THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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SUPREME COURT
2018 NOV 27 P 2:28

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

REPLY BRIEF OF PLAINTIFF/APPELLANT, EILEEN BLOOM

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ARGUMENT

I. Casella's Argument that DHMC Was Responsible for Sanding and Salting Is Not Supported by the Summary Judgment Record.

Casella repeats the following formulation at least 8 times in its Brief: Sanding and salting were the responsibility of DHMC, and not Casella. Casella Brief at 8, 10, 22, 23, 24, 26, 27 and 30. For example, at page 27 of its Brief, Casella states:

> Casella was responsible for snow removal and DHMC was responsible for sanding and salting.

While Casella might hope to prove this formulation at trial, the showings made on summary judgment do not permit this conclusion.

Casella apparently relies on a provision of the "Snow Plowing Guidelines" (incorporated as Exhibit C to the Snow Plowing Agreement between Casella and DHMC, App. at 31), stating: "The Contractor shall apply salt and/or sand only as directed by the DHMC Grounds Supervisor or his designee to meet the objectives of the Snow Removal Policy." Of course, this provision does not mean that Casella is not responsible for sanding and salting, only that its responsibility for sanding and salting will be determined by the DHMC Grounds Supervisor. The remainder of the Guidelines is fully consistent with the proposition that Casella will be directed to accomplish salting and sanding:

- The Guidelines provide a salt recipe (always mixed with sand, in a ratio of 1:4);

- The Guidelines set forth the purposes and methods of application to be employed by the Contractor;
- The Guidelines include a promise by DHMC to store sand and salt on site, in ample quantities;
- The Guidelines provide for the use by Casella of at least two plow trucks equipped with *spreaders*.

The matter of what Casella *actually did* is shown by the records for the accident day, December 30, 2013. App. at 172 (for ease of reference, attached as the page following this page). The record for Casella's performance has a column for the type of materials applied, together with the tonnage. According to the record, Casella was on site with one truck from 12 AM to 6:30 AM, and with a second truck from 12 AM to 7:30 AM. The second truck apparently applied salt but not the first truck. According to the Guidelines, lots were to be as clear as possible at the start of each shift change. The Plaintiff encountered the icy lot at approximately 6 AM, the beginning of her shift, when it was wholly untreated. App. at 147, 154. While salt may have been applied by the second truck upon clean-up at 7:30 AM, that application would not have benefitted the earlier-arriving Plaintiff.

The record of Casella's performance for December 30 belies the oft-repeated contention of its counsel that DHMC was responsible for salting and sanding. Moreover, contrary to the suggestion by Casella that DHMC Director Cutter's testimony supports the notion that DHMC was responsible for salting and sanding, Cutter's testimony

DHMC
2013-14

DHMC Employee Lots — Contractor: CASELLA CONSTRUCTION

DATE	TIME IN	TIME OUT	MATERIAL	AMOUNT USED	WORK PERFORMED/EQUIPMENT
Dec -27 ✓ 30	12 Am	4 Am			5 LOADERS PLOWIN
5.5	12 Am	6:30 Am	TREATED SALT	3 TON	ONE TON WITH SANDER
Dec -30 ✓ 12	8 pm	12 pm			3 Dump Trucks
8	8 pm	12 pm Am?			2 LOADERS
32.5	12 Am	6:30 Am			5 LOADERS
7.5	12 Am	7:30 Am	TREATED SALT	3 TON	ONE TON WITH SANDER
Dec -31 ✓ 12	12 Am	6 Am			2 LOADERS LOADING STACK
18	12 Am	6 Am			3 Dump Trucks R
4	2 Am	6 Am	TREATED SALT	2 TON	ONE TON WITH SANDER

supports only the notion that DHMC served an adjunct responsibility if it found a slippery spot or area between storms. Currier testified that sanding and salting were determined before the beginning of the season when DHMC would give its directions to the Contractor. App. at p. 163. When the Contractor was on site because of a storm, the Contractor would "automatically sand and salt as part of that job." App. at 164. These sanding and salting responsibilities would have been outlined at the beginning of the season, and not on a per-storm basis. App. at 164.

Reading the contract strictly, DHMC was responsible for sanding and salting until it directed someone else to do the job. In connection with storms, DHMC directed Casella to assume that responsibility pursuant to contract at the beginning of the season. Thereafter the responsibility was Casella's. The notion that DHMC was responsible for "sanding and salting" is simply belied by the records. In the context of summary judgment, it is not possible to resolve this assertion by Casella in favor of Casella.

II. The *Hungerford* "Exception" Does Not Turn on Whether the Defendant's Activity is Commonplace, but rather on Calculating the Risk of Harm.

In its Brief, Casella asserts that the Plaintiff is wrong to inquire into whether the "complained of conduct was performed carelessly." Defendant's Brief at p. 20. Rather, Defendant contends that such inquiry is foreclosed because snow removal is a "standard, run-of-the-mill activity' and thus beyond characterization as "unreasonably dangerous." Id. at p. 21. Casella's argument misunderstands the holding in Hungerford v. Jones, 143 NH 208 (1998).

Hungerford is not about whether the conduct or "activity" is commonplace. It is not about characterizing the *conduct* as unreasonably dangerous. Rather, it is about *characterizing whether the potential for harm stemming from that conduct is unreasonably dangerous*. Put another way, lighting a match may be thoroughly commonplace, but it is quite another thing to light a match in a dynamite factory.

The key to Hungerford is that it goes beyond "the relationship between the parties" to incorporate the "need for protection against reasonably foreseeable harm." Hungerford, *supra*, at 211. The question that needs to be addressed is whether the "likelihood and magnitude" of the risk of the conduct makes the conduct "unreasonably dangerous." Id. Obviously, the "risk" to be analyzed is the risk of conducting the activity carelessly, as without carelessness there would be no need to inquire as to duty or ultimate liability. In Hungerford, a crucial factor was the prospect that the negligence would become "common knowledge in the community," making the foreseeability of harm "great."

In other words, the contention that the activity is "commonplace" is wholly unresponsive to the analysis required in Hungerford. Aside from the fact that there is no easy measure of what constitutes the commonplace, the inquiry must be whether the likelihood and magnitude of the risk invited by the Defendant makes the conduct unreasonably dangerous. Hungerford is explicit in requiring that the analysis of unreasonable danger include the "societal interest involved, the severity of the risk, the likelihood of occurrence, the relationship between the parties, and the burden upon the

defendant." Hungerford at p. 211. While the Defendant asserts without reservation that Hungerford must not apply to this case, Casella makes no effort to undertake the analysis that assertion requires.

If that analysis were to be undertaken, it would be evident that Hungerford should apply. It should be remembered that the summary judgment showing made by the Plaintiff showed carelessness in the Defendant's failure to salt and sand the lot, insofar as the area in proximity to the plaintiff was wholly untreated with either salt or sand notwithstanding Casella's presence on the accident day. Business records show that salting and sanding were expected to be accomplished, but the work (at least in proximity to the plaintiff) was left undone. Clearly, performing its operations carefully posed no significant burden upon the Defendant. Casella was there with salt and sand, and it cannot be imagined that it would have been a significant burden for Casella to spread fully the materials it already carried.

On the other hand, the severity of the risk – serious bodily injury and lifetime impairment (or even death) -- is high. The societal interest is obvious, and the likelihood of occurrence is high. This is a case where the negligence of the defendant clearly poses a danger which, in view of the likelihood and magnitude of the risk, is simply unreasonable. Hungerford applies.

III. The Defendant's Mechanistic Application of the Provisos of Sec. 324A of the Restatement of Torts is Unwarranted and Not Supported by Case Law.

The Defendant takes the position that none of the independent provisos of Sec. 324A of the Restatement (exacerbation, assumption, or reliance) provide a basis for applying the Restatement section. It does so only be applying an overly mechanistic approach that is unsupported in New Hampshire Supreme Court case law and not in keeping with caselaw elsewhere.

A.) *Exacerbation.* Defendant acknowledges (Def. Brief at 24) that Casella's activities may not have improved the condition of the parking lot, but that "[t]his is very different from claiming that Casella worsened the condition of the parking lot. . ." This type of legal extremism has never found favor in the courts:

> It seems very unlikely that any court will ever hold that one who has begun to pull a drowning man out of the river after he has caught hold of the rope is free, without good reason, to abandon the attempt, walk away and let him drown, merely because he was already in extremis before the effort was begun.
>
> Prosser, Law of Torts (4th ed. 1971) at p. 348, sec. 56.

The obligation that an undertaking be performed with reasonable care under all the circumstances is a foundational principle. Id. at 347-48. Insulating paid contractors from the consequences of their carelessness is not. Whether or not a situation has been made worse in some technical sense should be only "one fact" to be considered in assessing whether conduct has been reasonable. Id. at 348. Casella also attempts to distinguish the exacerbation proviso by asserting (as discussed earlier in this Reply) that the matter is irrelevant as DHMC – not Casella – had the "obligation to salt or sand." Def. Brief at 24.

This is simply a misstatement, belied by the fact that business records show that Casella was at the site sanding at least some places on the accident day.

It is also the case that the exacerbation calculus is likely altered once the defendant is well into his performance: "[W]here performance clearly has been begun, there is no doubt that there is a duty of care." Prosser, *supra*, at 346. Without question, Casella had begun its performance at DHMC on the accident day, and had under its umbrella the obligation to plow and treat the DHMC lots. If, as stated under oath by the plaintiff, her area of the lot had not been treated and presented a glazed, icy surface, then surely, in the context of summary judgment, Restatement Sec 324A cannot be dismissed as a source of liability.

B. Assumption. Casella attempts to escape the Assumption proviso by arguing that the proviso applies only when it "agrees to entirely assume the property owner's duty." Casella seems to suggest that the proviso applies only if the contractual agreement between the owner and the contractor makes the owner a virtual "absentee landlord." The Restatement does not put forth such a broad proposition. Rather, it focuses on whether the contractor (or other person) has undertaken to perform *a duty* owed by the other to a third person. The proviso is not expressed in terms of *every* duty or *all* duties, but simply *a* duty. As expressed in an opinion cited by Casella, the proviso applies if a duty is undertaken "in lieu of, rather than a supplement to" the originating duty. Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993) (to be liable under 324A, contractor must completely assume *a duty* owed by the other to the plaintiff, 984

F.2d at 1156). The proviso is not meant to encompass functions "*coordinate to* or even *duplicative of* activities imposed on another by a legal duty," but it is meant to encompass the situation "in which one actually undertakes to perform for the other the legal duty itself." Blessing v. United States, 447 F.Supp. 1160 (E.D. Pa. 1978), 1193-1194. The key inquiry is whether the activity of Casella is meant to supplant or, on the other hand, merely supplement; typically, if the situation is one of supplementation, Casella and DHMC would be working in tandem as to the activity under scrutiny. Id. at 1194.

Also noteworthy is Hill v. James Walker Memorial Hospital, 407 F.2d 1036 (4th Cir. 1969), holding liable under the Restatement an extermination company which had failed to exterminate a hospital's rat horde, causing a patient to stumble into a bathtub when a rat ran across her feet. It was sufficient for liability that the exterminating company had "undertaken to perform a *certain aspect* of (the hospital's) duty in the hospital's behalf." Id. at 1042 (emphasis added). It was not necessary that the defendant undertake the hospital's plenary duty to safeguard patients, only that it had undertaken a certain aspect of those duties (the control of rats (and insects)).

Casella responds with its refrain that "salting and sanding will be done by DHMC" unless the DMHC grounds supervisor seeks the assistance of Casella. So formulated, Casella goes on to claim that it did not take the place of DHMC but merely acted in "supplement to" DHMC.

However, for the duty that is the fulcrum of this lawsuit – namely, the duty, set at the beginning of the season, to plow, sand/salt all storms – Casella was contractually

obligated to perform that duty *in lieu* of DHMC. Indeed, that is precisely what Casella was doing on the accident day. It is error to suppose that the matter of the assumption proviso can be settled in favor of Casella in the context of summary judgment.

C. Reliance. Casella attempts to diminish the "reliance" proviso by asserting that the plaintiff must show that "she acted or neglected to act in a certain way as a result of the services provided by Casella." Def. Brief at 29. The defendant is mistaken in its characterization of the plaintiff's proof. Casella's failure to salt and sand would not have been self-evident to a driver arriving in a parking lot at 6:00 AM on a late December day, as the time would be before sunrise. Casella's neglect would probably have been hidden by the darkness, even assuming some illumination from parking lot lights. It is settled law that reliance may be shown by circumstantial evidence. Hutcherson, *supra*, at 1157. The plaintiff was surprised by the conditions, as her feet slid out from under her after taking only two steps. App. at 147. She clearly relied on her mistaken assumption that the area had been sufficiently treated that she would have some traction when she tried to walk. Her account is consistent with encountering a smooth ice field, and being surprised by that encounter. Her reliance was misplaced.

Additionally, a central flaw in Casella's reliance argument is its failure to appreciate that that the reliance to be shown can be either reliance by the injured party *or* causal reliance by the original holder of the duty (here, DHMC). In the words of Restatement Sec. 324A (reproduced a p. 7 of Pl. Brief): "the harm is suffered because of reliance *of the other or the third person* upon the undertaking" (emphasis added). In the

instant case, Casella cannot maintain that its Agreement with DHMC did not result in DHMC reducing its snow activities in reliance upon Casella's promise of performing such activities. Exhibit A to the Agreement (App. at 29) specifically provides that DHMC's equipment is effectively loaned to Casella, with Casella charging a fee to DHMC for maintaining the readiness of the equipment. Of course, there is also the plain proof of Casella's presence at the lots on the accident day spreading sand (at least at some locations). In the context of summary judgment, it is clear that DHMC relied on Casella, and that such reliance is sufficient to make #324A(c) applicable. *See* Hutcherson v. Progressive Corp., *supra* at 1157.

CONCLUSION

Underlying Casella's appellate presentation of this case is its repeated message that it did not bear responsibility for sanding and/or salting. Based on the summary judgment record, this position is not sustainable. Its attempt to distinguish Hungerford based on the declaration that snow removal is a commonplace activity does not address the important holding of that case. Finally, Casella's argument that all of the provisos of Restatement Sec. 324A can be dismissed in the context of summary judgment fails to pay due heed to the law or to the standards for granting summary judgment. Plaintiff restates her request that the Superior Court decision be reversed.

Respectfully submitted,
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By her attorneys,

11/26/18
Date

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CERTIFICATION

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

This Reply Brief totals less than 2900 words.

11/26/18
Date

Brian C. Shaughnessy, Esquire, Bar #6894