidelines, nor did the Court cite the deposition testimony of Steven Cutter (previously referenced *supra*). As developed in the Argument section of this Brief, the evidence taken as a whole does not support the assertion that Casella was directed by DHMC on a "per storm" basis. Rather, Casella was to act according to criteria set before the beginning of the season.

4. The Decision of the Superior Court.

The Superior Court granted the Motion for Summary Judgment.

The Court held that Casella owed no common law duty to the plaintiff. The Court began with the proposition that a duty "generally arises out of a relationship between the parties." Superior Court Opinion, Brief at 43. A contract "may supply" that relationship, and the scope is limited to those in privity of contract. However, the Court recognized that New Hampshire had recognized an exception to the general rule, and defined that exception in Hungerford v. Jones. Hungerford established that parties owe a duty to those foreseeably endangered by their conduct as to risks that make that conduct "unreasonably dangerous." Superior Court Opinion, Brief at 43.

The Court determined that there was no privity adequate to establish a duty, notwithstanding an apparent mutuality of interest between the plaintiff and DHMC in avoiding workplace injuries. The Court declined to "infer" such a mutuality of interest, and was likewise not persuaded that New Hampshire had a judicial preference disfavoring privity as a means of avoiding personal injury liability.

The Court agreed that careless snow plowing could pose a foreseeable risk of harm to others, but still managed to distinguish the Hungerford exception. The Court's reasoning was based on the "commonplace" nature of snow and ice in New Hampshire. The Court offered the rationale that the plaintiff had identified *only a general risk of harm, and not an unreasonable risk of harm*:

> [The Hungerford is] 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.

Superior Court Opinion, Brief at 45.

The Court next addressed the applicability of Section 324A of the Second Restatement of Torts, which it found to have been implicitly adopted by the New Hampshire Supreme Court. Section 324A provides for three independent scenarios in which liability is imposed for injury resulting from the failure to exercise reasonable care. Those three scenarios can be paraphrased as follows:

(a) [Exacerbation]: the alleged negligent actor makes the existing situation worse;

(b) [Assumption]: the alleged negligent actor assumes a duty owed to another;

(c) [Reliance]: there is reliance by a third person on the negligent actor's conduct.

The Court seemed to dismiss out of hand both "Exacerbation" and "Reliance," and extensively analyzed only "Assumption." The Court chose to follow the "narrow interpretation" of 324A(b), citing to two intermediate appellate court opinions, one from Missouri and the other from Minnesota. Under the "narrow interpretation," the Court held that the negligent actor can be liable only where the intent was for the actor to

"completely subsume or supplant the duty of the other party." Superior Court Opinion, Brief at 47. In support of its conclusion that there was only an incomplete assumption by Casella, the Superior Court cited to its understanding that DHMC directed Casella on a "per storm" basis, specifying the extent of salting and sanding for each storm, and leaving to DHMC the matter of whether Casella would be called upon at all (i.e., no requirement that Casella respond spontaneously).

Finally, the Court found unpersuasive the argument that the "relationship" needed to impose a duty was strengthened by the public policies underlying the workers' compensation law and its provisions for third-party recoveries. Similarly, it "decline[d] to address" the argument that the existence of a duty was supported by the recently enacted statute entitled "Limited Liability for Winter Maintenance."

In addition to the legal argument contained in the Motion for Summary Judgment and the Objection to the Motion, the plaintiff submitted a "Suggested Draft Order" (Appendix at 173) and a timely Motion for Reconsideration (Appendix at 177). The Motion for Reconsideration was denied without substantive elaboration.

SUMMARY OF ARGUMENT

The Superior Court erred in holding on Summary Judgment that an independent snow removal contractor owed no duty of due care to a pedestrian employee of the business premises it was obligated to clear of snow and ice. The Court premised its

holding on the conclusion that there was no privity of contract between the plaintiff pedestrian and the contractor, notwithstanding the mutuality of interests between the pedestrian and the employer land-owner in avoiding workplace injuries. There was sufficient mutuality of interests between the plaintiff and her employer for the plaintiff to stand in the shoes of her employer and establish a relationship of privity warranting the imposition of a duty. This result is consistent with New Hampshire caselaw, which disfavors the use of strict privity rules to defeat liability in a personal injury case.

Even without regard to privity, the existence of a duty is established by the rule set forth in Hungerford v. Jones, which provides for liability if an actor foreseeably endangers others by creating risks sufficiently severe (in terms of likelihood and magnitude) to render the actor's conduct "unreasonably dangerous." The several New Hampshire Superior Court cases holding that Hungerford does not apply because snowplowing itself is not unreasonably dangerous to snowplow operators are logically faulty, as the potential claimants recognized in Hungerford are not the perpetrators of the risk but rather those injured by the risk. Under Hungerford, the unreasonableness of a risk is a function of "likelihood" and "magnitude." In other words, the risk must not be remote and it must not be small. "Commonplace" risks are more likely to fall within Hungerford than uncommon risks, as common risks are more likely to occur. Likewise, common risks (such as the risk from DWI operation) are not rendered small by virtue of being common. The Superior Court's attempt to disqualify risks because they are "commonplace" is not at all consistent with the rule set forth in Hungerford.

The sufficiency of the "relationship" for the purpose of supporting a duty is evidenced not only by the likelihood and magnitude of the risk, but also by at least three external elements supportive of a duty. These include; 1) the ostensible "privity" between DHMC and its employees, given the mutuality of interest in avoiding workplace injuries; 2) the policies at play in New Hampshire workers' compensation law, which encourage third-party lien recoveries, insofar as those recoveries enable lower insurance rates; and 3) the policies embodied in the State's law of "Limited Liability for Winter Maintenance," which both preserve contractor liability and encourage safety by protecting contractors from liability if they follow prescribed practices.

Finally, liability is easily satisfied under Section 324A of the Second Restatement of Torts, which provides for liability in the absence of privity if an actor performing a service necessary for the protection of others makes an existing situation worse, assumes a duty owed to another, or knows that others are acting in reliance on his performance. Satisfying any one of these conditions results in liability, but in this case all three are satisfied. Snow and ice removal from pedestrian areas clearly serves to protect others. In attempting to perform its removal obligations, Casella: 1) made the situation worse by leaving behind an untreated sheet of ice which was not pedestrian negotiable, 2) assumed the non-delegable duty of DHMC to make the parking areas reasonably safe, and 3) failed to satisfy the reliance expectations of DHMC employees that the parking lots would be reasonably safe.

While Casella attempts to put a gloss on the "assumption" rationale, claiming without controlling New Hampshire authority that the assumption must be completely subsumed or supplanted, here there is no question that "per storm" calculations and decisions were entrusted to Casella. DHMC set broad policy at the beginning of the season, but from then on it was Casella's obligation to stand in the shoes of DHMC.

ARGUMENT

I. A Snow Removal Contractor is Under a Duty to Pedestrians to Exercise Reasonable Care in its Operations, if Negligent Conduct will Result in Risks Whose Likelihood and Magnitude make the Conduct Unreasonably Dangerous.

The fundamental question in this appeal is whether Defendant Casella, a snow removal contractor under a contractual obligation to clear the parking lots of the Dartmouth-Hitchcock Medical Center – but having no direct contractual relationship with the pedestrian employees making use of those lots – is under a duty to those pedestrians to clear the lots with reasonable care. The Superior Court held on Summary Judgment that no such duty existed, and that this action against Casella must fail.

A. Privity May Be Said to Exist Where There Is a Mutuality of Interest.

It is often said (because it is a truism) that absent a duty there is no negligence. Walls v. Oxford Management, 137 NH 653, 656 (1993). Of course, that truism does not illuminate the somewhat more difficult inquiry of determining whether a duty exists. The

New Hampshire Supreme Court has observed that "the existence and extent" of a legal duty "depends on the nature of the relationship between the parties." Sintros v. Hamon, 148 NH 478, 480 (2002).

The matter of whether a duty exists was tellingly analyzed by Professor Prosser in his famous treatise. In observing that the existence of a duty is a question entrusted as a matter of law to the courts (thereby achieving a measure of uniformity as to the reach of the law of torts in a given jurisdiction), Prosser wrote:

> Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.

Prosser, Law of Torts, sec 53 at 327 (4th Edition, 1972). *See also* Corso v. Merrill, 119 NH 647 (NH 1979) (recognizing right of recovery for parental bystanders); and *cf.* Siciliano v. Capitol City Shows, 124 NH 719 (NH 1984) (not recognizing parental recovery for loss of consortium of child).

When a contract is the foundation of the "relationship" imposing a duty, ordinarily the duty is confined to those in privity of contract. Sisson v. Jankowski, 148 NH 503, 505 (2002). It is sometimes said (including by the Defendant here) that privity cannot be established unless the person or entity "is a party to the contract." However, New Hampshire has not endorsed "privity" as a shield for tortfeasors: "We [the NH Supreme Court] have expressed our disfavor for the privity doctrine in personal injury cases." *See* Spherex v. Alexander Grant & Co., 122 NH 898, 903 (NH 1982). Moreover, this Court has

recognized exceptions to the "privity requirement" where "necessary to protect against reasonably foreseeable harm." Sisson v. Jankowski, *supra* at 505.

In the instant context, the question of whether a duty exists is not a talismanic inquiry into whether there is formal privity of contract. A Court is obligated to examine numerous elements, including the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant. Id. at 506. Analogizing to the legal aphorism that a single property right can be said to embrace a "bundle of sticks," these elements are the bundle of sticks which bear on whether a duty will be imposed.

Even if the analysis is confined to the matter of privity, Casella's reasoning surely shortchanges the breadth of that concept. Privity is merely "mutuality of interest" -- an interest "growing out of contract, *connection,* or bond of union.". Hodgson v. Midwest Oil Co., 17 F.2d 71, 75 (8th Cir. 1927) (mining claims) (emphasis added):

> [W]aiving the question of privity . . . technically considered, there is a privity of interests, a mutuality of concern in the questions to be litigated.

In the instant case there is clearly a "mutuality of concern" between the Plaintiff and DHMC. The plaintiff is an employee of DHMC, and it is clear that DHMC and the plaintiff have a mutual interest in avoiding workplace injuries. The plaintiff's interest is the avoidance of injury, while DHMC's economic interest is avoidance of the costs of on-the-job injuries. Indeed, DHMC is obligated, through New Hampshire workers' compensation

law, to cover medical bills and lost wages arising from workplace injuries to its employees. There is plainly a mutuality of concern, and it is not fair to completely disown the concept of legal privity as between employer and employee. While alleviating wintry conditions in parking lots is in part about convenience, it is also surely about safety (and injury).

The mutual interest here is sufficient to make "privity" an element weighing in favor of imposing a duty.

B. Application of the Rule Put Forward in Hungerford v. Jones.

As recognized in Sisson v. Jankowski, *supra*, privity can in any event be disregarded where necessary to protect against reasonably foreseeable harm. That protection is in fact afforded by the decisional law of New Hampshire. In the case of Hungerford v. Jones, 143 NH 208 (1998), the New Hampshire Supreme Court noted an important elaboration on the duty rules governing New Hampshire actors. The Court held that parties owe a duty to persons foreseeably endangered by their conduct "with respect to those risks whose *likelihood and magnitude* make the conduct unreasonably dangerous." Id. at 211 (emphasis added).

In Hungerford, the conduct at issue was the mental health care of patients suspected of having suffered sexual abuse. The allegation was that the defendant therapist had negligently treated an alleged victim of sexual abuse, causing the patient to summon false, repressed memories of abuse by her father. The plaintiff was the victim's father, who was ultimately indicted based on the false memories elicited by the therapist. The defendant

therapist argued that she owed no duty to her patient's father. The Court stated that "a duty arises if the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous." Id. The duty runs to those "foreseeably endangered by . . . the conduct." Id.

It goes without saying that what the therapist does is not intrinsically dangerous. The therapeutic process of question, answer, and analysis does not itself present a prospect of immediate injury, even if done carelessly. However, a careless *finding* of sexual abuse presents a substantial prospect of later injury to the parent or other person who has been stigmatized by an undeserved label. Applying Hungerford to this case, it is clear that the relevant inquiry would be whether careless snow removal is unreasonably dangerous to the pedestrians who will later need to negotiate the surfaces and pathways which should have been safely treated.

Casella tries to make Hungerford inapplicable to this case by focusing not on whether careless snow removal "activity" is dangerous to later pedestrians, but rather whether snow-removal activity is dangerous in and of itself. In Hungerford terms, this approach is comparable to focusing on whether careless therapeutic counseling is dangerous in and of itself and disregarding the later consequences of such carelessness to someone wrongfully accused. However, we know from Hungerford that such an approach would be mistaken.

In concluding that a father was owed a duty by the therapist, the Hungerford Court observed that the label of "child abuser is one of the most loathsome labels in society." Id.

at 212. The likelihood and magnitude of the risk made the therapist's conduct unreasonably dangerous. *Clearly, the inquiry focuses not on whether the tortfeasor's conduct (psychiatric therapy (or snow plowing)) is dangerous in itself, but rather whether the conduct – carelessly performed – is foreseeably dangerous to others.*

Casella's argument – that the *dispositive matter is whether snow-clearing is dangerous in itself, and not whether careless snow-clearing is foreseeably dangerous to others* – is self-refuting. It is not colorable to suggest that the dispositive concern is whether snow-clearing is dangerous to snow-clearing operators. However, that is exactly the proposition put forward in defendant's Motion for Summary Judgment:

> Here, Casella contracted with DHMC to remove snow and ice from a parking lot, manifestly not an unreasonably dangerous activity. It is an activity that occurs throughout the fall, winter, and spring in New Hampshire in nearly every part of the state. Since the activity is not unreasonably dangerous, and because there was no privity between Casella and Plaintiff, Casella did not owe a duty to Plaintiff.

Appendix at 17. This argument misses the pertinent question: Is the "activity" of snow and ice removal, if done carelessly, unreasonably dangerous to those foreseeably encountering the result of that carelessness? That question should be answered affirmatively.

C. The Superior Court's Distinction Between "General Risks" and "Unreasonable Risks" Is Not a Workable Basis for Decision.

The Superior Court recognized that it must address what it calls the Hungerford "exception." The Court posited that Hungerford "clearly meant to distinguish between

activity that poses a general risk of harm and those that pose an *unreasonable* risk of harm." Superior Court Opinion, Brief at 45. The Court reasoned, with no direct support from any New Hampshire authority, that careless snow plowing poses a foreseeable risk but not an unreasonable risk. In this manner, the Court simply defined the problem away.

Unfortunately for the distinction put forward by the Court, there is no support for that distinction in Hungerford. The Hungerford "activity" was psychiatric therapy. The founding element supporting a relationship between the therapist and the plaintiff parent was the parent's expectation "that a determination of sexual abuse, touching him or her as profoundly as it will, will be carefully made." Hungerford v. Jones, 143 NH 208, 214 (1998). A duty rule would result in "greater protection for parents and families from unqualified or unaccepted therapeutic diagnoses." Id. There was no "social utility" in shielding cavalier therapists who cause profound damage. Whatever the "advantages of giving free reign to therapists, those advantages were outweighed by the "substantial risk of severe harm to falsely accused parents." Id.

It is clear from Hungerford that the distinction is not between a "general risk" (the term does not appear in the opinion at all) and an "unreasonable risk" (that term likewise does not appear in the opinion). The opinion is not about attaching tag-words to "risk." Rather, as stated in the opinion, multiple elements must be assessed to determine whether a duty exists: *"[W]e examine the societal interest involved, the severity of the risk, the likelihood of occurrence, the relationship between the parties, and the burden upon the*

defendant." Id. at 211. The Superior Court did not attempt to undertake any such assessment.

Fortunately, the inquiry that should have been undertaken leads to a clear result. The parties have a "relationship" based on mutual interest, statutory elements, and other factors; society has a clear interest in the policies of tort law (compensation and deterrence); the likelihood of serious accident is high if persons are compelled to traverse untreated snow and ice; and the burden on the defendant is small, particularly given the availability of a statutory scheme which, if followed, will help to protect it from liability (*see* discussion *infra*).

Hungerford does not attempt to create a typology of risk, from which a legal conclusion can be drawn. Not every risk gives rise to a duty, but a duty is created if the CONDUCT is "unreasonably dangerous" in light of the likelihood and magnitude of the risk. Snow may be commonplace, and careless snow removal may be commonplace, but that does not detract at all from the fact that the conduct is unreasonably dangerous – anymore than the common practice of texting while driving was excused by its commonality, with the unreasonable danger it posed ultimately enshrined by statute as unlawful.

D. Superior Court Decisional Law Relied Upon by Casella.

It is perhaps noteworthy that Casella's misreading of Hungerford appears frequently in the Superior Court cases it relies upon in its Motion. *See* McEneny v. Brady Sullivan at p. 4 (Casella's Exhibit C, Appendix at 41) ("Furthermore, the Court finds the conduct about which plaintiff complains – snow and ice removal – are not unreasonably dangerous activities"); Wood v. Springwise Facility Management at p. 6 (Casella's Exhibit D, Appendix at 50) ("Further, the court finds that Springwise's snow and ice maintenance activities were not unreasonably dangerous"); Powell v. Cameron Real Estate at p. 5 (Casella's Exhibit E, Appendix at 66) ("Furthermore, the Court finds the conduct about which plaintiffs complain – snow removal and salting and sanding of a parking lot – are not unreasonably dangerous activities"); Lavoie v. Bank of America at p. 6 (Casella's Exhibit F, Appendix at 77) ("Lavoie also fails to allege that plowing and salting is an unreasonably dangerous activity"); Dunshee v. Burhoe at p. 4 (Casella's Exhibit G, Appendix at 83) ("Construing the allegations in the plaintiff's writ most favorably to the plaintiff, they do not describe conduct that is unreasonably dangerous").

It is significant that every Superior Court opinion included as an Exhibit in Casella's Motion relies on the erroneous proposition that the test for dangerousness is not dangerousness to the public at large, but rather dangerousness to the removal operator. This is an analytical error, and the error is not remedied by the fact that it has been oft-repeated in the Superior Court.

(There are numerous Superior Court orders allowing direct actions against contractors. A collection of these cases was included in the plaintiff's opposition to the Motion for Summary Judgment, and appears at pp. 102-144 of the Appendix.)

II. Several External Elements Support the Finding of a Relationship Adequate to Impose a Duty.

A. The Superior Court Decision Frustrates the Public Policy Underlying Workers' Compensation Exclusivity.

In a case such as this, the Plaintiff is barred from suing her site-owning employer by the statutory provision limiting the plaintiff's remedy against her employer to that provided by workers' compensation. She is not at liberty to make a claim against her employer and derives no benefit from the "non-delegable" duty owed by the owner/employer.

In the interest of insulating the workers' compensation system from excessive rates and avoiding double recoveries by injured parties, the workers' compensation law provides that injured workers with a third-party recovery are subject to a lien for the amounts paid out in benefits by the insurer (or employer). RSA 281-A:13(1)(b). This lien is an important part of the workers' compensation system, as it amounts to a recovery of the benefits previously paid.

In barring the plaintiff's action against the third-party contractor, the law would prevent the workers' compensation carrier (or employer, if self-insured) from replenishing

itself, and place upward pressure on the carrier's rates. A legal position which works to justify such an impairment to the bottom-line of the compensation carriers should be disfavored as a matter of policy.

As noted above, the imposition of a duty derives from the "relationship" between the parties. That relationship in turn derives from specific aspects of the relationship, and also from broad public policies defining their respective roles. New Hampshire has declared by statute its interest in allowing workers' compensation insurers to reimburse themselves at the expense of at-fault third parties. That interest is supportive of the imposition of a duty upon Casella, and wholly frustrated by the decision reached by the Superior Court.

B. Casella's Appeal to DHMC's "Freedom to Hire" Is Not Persuasive.

In its Summary Judgment Motion, Casella claims as its ultimate policy rationale that:

> Imposition of a common law duty of care from Casella to Plaintiff would short-circuit DHMC's freedom to hire a contractor to perform a limited selection of winter maintenance activities.

Appendix at 19. It is perhaps surprising that Casella focuses on "the freedom of property owners and snowplow contractors to determine for themselves the circumstances under which they choose to operate." Id. However, Casella cannot credibly maintain that this potential limitation on freedom would be something unanticipated. Indeed, it fully protected itself with its own liability insurance, procured in 2012. Appendix at 30. That insurance (or a successor policy) is presumably operative for the instant claim.

If a duty is found, the real "limitation" on Casella will be its liability for unreasonable conduct which foreseeably injures others. Casella seeks a determination that it should be insulated from such direct liability However, the protection it seeks is ultimately quite narrow, and comes at the expense of innocent pedestrian employees. Casella will still be liable for its negligence (in most cases) through an indemnity action against it by the property owner. It achieves "freedom" only in the small number of cases where its negligence victim happens to be an employee barred from suing her employer. It cannot be imagined that insulating itself from liability in this small number of cases markedly affects its "freedom."

Protecting the "freedom to hire" comes at the expense of long-recognized public policies of great importance. For a duty to exist, it should appear that the parties bring themselves "within the scope of a definite legal obligation," so that the matter is "personal to him." William Prosser, Law of Torts, sec53 at 325 (4th Edition). Numerous policy considerations are also brought to bear, including the policy of deterring future injury (or damage), and the policy of requiring compensation on the part of those to whom moral blame is attachable. Id. at 327. In other words, recognizing the existence of a "duty" brings an actor's conduct within the reach of two great public policies: deterring injury and requiring compensation from the blameworthy.

Insulating an actor such as Casella from the consequences of its negligence diminishes the natural deterrence imposed by the law of negligence and frees the

blameworthy from the justice of compensation. Both of these policies dwarf the concern of Casella that it be able to maximize its freedom of contract.

C. Casella's Legal Position Subverts the New Hampshire Statutory Framework for "Limited Liability for Winter Maintenance."

On September 26, 2013, the New Hampshire legislature enacted R.S.A. 508:22, "Limited Liability for Winter Maintenance." The statute provided an option for "commercial operators" (meaning any non-governmental individual who applies salt) to become certified through the Department of Environmental Services. Such certified operators are protected from "damages" caused by failure or delay in removing snow or ice, provided they implemented "best management practices" as defined by the Department of Transportation (absent recklessness or gross negligence).

It is evident that the State of New Hampshire acted to balance the interests of snow removal operators and persons injured when removal operations appear inadequate. A substantial measure of protection is provided to operators if they are certified and have implemented so-called best management practices. The foreclosure of liability favored by Casella is inconsistent with the balance enacted by the New Hampshire legislature, and as such must be deemed disfavored. The legislature having spoken on the matter of liability for snow and ice removal, the "new" immunity put forward by Casella is inconsistent with the statutory framework and should be rejected on that basis alone.

In summary, there are multiple elements supportive of imposing a duty upon Casella. Not only does the imposition of a duty advance the policies of deterrence and just

compensation, it also serves to undergird the policies of our workers' compensation law and our specific statutory enactment governing liability for "Winter Maintenance." These elements are more persuasive than Casella's claimed loss of contractual "freedom."

III. Liability in this Case Is Supported by the Second Restatement of Torts, Section 324A.

The Superior Court acknowledges that Sec. 324A appears to have been "implicitly adopted" by the Supreme Court of New Hampshire and deserves consideration in this case. Superior Court Opinion, Brief at 46. The New Hampshire Supreme Court has dealt with the Section favorably. *See* VanDeMark v. McDonald's Corp, 153 NH 753, 757 (2006); Williams v. O'Brien, 140 NH 595, 600 (1995); Corson v. Liberty Mutual Ins. Co., 110 NH 210, 214 (1970). Section 324A provides simply that an actor, whether paid or volunteer, who performs a service for another which the actor "should recognize as necessary for the protection of a third person," is subject to liability for his failure to exercise reasonable care: (a) if that failure increases the risk of harm; or (b) the actor has undertaken to perform a duty owed by the other to the third person; or (c) harm is suffered because of reliance on the actor by "the other or the third person." Liability is established if any one of the three conditions is established.

The "provisos" to 324A may be summarized as follows: a) the actor *makes the situation worse*; b) the actor *assumes a duty* owed by the other; or c) there is *reliance* by the other or the third person upon the actor. The Superior Court improvidently disregarded

subsections (a) and (c), holding that there was no evidence that Casella either made things worse or was the subject of reliance. It went on to analyze liability under proviso (b), holding that "assuming the duty" is relevant only if the actor "intends to completely subsume or supplant the duty of the other party." Superior Court Opinion, Brief at 46. This gloss on the Restatement is not supported by any New Hampshire Supreme Court authority.

As to proviso (b) [assumption], it is not clear as a matter of policy why liability should turn on whether the "assumption" is partial or complete, or how one is to measure "completeness." Where there is a written contract, there will probably be important guidance as to the responsibilities, if any, retained by the landowner. Here, for example, it is clear that Casella bore responsibility for sanding and salting the parking lots, and Casella's own records demonstrate that it was at times on the scene performing those functions. Appendix at 172. Moreover, the actor will be liable only for the respects in which *his separate performance was not reasonable*. There is no unfairness in attaching liability to an actor who has performed unreasonably, no matter whether his role in the total performance was large or small, so long as causation is satisfied.

Generally, New Hampshire law does not favor extinguishing a liability because some other person or entity played a contributing role in bringing about the damage; rather, New Hampshire law generally seeks to hold tortfeasors responsible to the extent of their actual culpability. Not only is this policy reflected in DeBenedetto v. CLD Consulting (153 NH 793, 2006) (and progeny), but also guides portions of the statutory rules pertaining to joint and several liability. R.S.A. 507:7-e. The rule advanced by the Court to limit the reach of

324A is thus seemingly inconsistent with New Hampshire law. Insofar as the gloss on 324A put forward by Casella shields a tortfeasor from liability, that shield would be justified only if needed to advance strong public policies.

More fundamentally, the Court mischaracterized the evidence put before it on the matter of whether *in fact* Casella had only partially assumed DHMC's duty to the Plaintiff. The Superior Court's rationale for partial assumption was that Casella "was not expected to 'spontaneously' respond to a winter weather event, nor was it expected to inspect the DHMC property between visits." Superior Court Opinion, Brief at 47. The Court seems to be relying, at least in part, on a portion of the "Snow Plowing Guidelines" attached to the DHMC/Casella contract. See Appendix at 31-32. The Snow Plowing guidelines seem to suggest that salting and sanding will be done by DHMC and that DHMC "will coordinate a . . . removal operation . . . for each storm." Appendix at 31.

The actuality of Casella's responsibilities was addressed earlier in the Statement of the Case ("Characterizing Casella's Snow Removal Role with Respect to DHMC"), but for ease of reference will be recapitulated here. In relying on the "Snow Plowing Guidelines," the Superior Court appears to have neglected the up-to-date and clarifying deposition testimony of Steven Cutter, who managed the contract for DHMC and was charged with overseeing the snow removal contract with Casella. See Appendix at 160. It is simply not true that Casella was "not expected to spontaneously respond to a winter weather event." Rather, as can be seen at pp.16-17 of Cutter's deposition Appendix at 168-69), Casella was required to monitor the weather itself and respond on its own initiative at the beginning of a

snow event. Id. Sanding and salting were to be done "automatically" by Casella and DHMC would not assist. Appendix at 164. It is assumed that Mr. Cutter's interpretation is based on the specific language in the Snow Plowing Guidelines which states: "It will be contractor's responsibility to monitor weather forecasts and conditions and respond accordingly." Appendix at 31.

Also, decisions on sanding and salting were not made "per storm," but rather defined by an understanding reached before the beginning of the season. Appendix at 164. Sanding and salting were thus the province of Casella, which was required to perform its obligations consistent with the Snow Plowing Guidelines. The notion that Casella's storm performance was actively directed "per storm" by DHMC is contradicted by Cutter's testimony. Certainly, the matter of "per-storm" direction by DHMC cannot be resolved in favor of Casella in the context of a motion for summary judgment.

Given that the Superior Court's rejection of proviso (b) was errant, the Court is not free to hold that that Restatement Second 324A is inapplicable to this case. Moreover, the Court also erred – at least in the context of summary judgment – in rejecting provisos (a) and (c). The Defendant, which carries the burden on its Motion, made no showing that the conduct of Casella did not make the situation worse (proviso (a)). Plaintiff's Objection to the Motion, which utilizes the records provided by Casella, points out that although Casella was performing operations on the accident day, it apparently neglected to treat the lot area where the Plaintiff slipped and fell. Appendix at 98. This is consistent with the Plaintiff's testimony that there was "no sand nor ice melt applied to the lot." Plowing the snow but

failing to provide salt or sand apparently transformed the lot into a sea of ice, worsening a pedestrian's capacity to negotiate the area. In the context of a summary judgment motion, the Court erred in concluding that proviso (a) did not apply.

Likewise, it was wrong for the Court to conclude on Summary Judgment that proviso (c) (reliance) did not apply. Casella put forward no evidence supporting the proposition that pedestrians did not rely on snow removal. Indeed, the Snow Removal Guidelines provide that removal operations will be timed "to the start of each shift change." Appendix at 32. Reliance can almost be presumed, as workers at large facilities such as Dartmouth-Hitchcock understand that company parking areas will be maintained so as to remove ice and snow, and rely on that maintenance when they confront snow events and their aftermath. It goes almost without saying that employees rely on snow removal at large places of employment, where traversing the parking lot to the building door may involve a lengthy walk of several minutes. Summary judgment as to proviso (c) was thus unwarranted.

As applied to the circumstances of the instant case, Section 324A will apply if snow-clearing is recognized as necessary for the protection of third persons, and the performance of such snow-clearing works to increase the risk of harm, assume the duty of another, or fail the reliance interests of foreseeable pedestrians. All of these conditions are met.

IV. Summary.

Good public policy should recognize that an employee of DHMC is in privity with her employer for purposes of establishing liability, as both the employee and the employer have a mutual interest in avoiding injury and providing redress for injury. It does not profit DHMC to suffer injured employees who are not fully compensated. There is nothing exceptional in liability attending careless conduct that is foreseeably dangerous to others. The inquiry is not whether the careless conduct is dangerous in itself, but rather whether the conduct is foreseeably dangerous to others. This underlying principle animates both the Restatement of Torts (Second) 324A and this Court's jurisprudence in Hungerford.

Public policy favors the recognition of direct actions such as this. By virtue of the workers' compensation lien on third-party actions, this lawsuit (and others like it) ameliorate the cost burdens on workers' compensation carriers. The great policy ambitions of tort law generally – deterring future injury and requiring compensation from the blameworthy – are both served. Finally, the position advocated by Casella frustrates the balance struck by the legislature when it enacted "Limited Liability for Winter Maintenance."

Also noteworthy, the public policy put forward by Casella – freedom "to hire" – is shown to be empty. Direct actions in these circumstances will not diminish the ability of snow-removal operators and property owners to divide removal tasks as they see fit. However, the contractor will bear responsibility for the damages occasioned by its own

negligence in performing its own contractual obligations. Public policy is served by honoring that fundamental responsibility, not compromising it.

V. Conclusion.

The plaintiff requests that this Court reverse the Superior Court and remand this matter to the Superior Court for resolution on the merits.

Oral argument is requested before the full court. The plaintiff's case will be presented by Brian Shaughnessy, Esq. The appealed decision(s) is in writing and is appended to this Brief

Respectfully submitted,

Eileen Bloom, Plaintiff

By her attorneys,

10/4/18
Date

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CERTIFICATION

I, Brian C. Shaughnessy, Esq., certify that two copies of this pleading (and the Appendix) were forwarded by e-mail and First-Class Mail to the Defendant's counsel of record (Joseph Yannetti, Esq.).

10/9/18
Date

Brian C. Shaughnessy, Esquire, Bar # 6894

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JUDICIAL BRANCH
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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

James D. O'Neill, III
Presiding Justice

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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

JDO'N
James D. O'Neill III
Presiding Justice