THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0526

JAMES M. VIRGIN

V.

FIREWORKS OF TILTON, LLC AND FOURSQUARE IMPORTS, LLC
D/B/A AAH FIREWORKS, LLC

Opposition Brief of the Defendant/Appellee, Fireworks of Tilton, LLC

In this Interlocutory Appeal from the Belknap Superior Court

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Oral Argument Requested to be Argued
by Stephen Zaharias, Esq.

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QUESTION PRESENTED

1. Is apportionment of fault and damages pursuant to RSA 507:7-e and as interpreted in DeBenedetto and its progeny – specifically with respect to the interpretation of the phrase "[i]n all actions" in RSA 507:7-e – limited to tort actions or does it also apply to other actions, such as contract and implied warranty actions?

TEXT OF PERTINENT STATUTES/RULES

RSA 507:7-d Comparative Fault. – Contributory fault shall not bar recovery in an action by any plaintiff or plaintiff's legal representative, to recover damages in tort for death, personal injury or property damage, if such fault was not greater than the fault of the defendant, or the defendants in the aggregate if recovery is allowed against more than one defendant, but the damages awarded shall be diminished in proportion to the amount of fault attributed to the plaintiff by general verdict. The burden of proof as to the existence or amount of fault attributable to a party shall rest upon the party making such allegation.

Source. 1986, 227:2, eff. July 1, 1986.

RSA 507:7-e Apportionment of Damages. –

I. In all actions, the court shall:

(a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and

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

(c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.

II. In all actions, the damages attributable to each party shall be determined by general verdict, unless the parties agree otherwise, or due to the presence of multiple parties or complex issues the court finds the use of special questions necessary to the determination. In any event, the questions submitted to the jury shall be clear, concise, and as few in number as practicable, and shall not prejudice the rights of any party to a fair trial.

III. For purposes of contribution under RSA 507:7-f and RSA 507:7-g, the court shall also determine each defendant's proportionate share of the obligation to each claimant in accordance with the verdict and subject to any reduction under RSA 507:7-i. Upon motion filed not later than 60 days after final judgment is entered, the court shall determine whether all or part of a defendant's proportionate share of the obligation is uncollectible from that defendant and shall reallocate any uncollectible amount among the other defendants according to their proportionate shares. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

IV. Nothing contained in this section shall be construed to modify or limit the duties, responsibilities, or liabilities of any party for personal injury or property damage arising from pollutant contamination, containment,

cleanup, removal or restoration as established under state public health or environmental statutes including, but not limited to, RSA 146-A, RSA 147-A and RSA 147-B.

Source. 1986, 227:2. 1989, 278:1-3, eff. Jan. 1, 1990.

RSA 507:7-h Effect of Release or Covenant Not to Sue. – A release or covenant not to sue given in good faith to one of 2 or more persons liable in tort for the same injury discharges that person in accordance with its terms and from all liability for contribution, but it does not discharge any other person liable upon the same claim unless its terms expressly so provide. However, it reduces the claim of the releasing person against other persons by the amount of the consideration paid for the release.

Source. 1986, 227:2, eff. July 1, 1986.

RSA 507:15 Penalties for Frivolous Actions. – If, upon the hearing of any contract or tort action, it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also

report such conduct to the supreme court committee on professional conduct.

Source. 1986, 227:3. 1996, 2:2, eff. July 1, 1996.

RSA 382-A:2-314 Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity with each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Source. 1959, 247:1, eff. July 1, 1961.

OFFICIAL COMMENT

Prior Uniform Statutory Provision:

Section 15(2), Uniform Sales Act.

Changes:

Completely rewritten.

Purposes of Changes:

This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2-316). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words “grower or manufacturer or not” which appeared in Section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee".

5. The second sentence of subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2)(c) of this section.

6. Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through

case law. The language used is “must be at least such as ...,” and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (a) and (b) of subsection (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. “Fair average” is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass “without objection.” Of course a fair percentage of the least is permissible but the goods are not “fair average” if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be “honestly” resalable in the normal course of business because they are what they purport to be.

9. Paragraph (d) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a remainder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (e) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this Article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its subsection (4) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2-316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

RSA 466:19 Liability of Owner or Keeper. – Any person to whom or to whose property, including sheep, lambs, fowl, or other domestic creatures, damage may be occasioned by a dog not owned or kept by such person shall be entitled to recover damages from the person who owns, keeps, or possesses the dog, unless the damage was occasioned to a person who was engaged in the commission of a trespass or other tort. A parent or guardian shall be liable under this section if the owner or keeper of the dog is a minor.

Source. 1851, 1124. CS 133:7. GS 105:7. GL 115:10. PS 118:9. PL 150:23. RL 180:23. RSA 466:19. 1989, 158:1. 1991, 213:1. 1995, 298:11, eff. Jan. 1, 1996.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Plaintiff, James Virgin, sued Defendants, Fireworks of Tilton, LLC and Foursquare Imports, LLC d/b/a AAH Fireworks, LLC, alleging, among other things, breach of implied warranties, strict products liability, and negligence for injuries that he purportedly sustained because a firework imported and sold by the Defendants detonated improperly. See Appx. to Plaintiff's Brief at 1-11.

Foursquare Imports identified the Chinese manufacturer of the firework as an unnamed party who may be at fault for the Plaintiff's alleged injuries. See generally DeBenedetto v. CLD Consulting Engineers, Inc., 153 N.H. 793 (2006); see also Appx. to Plaintiff's Brief at 15-31 (addressing Foursquare Imports' DeBenedetto disclosure). The Plaintiff moved to strike the disclosure, arguing that DeBenedetto and apportionment in general was inapplicable to this action, particularly because the concept of "fault is not an issue in cases of breach of contract, which include cases of breach of implied warranty." Appx. to Plaintiff's Brief at 25-26.

Following Foursquare Imports' Objection to the Motion to Strike, Plaintiff filed a Reply, in which the Plaintiff argued that apportionment did not apply to this case given the claims of strict products liability and breach of implied warranty. See Appx. to Plaintiff's Brief at 106-113. Defendant, Fireworks of Tilton, LLC then filed an Objection to the Plaintiff's Reply, in which Fireworks of Tilton, LLC argued, in part, that apportionment applies here, especially given that the New Hampshire Legislature and New Hampshire Supreme Court have clearly stated that apportionment applies in

all cases, including those involving strict liability claims. See Appx. to Plaintiff's Brief at 114-120.

The Plaintiff filed a Reply to Fireworks of Tilton's Objection. See Appx. to Plaintiff's Brief at 121-125. The trial court held oral argument and subsequently denied the Plaintiff's Motion to Strike Foursquare Imports' DeBenedetto disclosure. See Addendum to Plaintiff's Brief at 28-38. Thereafter, the Plaintiff filed a Motion for Clarification, a Motion to Reconsider and a Motion for Interlocutory Appeal. See Addendum to Plaintiff's Brief at 39; Appx. to Plaintiff's Brief at 126-147. Following objections by the Defendants, and another hearing, the trial court granted in part the Plaintiff's Motion for an Interlocutory Appeal, concluding that the issue of whether apportionment applies beyond tort actions to contract and implied warranty actions is properly the subject of an interlocutory appeal. See Addendum to Plaintiff's Brief at 39-47. This Court accepted the interlocutory appeal.

SUMMARY OF ARGUMENT

The question on appeal is whether apportionment of fault and damages applies to all actions, including contract, strict liability, and implied warranty actions, or whether apportionment applies only to tort actions.

The New Hampshire Legislature has already answered this question, given that RSA 507:7-e explicitly states that apportionment applies "[i]n all actions." RSA 507:7-e, I. The Legislature included no exception in RSA 507:7-e for cases involving contract claims or claims based upon breaches of any implied warranties, although the Legislature certainly could have done so. Nor did the Legislature limit RSA 507:7-e's application to tort actions, unlike some other sections of RSA chapter 507. Further, to the extent that the Plaintiff relies upon the titles of statutes to support his arguments, those titles do not supplant the statute's unambiguous command that apportionment applies in "all actions." RSA 507:7-e, I.

This conclusion is buttressed by decisions from this Court, which has recognized that apportionment applies in all actions, including in the context of a case such as the present one. Accordingly, the Plaintiff's reliance upon cases outside of New Hampshire to the contrary is misplaced. Furthermore, there are several jurisdictions outside of New Hampshire that have applied apportionment principles to actions beyond those merely involving tort claims. Other arguments raised by the Plaintiff are equally unpersuasive.

In sum, in answering the question presented in this interlocutory appeal, this Court should conclude that apportionment applies in all actions, including the present one.

ARGUMENT

I. Standard of review.

This appeal raises a question of statutory interpretation, which this Court reviews de novo. See, e.g., In re Trevor G., 166 N.H. 52, 54 (2014). In matters of statutory interpretation, this Court is the "final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole." Id. "When examining the language of the statute, [this Court will] ascribe the plain and ordinary meaning to the words used." Id. Additionally, this Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id.

II. The plain language of the apportionment statute states that apportionment applies in "all actions."

The Plaintiff argues that if the "legislature decide[s that] RSA 507:7-e, I should . . . apply to all actions that seek recovery for personal injury, whether tort, contract or statute, or indeed all actions that could be brought in the state of New Hampshire, then they [sic] should clearly state as much." Plaintiff's Brief at 24. In making this argument, the Plaintiff ignores that the Legislature has already "clearly stated" as much. RSA 507:7-e's plain language makes clear that apportionment applies in "all actions." RSA 507:7-e, I provides:

I. In all actions, the court shall:

> (a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and
>
> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.
>
> (c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.

(Emphasis added).

The Legislature's use of the term "all actions" signifies that apportionment applies to all matters, including the present matter. As this Court has stated, the "legislature is presumed to know the meaning of the words it chooses and to use those words advisedly." State v. Njogu, 156 N.H. 551, 554 (2007). Thus, if the Legislature wanted apportionment to apply only to tort actions, or if the Legislature wanted to provide a statutory exception to apportionment for certain cases, the Legislature certainly could have drafted RSA 507:7-e differently. See In re Estate of McCarty, 166 N.H. 548, 551 (2014) (observing that if the Legislature wanted to limit the application of a statute it could have done so explicitly, and that the court "will not add language that the legislature did not see fit to include"); cf. Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 334 P.3d 780, 797 (Idaho 2014) (concluding that, as drafted, Idaho Code section 6-803(4)

only applied to tort liability, given that the apportionment statute explicitly referred to people being "liable in tort," and noting that the "legislature could have included liability based upon breach of contract, but it did not do so").

However, the Legislature neither limited the statute to tort claims, nor excepted any kinds of cases but one. The only exception in the statute is provided in subsection I(c), for "cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm." RSA 507:7-e, I(c). This exception, however, is not applicable to the present action and is beyond the scope of the question presented in this interlocutory appeal.

Accordingly, we are left only with the Legislature's plain language commanding that apportionment applies in "all actions," which necessarily includes the present matter. RSA 507:7-e, I. Reading the statute any other way ignores the Legislature's intent and violates several rules of statutory construction, including failing to heed the statute's plain language, and adding words to the statute that the Legislature did not include. See, e.g., In re Muller, 164 N.H. 512, 517 (2013) (explaining that when "a statute's language is plain and unambiguous, we need not look beyond it for further indications of legislative intent," and that courts "can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include" (quotation omitted)); see also Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 637-38 (1993) (interpreting statute – which, by its plain terms, applied to "all personal actions, except actions for slander or libel" – as being applicable to both contract and tort actions,

given that "nothing in the statute prohibits [its] applicability . . . to contract actions" (quotation and emphasis omitted)).

If this Court examines RSA 507:7-e in the context of the overall statutory scheme, as the Plaintiff urges, see In re Muller, 164 N.H. at 517 (stating that this Court does not interpret statutes in isolation), this Court will find that when the Legislature wants to limit a statute to certain types of claims, it does so. For example, RSA 507:7-h, regarding releases and covenants not to sue, explicitly applies only to tort actions. See RSA 507:7-h. As the Plaintiff discusses in his brief, other sections of RSA chapter 507 also reference "torts," thereby limiting such statutory provisions to only tort actions. See, e.g., Plaintiff's Brief at 15-19. Critically, however, RSA 507:7-e – the statute actually at issue here – contains no similar limitation.

The Legislature drafts statutes to apply to a wider range of cases when the Legislature wants to do so. For instance, the plain language of RSA 507:15, concerning frivolous actions, makes that statute applicable to "any contract or tort action." This, however, is still not as broad as RSA 507:7-e, which applies to "all actions."

The statutes noted in the preceding paragraphs are a part of RSA chapter 507 and thus are at least somewhat related to RSA 507:7-e. As this Court has stated, "where the legislature uses different language in related statutes, we assume that the legislature intended something different." State Employees Ass'n of New Hampshire, SEIU, Local 1984(SEA) v. New Hampshire Div. of Pers., 158 N.H. 338, 345 (2009) (quotation omitted). Thus, here, when the Legislature provided in RSA 507:7-e that apportionment applies in "all actions," surely the Legislature intended for

apportionment to apply in all actions, particularly when the Legislature has the ability to limit other related statutes to certain types of cases.

In other words, if the Legislature wanted RSA 507:7-e to apply only to tort actions, the Legislature would have limited the statute in that manner, just as it did in other statutes. But, it did not, instead making the statute as broad as possible: "all actions." This Court should, therefore, conclude that the Legislature meant "all actions" to mean "all actions." See Kelley v. Volkswagenwerk Aktiengesellschaft, 110 N.H. 369, 371-72 (1970) (stating that, unlike RSA 556:9, which "specifically applies to 'tort' actions," there "is nothing specific in RSA 556:12 which would limit its application to tort actions," and that any "damages recoverable by virtue of RSA 556:12 are limited by RSA 556:13, 14 whether the form of the action sounds in tort or contract"); see also Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501, 505 (1980) (explaining that if "count I of the plaintiff's complaint does make out a cause of action in contract, it survives by virtue of RSA 556:15 and dismissal of the action would be erroneous," given that the "limitation contained in RSA 556:11 restricts only the survival of tort actions").

Further supporting this conclusion is the fact that this Court has explicitly treated RSA 507:7-e differently from other provisions of RSA chapter 507, including that of RSA 507:7-d. As explained by this Court, when RSA 507:7-e was enacted in 1986, "the legislature separated the concepts of apportionment and contributory negligence, enacting section 7–d to address contributory negligence and section 7–e to address apportionment." Goudreault v. Kleeman, 158 N.H. 236, 253 (2009) (quotation and brackets omitted). "As enacted in 1986, section 7–e

provided for apportionment of damages in all actions, not only those involving contributorily negligent plaintiffs." Id. (quotation omitted and emphasis added). "The legislature thereby established a system for contribution among tortfeasors and reinstituted joint and several liability . . . for each party liable." Id. (quotations and brackets omitted; emphasis added). Accordingly, this Court has already recognized that, unlike other sections of RSA chapter 507, apportionment pursuant to RSA 507:7-e applies to all actions.

The Plaintiff also argues that, because the section heading references tortfeasors, the Legislature intended to have apportionment apply only to tort claims. See, e.g., Plaintiff's Brief at 15. As this Court has explained, however, the "title of a statute is not conclusive of its interpretation, and where the statutory language is clear and unambiguous this court will not consider the title in determining the meaning of the statute." In re CNA Ins. Companies, 143 N.H. 270, 274 (1998). Thus, the clear phrase "all actions" cannot be muddied by the section heading. The use of the word "tortfeasor" in the section heading does not limit apportionment of damages to tort actions. See id. (concluding that where the statute's use of the phrase "subsequent disability" was clear, the title of the statute, which used the term "second injury," did not affect the meaning of the statute).

Even if this Court considers the section heading, this Court should look at the entire section heading as a whole. See New Hampshire Health Care Ass'n v. Governor, 161 N.H. 378, 385 (2011) ("We read words or phrases not in isolation, but in the context of the entire statute and the entire statutory scheme."). The section heading reads: "Comparative Fault, Apportionment of Damages, and Contribution Among Tortfeasors." Thus,

the section heading includes three separate phrases, separated by commas. Plaintiff may wish that the section heading read "apportionment of damages in actions among tortfeasors," but it does not; rather, the word "tortfeasors" modifies only the reference to contribution, and, therefore, the word "tortfeasor" does not affect the meaning of "apportionment of damages." See Marcotte v. Timberlane/Hampstead Sch. Dist., 143 N.H. 331, 338 (1999) (explaining that, "[a]ccording to normal rules of English punctuation, the placement of commas between each element enumerated and before the conjunction, 'and,' generally dictates that the elements are to be read as a consecutive series of discrete items"). In other words, even the section heading undercuts Plaintiff's argument; apportionment applies in "all actions." See id. (concluding that elements enumerated in statute separated by commas and before conjunction must "be read as discrete items . . . each a distinct part of the series"); see also Gen. Insulation Co. v. Eckman Const., 159 N.H. 601, 609-10 (2010) (concluding that where certain statutory phrases were separated by a comma and a conjunction, the final phrase after the conjunction was "to be read on its own").

Under RSA 507:7-e, apportionment applies in "all actions." When the Legislature wants to limit a statute's reach, the Legislature does so. It did not do so in RSA 507:7-e, and so this Court should conclude that "all actions" means "all actions."

III. This Court has already recognized in several cases that apportionment applies in all actions, including in the context of a case such as the present one.

In prior cases, this Court has explicitly held that apportionment applies in all actions, including those involving strict liability claims. For example, in the context of a strict liability case involving multiple defendants, this Court held that "if recovery is allowed against more than one defendant, the jury shall apportion the loss in the ratio to which each liable defendant caused or contributed to the loss or injury to the amount of causation or liability attributed to all defendants against whom recovery is allowed." Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 813 (1978). Likewise, in Trull v. Volkswagen of Am., Inc., 145 N.H. 259 (2000), this Court relied upon principles applicable in strict product liability actions and concluded that, when a plaintiff's injuries are indivisible, defendants "bear the burden of apportioning their respective liability once the plaintiffs have made a prima facie showing that the defendants' conduct contributed as a proximate cause to the harm suffered." Trull, 145 N.H. at 266. In a more recent case, this Court upheld the trial court's jury instructions that allowed the jury to consider – in a case involving strict liability claims – the apportionment of fault, including among non-parties. See State v. Exxon Mobil Corp., 168 N.H. 211, 259-60 (2015). To suggest, as the Plaintiff does in his brief, that the Defendants are not permitted to apportion fault and damages in this case, is inconsistent with this Court's case law.

Even cases cited by the Plaintiff in his brief support the conclusion that apportionment applies in all actions, including those involving claims similar to the present case. See, e.g., Jaswell Drill Corp. v. Gen. Motors

Corp., 129 N.H. 341, 344 (1987) (explaining that "under the new statutory scheme, RSA 507:7-e provides for apportionment of damages in all actions"); Goudreault, 158 N.H. at 253 (observing that in "1986, the legislature separated the concepts of apportionment and contributory negligence, enacting section 7–d to address contributory negligence and section 7–e to address apportionment," and noting that "section 7–e provide[s] for apportionment of damages in all actions, not only those involving contributorily negligent plaintiffs" (quotations and brackets omitted)); McNeil v. Nissan Motor Co., 365 F. Supp. 2d 206, 211-12 (D.N.H. 2005) (explaining that the New Hampshire Supreme Court has reiterated on multiple occasions that "a plaintiff's comparative fault may be considered in a strict products liability case" and that "New Hampshire law is sufficiently settled in favor of the view that a defendant may assert plaintiff's misconduct in defense to a strict products liability action"); E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492, 501 (1st Cir. 1994) (recognizing that the defense of comparative fault has been applied in New Hampshire in "personal injury cases based on dual theories of strict liability in tort and breach of an [sic] the implied warranty of merchantability").

Moreover, although this Court need not review the legislative history of RSA 507:7-e in this case given the plain and unambiguous language used in the statute, see In re Guardianship of Eaton, 163 N.H. 386, 389 (2012) (explaining that this Court does "not consider legislative history to construe a statute that is clear on its face"), this Court's discussion in prior cases of the legislative history of the statute provides further support for the conclusion that apportionment applies in all cases. For example, this Court

has explained that, as originally enacted, RSA 507:7-e "provided for apportionment of damages in all actions, not only those involving contributorily negligent plaintiffs." Goudreault, 158 N.H. at 253 (quotation omitted and emphasis added). Then, when amending the statute in 1989, the Legislature modified joint and several liability to "ameliorate the inequities suffered by low fault, 'deep pocket' defendants," such as "manufacturers," to "treat fairly those entities which may be unfairly treated under joint and several liability." Ocasio v. Fed. Exp. Corp., 162 N.H. 436, 442 (2011) (quotations omitted). In enacting this change, the Legislature recognized that manufacturers and others often "become targets for damage recoveries because of their potential monetary resources rather than their fault." Id. (quotation omitted). By explicitly referring to manufacturers, the Legislature surely contemplated the concept of strict liability and implied warranties when amending the apportionment statute, and this, therefore, provides additional support for the conclusion that apportionment applies here. See Exxon Mobil Corp., 168 N.H. at 259 (2015) (explaining that apportionment applies "not only to parties to an action, including settling parties, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court" (quotations omitted)).

IV. Other arguments raised by the Plaintiff are unavailing.

The Plaintiff makes much of the fact that contract actions are distinct from tort actions and that breach of warranty actions sound in contract. See, e.g., Plaintiff's Brief at 12-14. There is no dispute that contract actions are distinct from tort actions, nor is there any dispute that this Court has, in

some cases, recognized that breach of warranty actions may be construed similarly to contract actions. See, e.g., Sheehan v. New Hampshire Liquor Comm'n, 126 N.H. 473, 476 (1985) (stating that the "language of RSA 382-A:2-314(1) indicates that such an action sounds in contract"). However, the Plaintiff ignores the fact that this Court has also stated that implied warranty claims are "neither a tort nor a contract concept, but a freak hybrid born of the illicit intercourse of tort and contract," and that such actions exist independently, "imposed by operation of law, the imposition of which is a matter of public policy." Lempke v. Dagenais, 130 N.H. 782, 785-86 (1988) (quotation omitted). Additionally, some courts have even determined that implied warranty claims are actually tort claims. See, e.g., Wolfe v. Ford Motor Co., 434 N.E.2d 1008, 1010 (Mass. 1982) (concluding under Massachusetts law that a "claim for breach of warranty of merchantability is in essence a tort claim," and as such, the statute granting the right of contribution among joint tortfeasors embraced liability for the breach of the implied warranty of merchantability).

Moreover, whether implied warranty actions are contract actions or tort actions is of no significance to the question presented on appeal here because, regardless, apportionment applies to "all actions" pursuant to the plain language of RSA 507:7-e, as discussed above. Thus, apportionment necessarily applies here, and, therefore, any distinction that the Plaintiff attempts to draw in his brief between tort and contract actions does nothing to advance the Plaintiff's argument.

The Plaintiff's argument that apportionment cannot apply in this case because the concept of "fault" is inapplicable to actions beyond tort actions, like those involving contract, strict liability and implied warranty

claims, is erroneous. The Plaintiff reads "fault" too narrowly, equating it with negligence. Read appropriately, the term "fault" necessarily includes concepts bearing upon the respective responsibilities of the parties for the injuries and damages at issue.

For example, product misuse is a defense in strict liability cases and those involving alleged breaches of the implied warranty of merchantability. See, e.g., Thibault, 118 N.H. at 810 (stating that "[o]f course, product misuse and abnormal uses are defenses to strict liability"); Stephan v. Sears Roebuck & Co., 110 N.H. 248, 251 (1970) (stating that, "[c]ontrary to the contention of the plaintiff, we hold that contributory negligence is a defense to an action for breach of warranty under RSA 382-A:2-314 in the same manner as in actions based on strict liability"); Willard v. Park Indus., Inc., 69 F. Supp. 2d 268, 273 (D.N.H. 1999) (explaining that "product misuse, abnormal use, and a plaintiff's decision to encounter a known risk are all valid defenses in a products liability case, and are collectively known under New Hampshire law as 'plaintiff's misconduct' . . . . The words 'plaintiff's misconduct' accurately describe what action by the plaintiff, combined with the interaction of a defendant's product, caused an accident or injury." (Quotation and brackets omitted)); see also Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1, 14–15 (1st Cir. 2001) (explaining that, under Massachusetts law, "misuse of a product is an affirmative defense to a negligent design claim while the unreasonable use of a product is an affirmative defense to a claim of breach of the implied warranty of merchantability," and noting that each defense "requires an examination of precisely how the plaintiff 'misused' the defendant's product"); Knowlton v. Deseret Med., Inc., 930 F.2d 116, 120 (1st Cir. 1991) ("Under

Massachusetts law, the implied warranty of fitness includes uses which are reasonably foreseeable but does not include unforeseeable misuses of a product." (Quotation and brackets omitted)). When a plaintiff misuses a product, his misuse necessarily impacts the plaintiff's fault for his own injuries, and, therefore, the misuse must be considered when apportioning damages pursuant to RSA 507:7-e.

This conclusion comports with this Court's holding in Bohan v. Ritzo, 141 N.H. 210 (1996), in which this Court concluded that applying RSA 507:7-d to strict liability actions under RSA 466:19 (involving injuries caused by a dog), was "consistent with our prior cases." Bohan, 141 N.H. at 215. This Court explained that when "RSA 507:7–d was enacted, our case law applied comparative causation concepts to strict products liability cases, even though the predecessor statute, RSA 507:7–a, by its terms, applied only to negligence actions. . . . Nothing in Thibault indicates that we would have been unwilling to apply a comparative causation statute to products liability cases or to other strict liability cases if such a statute were applicable." Id. Further, this Court stated that "[i]ndeed, it would defy common sense for the plaintiff's misconduct to be totally irrelevant to a claim under RSA 466:19—for example, if a plaintiff approached an otherwise passive dog and hit it on the nose with a stick, thereby provoking the dog to bite him, his own misconduct should certainly be considered by the jury in assessing any damages to be paid by the dog's owner." Id.

However, this Court did note that it would "interpret 'comparative fault' slightly differently . . . in the context of a strict liability case than in a negligence case. Prior to the enactment of RSA 507:7–d, we noted that, by definition, strict liability and 'comparative negligence' are incompatible

concepts . . . because strict liability imposes liability on defendants without regard to their fault . . . . We avoid construing statutes in a manner that would produce such 'seemingly illogical results.' Instead, courts should look to 'comparative causation' in evaluating damages in strict liability cases." Id. at 216 (citations omitted).

As particularly applicable to the present case, this Court further explained that in "the products liability context, the plaintiff's misconduct" that could diminish the plaintiff's award of damages "might include, where applicable, product misuse or abnormal use, as well as embodying the 'negligence' or 'assumption of the risk' concepts in our prior cases of voluntarily and unreasonably proceeding to encounter a known danger." Id. (quotations, brackets, and emphasis omitted). Thus, contrary to the Plaintiff's arguments, apportionment applies to a case like the present one.

The Plaintiff also argues that "many courts have limited the comparative fault defense only to tort actions." Plaintiff's Brief at 16. True, some courts outside of New Hampshire may have held as much, but numerous other courts have reached contrary conclusions, holding that apportionment and the concept of comparative fault can, and should, apply to actions beyond tort or negligence actions, including those involving contract and implied warranty claims. See, e.g., Owens v. Truckstops of Am., 915 S.W.2d 420, 430, 434 (Tenn. 1996) (explaining that, "in Tennessee, as in the majority of other jurisdictions, comparative negligence applies to products liability actions based on strict liability" and stating that, "in an action for damages for personal injuries based on breach of implied warranty of merchantability of a product, comparative negligence may be pled as a defense" since the "rationale is the same as that supporting

comparative negligence as a defense in actions based on negligence and strict liability"); Morales v. Am. Honda Motor Co., 151 F.3d 500, 519 (6th Cir. 1998) (concluding that Kentucky's comparative fault statute "applies to products liability actions based on breach of warranty"); Coulter v. Am. Bakeries Co., 530 So. 2d 1009, 1010 (Fla. Dist. Ct. App. 1988) ("It is settled that comparative negligence is a defense in an implied warranty action."); Avis Budget Car Rental, LLC v. JD2 Envtl., Inc., No. 12-CV-5010 (PKC), 2017 WL 3671554, at *2 (E.D.N.Y. Aug. 23, 2017) (explaining that under "New Jersey law, losses caused by a breach of contract can be subject to comparative fault principles, as in tort causes of action, particularly where the claim for breach of contract 'parallels' a claim based on negligence," and noting that determining whether the plaintiff "bears any comparative 'fault' under New Jersey law, the jury may consider [plaintiff's] purported negligence, breach of contract, or both, to the extent the evidence presented at trial warrants such an instruction to the jury"; further explaining that, under New York law, "the notion of 'culpable conduct' embraces any action based on breach of duty, whether through negligence, through breach of warranty or predicated upon strict liability, upon a violation of statute giving rise to civil liability or upon intentional misconduct," and, therefore, "when determining whether [plaintiff] bears any comparative 'fault' under New York law, the jury may consider [plaintiff's] purported negligence, breach of contract, or both, to the extent the evidence presented at trial warrants such an instruction to the jury" (brackets and quotation omitted)); Lesmeister v. Dilly, 330 N.W.2d 95, 103 (Minn. 1983) (holding that, in a contract action, the "[u]nreasonable failure to mitigate damages is 'fault' which can be

apportioned under the comparative fault statute"); F.D.I.C. v. Straub, No. 11-03295 SBA, 2012 WL 1965621, at *3 (N.D. Cal. May 31, 2012) (denying plaintiff's motion to strike certain affirmative defense in part because, although plaintiff cited two cases which stated that "comparative fault is generally not a defense to a breach of contract claim," neither case held that "comparative fault is never a defense to a breach of contract claim"); Gateway W. Ry. Co. v. Morrison Metalweld Process Corp., 46 F.3d 860, 862 (8th Cir. 1995) (upholding jury instruction allowing contract damages to be apportioned under comparative fault principles); see also John Barclay Phillips, Out with the Old: Abandoning the Traditional Measurement of Contract Damages for A System of Comparative Fault, 50 Ala. L. Rev. 911, 926-27 (1999) ("[C]ontract law should abandon the doctrine of expectation for a system of comparative fault. This idea is not radical because notions of tort are already heavily integrated into the arena of contracts. A system of comparative fault creates better economic incentives and more market efficiency in decisions to breach than does the current doctrine of expectation. Moreover, many tribunals across the country have already accepted the practice of applying comparative fault principles to contract damages determinations because the system generates more equitable results while better evaluating each party's participation in creating breaches of contract.").

As the Supreme Court of Rhode Island has explained:

> If the comparative-negligence statute only applied to negligence actions, a defendant manufacturer found liable in strict liability or implied warranty could not have the damages apportioned because of plaintiff's culpable conduct. Ironically, defendant manufacturers found liable in negligence would have the damages

> apportioned, despite the fact that their conduct was clearly more culpable than the conduct of those defendants found liable in strict liability or implied warranty. We believe that the just outcome of a case should not be determined by adroit pleading or semantical distinctions. A defendant's culpability is the basis for an award of damages, whether that culpability is denominated negligence, strict liability, or breach of warranty. Similarly, a plaintiff's culpable conduct is the basis for an apportionment of those damages.

Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719, 728 (R.I. 1983). This Court should take heed of such decisions. See id. (collecting cases and noting that there are even "jurisdictions that have applied comparative-negligence principles to strict-liability claims despite the presence of comparative-negligence statutes that are limited by their terms to actions for negligence . . . . Fortunately, because of the broad language in our comparative negligence statute, we do not need to engage in any such creative analysis. Nonetheless, the existence of these cases can only lend support to our decision.").

The Plaintiff also argues that if this "Court holds that RSA 507:7-e applies to breach of warranty cases, then the consumer protection afforded by RSA 382-A:[2]" would "be eviscerated." Plaintiff's Brief at 21. Besides the fact that the authorities cited by the Plaintiff in this section of his brief do not support this broad proposition,[1] at bottom, such arguments

[1] Additionally, the case of Collella v. Beranger Volkswagen, Inc., 118 N.H. 365 (1978), upon which the Plaintiff principally relies, does not – as the Plaintiff asserts – "demonstrate[] that DeBenedetto apportionment is inapplicable to breach of implied warranty claims." Plaintiff's Brief at p. 20. Not only was that case decided several years before RSA 507:7-e was even enacted or DeBenedetto was decided, but Collella holds only that, when RSA 382-A:2-314 applies, the implied warranty of merchantability

are public policy arguments that are better left for the Legislature to decide, rather than this Court. See, e.g., Dolbeare v. City of Laconia, 168 N.H. 52, 57 (2015) ("To the extent that the plaintiff relies upon public policy to support her construction of RSA 508:14, I, she makes her argument in the wrong forum, as matters of public policy are reserved for the legislature.")

Moreover, the Plaintiff's assertion about implied warranties under RSA 382-A being "eviscerated" if apportionment were to apply ignores the official comments that suggest that the drafters contemplated apportionment when enacting the Uniform Commercial Code. For example, according to the official comments to RSA 382-A:2-314:

> In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as

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exists unless expressly excluded or disclaimed by the parties. See Collella, 118 N.H. at 366. Apportionment of damages and fault is not discussed, addressed, or even mentioned in any way in the opinion. See id. Therefore, the case has no application here.

Likewise, to the extent that the Plaintiff separately asserts that RSA 507:7-e must be read consistent with all case law prior to the statute's enactment, such an argument is erroneous. This is especially so given that the enactment of the statutory scheme abrogated various facets of the common law, including contributory negligence. See Goudreault, 158 N.H. at 253.

> matter bearing on whether the breach itself was the cause of the injury.

RSA 382-A:2-314, cmt. 13 (emphases added). The references to determining whether the breach of warranty "cause[d]" the injury or loss, or whether there was another cause of the injury, suggests that apportioning fault and damages based upon the respective responsibility of each party is appropriate in this case. Thus, to say, as the Plaintiff does, that apportionment is inapplicable to implied warranty claims would ignore such official comments, which this Court has explained it must consider when looking at uniform acts such as the UCC. See Roy v. Quality Pro Auto, LLC, 168 N.H. 517, 519 (2016) (noting that the implied warranty of merchantability set forth in RSA 382–A:2-314 is part of the Uniform Commercial Code and relying upon the official comments to that statute, explaining that "[w]hen we interpret the UCC, we rely not only upon our ordinary rules of statutory construction, but also upon the official comments to the UCC" (quotation omitted)).

Common law breach of contract actions include a similar causation requirement: a "party claiming damages for breach of contract must show, by a preponderance of the evidence, that the damages were caused by the defendant's alleged wrongful act, as well as the extent and amount of such damages." Audette v. Cummings, 165 N.H. 763, 770 (2013). At the very least, a plaintiff is required to show that any breach of contract was a "substantial factor in bringing about [his or her] damages." Id. at 771; see also Indep. Mech. Contractors, Inc. v. Gordon T. Burke & Sons, Inc., 138 N.H. 110, 115 (1993) (explaining that in "all cases involving problems of causation and responsibility for harm, a good many factors have united in

producing the result . . . In order to establish liability the plaintiff must . . . show that the defendant's breach was 'a substantial factor' in causing the injury." (Quotations omitted)). Determining whether a breach of contract caused, or was a substantial factor in bringing about, the damages at issue, suggests that apportioning fault and damages based upon the respective responsibility of each party, even in a classic breach of contract action, is appropriate, contrary to the Plaintiff's suggestion.

The Plaintiff further asserts that if this Court finds that RSA 507:7-e "applies to any civil action that could be brought in this state, an absurd and illogical situation would arise." Plaintiff's Brief at 23. For support, the Plaintiff relies in part upon the Superior Court decision of the Town of Bow v. Provan and Lorber, Inc. et al., No. 2009-CV-0190 (Merrimack Super. Ct. Feb. 14, 2014).

Not only is Provan and Lorber a trial court opinion with no precedential value, but it is also important to note that the analysis in that case supporting the trial court's conclusion that apportionment did not apply under the specific circumstances therein focused upon whether the defendants were entitled to a claim for contribution – circumstances that are not present here. Provan and Lorber, Inc., No. 2009-CV-0190. Moreover, the court highlighted RSA 507:7-d and other provisions in RSA chapter 507 that, as explained above, explicitly apply only to tort claims, rather than examining the plain language of RSA 507:7-e, which explicitly applies to "all actions." See id. It is also noteworthy that, in footnote two, the trial court actually recognized that there is authority to support the proposition that apportionment of liability applies in contract actions, particularly if "both parties had contracted for identical performance." Id. Further, the

case involved the allegedly defective design and construction of a bridge and culvert, rather than the sale of goods as in this case. Id. Thus, the issues in Provan and Lorber were distinct from those in the present case, and the trial judge's analysis is not applicable here.

Moreover, contrary to the Plaintiff's assertion, an absurd result will arise if this Court ignores the plain language of RSA 507:7-e and holds that apportionment does not apply to any action beyond those involving torts. See Appeal of Vicky Morton, 158 N.H. 76, 81 (2008) (explaining that this Court will not interpret a statute to lead to an absurd result). As explained above, there is nothing illogical or unreasonable about applying apportionment principles to all sorts of actions, including those based upon contract and implied warranties. To hold that apportionment does not apply would disregard both the clear statutory language set forth in RSA 507:7-e and significant authority that demonstrates that apportionment can, and should, apply to all actions, including those at issue in this case.[2]

CONCLUSION

Apportionment applies in "all actions," including this case. The Plaintiff has done nothing in his brief to change this statutory reality.

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[2] Plaintiff separately asserts, such as on pages 11-12 of his brief, that certain common law will be abrogated or that certain statutes will be repealed by implication if RSA 507:7-e is interpreted to apply to all actions. These arguments are not sufficiently developed and do not warrant a response. See, e.g., State v. Blackmer, 149 N.H. 47, 49 (2003) (stating that a "mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review," and, therefore, deciding to address "only those issues that the [party] has fully briefed" (quotation omitted)).

Accordingly, this Court should conclude that apportionment is not limited to tort actions, but instead applies to all actions, including contract actions and those alleging breach of implied warranties.

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16, the Defendant Fireworks of Tilton, LLC requests 15 minutes of oral argument before the full court to be presented by Stephen Zaharias, Esq.

DECISIONS APPEALED

The decisions appealed are in writing and appended to this brief.

Respectfully Submitted,

FIREWORKS OF TILTON, LLC

By its attorneys,

WADLEIGH, STARR & PETERS, PLLC

/s/ Joseph G. Mattson
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Dated: February 11, 2019

CERTIFICATION

I hereby certify that a copy of this brief has this 11th day of February 2019 been served via the Court's e-filing system upon J. Daniel Marr, Esq.; Andrew J. Piela, Esq.; Jonathan M. Eck, Esq.; John H. Brooke, Esq.; and John M. Stevens, Esq. I further certify that this brief complies with the word limitations set forth in Rule 16, as there are 6,979 words in this brief, exclusive of any addendum and pages containing the table of contents, tables of citations, and pertinent texts of statutes, rules, regulations, and other such matters.

/s/ Joseph G. Mattson
Joseph G. Mattson, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Belknap Superior Court
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Laconia NH 03246

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http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **James M Virgin v Fireworks of Tilton, LLC and Foursquare Imports, LLC d/b/a AAH Fireworks, LLC**
Case Number: **211-2016-CV-00070**

Enclosed please find a copy of the court's order of December 21, 2017 relative to:

Re: Motion to Strike Debenedetto Disclosure; Motion to Exclude Supplemental Report

December 21, 2017

Abigail Albee
Clerk of Court

(480)

C: Andrew J. Piela, ESQ; Joseph G. Mattson, ESQ; John H Brooke, ESQ; Jonathan M. Eck, ESQ; John M Stevens, ESQ

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. **SUPERIOR COURT**

James M. Virgin

v.

Fireworks of Tilton, LLC &
Foursquare Imports, LLC d/b/a AAH Fireworks, LLC

Docket No.: 211-2016-CV-070

ORDER

Hearing held (10/27/17) on the following:

- The plaintiff's Motion to Strike Defendant Foursquare Imports DeBenedetto Disclosure (filed 8/24/17), the defendant's Objection to same (filed 9/15/17), the plaintiff's Reply (filed 9/21/17), and the defendant's Objection to the plaintiff's Reply (filed 9/28/17); and
- The defendant Fireworks of Tilton's Motion to Exclude the Supplemental Report of Anthony Albright, CPA (filed 9/29/17), the plaintiff's Objection to same (filed 10/3/17), and the defendant's Sur-Reply (filed 10/13/17).

Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on March 24, 2016, when the plaintiff, James M. Virgin, filed a Complaint against the defendants, Fireworks of Tilton, LLC ("Fireworks of Tilton") and Foursquare Imports, LLC d/b/a AAH Fireworks, LLC ("Foursquare"), alleging breach of implied warranty, strict product liability, and negligence against the defendants for injuries purportedly sustained as a result of a defective firework sold and manufactured by the defendants. The plaintiff now moves to strike the defendant Foursquare's DeBenedetto disclosure, and Foursquare objects. The defendant Fireworks of

Tilton also moves to exclude the supplemental report of the plaintiff's expert witness, and the plaintiff objects. The Court shall consider each pending Motion in turn.

I. Plaintiff's Motion to Strike Defendant Foursquare Imports' DeBenedetto Disclosure

The plaintiff raises several arguments in support of his request to strike Foursquare's DeBenedetto disclosure. First, the plaintiff argues the disclosure should be stricken because it was filed after the deadline set in the Case Structuring Order. Second, the plaintiff avers that Foursquare's disclosure is inadequate because it does not set forth sufficient facts of the non-litigant's purported liability. Third, the plaintiff raises several substantive arguments as to why DeBenedetto does not apply in this case. Specifically, the plaintiff asserts that Foursquare cannot apportion liability because it made affirmative representations that the firework was its own brand, and that DeBenedetto does not apply to cases involving product liability, breach of limited warranty, or a common plan. Finally, the plaintiff asserts that allowing Foursquare to apportion liability may violate Part I, Article 14 of the New Hampshire Constitution.

The defendant Foursquare objects, first arguing that its disclosure should not be stricken as untimely because it raised the issue of allocating fault to an "upstream manufacturer" prior to its disclosure and there is no prejudice to the plaintiff. Foursquare further contends that its disclosure is adequate because it specified the identity of the manufacturer and the basis for its potential liability in accordance with the Case Structuring Order instructions. Finally, Foursquare generally avers that the substantive issues raised by the plaintiff are premature to determine at this stage, and are otherwise without merit.

The Court will first address the plaintiff's argument that Foursquare's DeBenedetto disclosure should be stricken as untimely because Foursquare made its disclosure on May 10, 2017, despite the Case Structuring Order deadline of November 1, 2016 for same. As an initial

matter, the Court acknowledges the importance of adhering to these deadlines, and notes that "justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." Wong v. Ekberg, 148 N.H. 369, 372 (2002) (quotation omitted). Nonetheless, the Court has broad discretion to waive the application of any rule for good cause and as justice may require. Super. Ct. Civ. R. 1(d). At the hearing, counsel for Foursquare explained that the late disclosure was a mistake due to his recent discovery of the specific manufacturer's identity after being added as new counsel to the case. Moreover, Foursquare's disclosure was provided over eight months prior to trial. These facts are much different than those in Wong v. Ekberg, the case cited by the plaintiff in support of his position. In Wong, our Supreme Court found the plaintiff's failure to disclose an expert witness was due to neglect, rather than accident, mistake or misfortune, and that disclosure one month prior to trial caused significant prejudice to the defendant. 148 N.H. at 372–73. Here, there is no evidence that Foursquare's late disclosure was due to neglect, and the Court has no reason to doubt counsel's representations at the hearing. Further, any prejudice to the plaintiff is minimal in light of its disclosure eight months prior to trial. Accordingly, the Court concludes that Foursquare's DeBenedetto disclosure shall not be stricken as untimely.

The Court will next address the plaintiff's argument that Foursquare's DeBenedetto disclosure is inadequate. In DeBenedetto v. CLD Consulting Engineers Inc., our Supreme Court held that damages could be apportioned to nonparties under RSA 507:7-e. 153 N.H. 793, 797–804 (2006). The court noted, however, that "a defendant may not easily shift fault under RSA 507:7–e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." Id. at 804. In the case Goudreault v. Kleeman, the court subsequently refined its DeBenedetto holding, noting that "a

civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense" and that the defendant therefore "carries the burdens of production and persuasion." 158 N.H. 236, 259 (2009) (citations and quotations omitted).

Notably, both DeBenedetto and Goudreault contemplated what must be demonstrated before the trier of fact may consider a nonparty's fault for apportionment purposes *at trial*; neither case addressed the pleading requirements for disclosing a potentially liable nonparty, and the Court is unaware of any binding New Hampshire authority that directly addresses this issue. Contrary to the plaintiff's assertion, the Court does not find the holding in State v. Exxon Mobile Corp. to be instructive on this point. 168 N.H. 211 (2015). While the Supreme Court upheld the trial court's decision that the defendant did not sufficiently allege fault against the non-litigants in its initial DeBenedetto disclosure, its decision was ultimately based on the jury's affirmative rejection of whether the defendant had proven allocation of fault to a nonparty based on the evidence presented at trial. Id. at 259–60. Therefore, it does not appear the Supreme Court meant to establish a pleading standard for DeBenedetto disclosures with its holding.

Upon review, the Court finds that a party filing a DeBenedetto disclosure must identify the non-litigant to whom it may intend to apportion fault and assert sufficient facts to put that party on notice as to the basis under which such fault might be apportioned. A DeBenedetto disclosure is a preliminary notice to the parties and potentially liable nonparties of the possibility of nonparty apportionment. More is required than a mere allegation that some unnamed third party might be at fault, but the party filing the disclosure need not initially plead all of the facts necessary for non-litigant fault to be put before the trier of fact at trial. Indeed, this understanding is reflected by the fact that courts regularly set the deadline for DeBenedetto disclosures well prior to any discovery deadlines. See, e.g., Case Structuring and ADR Order,

(July 11, 2016) (Order, O'Neill, J.). The above formulation adequately balances the interests of the parties and the nonparties in having adequate notice of the basis of such an apportionment, while also allowing for further facts to be uncovered during discovery that might support a delegation of fault. However, the Court further finds that a defendant must make a greater factual showing than what is included in its initial DeBenedetto disclosure before a trier of fact may consider apportionment of fault to a nonparty.

Turning to the present case, the Court finds that Foursquare's DeBenedetto disclosure includes sufficient information to meet the pleading requirements described above. More specifically, Foursquare's disclosure identifies Liuyang Qingtai Fireworks Manufacturing Co., Ltd. as the manufacturer of the specific firework purported to have caused the plaintiff's injuries. (Pl.'s Mot. Strike, Ex. C.) Foursquare further states: "[t]o the extent there were any defects with the subject firework, Liuyang Qingtai is solely and completely at fault for those product defects." (Id.) This disclosure sufficiently notifies the plaintiff that Foursquare may attempt to apportion fault to the manufacturer Liuyang Qintai, and includes the basis of any such apportionment, that Liuyang Qintai is responsible for any product defects found in the firework. Foursquare's disclosure also comports with the instructions in the Case Structuring Order, which directed the defendants to disclose the identity of any unnamed parties at fault in the matter and the basis of the allegation of fault. See Case Structuring and ADR Order (July 11, 2016) (Order, O'Neill, J.). As such, Foursquare's DeBenedetto disclosure shall not be stricken as inadequate.

The Court will now turn to the plaintiff's substantive arguments regarding whether DeBenedetto is applicable to this case. As noted above, Foursquare must demonstrate a greater factual showing than what is included in its initial disclosure before a jury may consider apportionment of fault to the nonparty manufacturer. However, having decided that

Foursquare's disclosure should not be stricken as untimely or inadequate, the Court agrees that ruling on a facially-adequate DeBenedetto disclosure at this stage is premature. While true that "allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes," the plaintiff's present Motion does not provide an opportunity for the Court to make the necessary factual determinations regarding whether Foursquare can meet this standard at trial. See DeBenedetto, 153 N.H. at 804. As such, without a more developed factual record before it at this stage, the Court finds it premature to rule on Foursquare's DeBenedetto disclosure as a matter of law.

Notwithstanding the above determination, the Court further notes that the plaintiff's substantive arguments are not adequately supported by New Hampshire law. First, the plaintiff provides no legal support for his claim that Foursquare should be foreclosed from asserting a DeBenedetto defense due to its affirmative representations that the firework at issue was its own brand. Further, while RSA 507:7-e(I)(c) does impose joint and several liability in cases where the "parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm," it does not appear that the plaintiff's mere allegation of the existence of a common plan automatically forecloses Foursquare from presenting a DeBenedetto defense. Rather the statutory language requires a *finding* of a common plan among alleged tortfeasors, and such a finding cannot be made as a matter of law at this stage.

The plain language of RSA 507:7-e also appears to diminish the plaintiff's arguments regarding the inapplicability of DeBenedetto in cases involving products liability or breach of warranty. The clear language of RSA 507-7:e does not foreclose particular claims from apportionment of damages, and in fact specifically denotes that its provisions apply to "all actions." RSA 507:7-a(I) (emphasis added). As such, the Court is not persuaded by the

plaintiff's argument, particularly in light of the general principle that statutory language must be construed according to its plain and ordinary meaning, and that courts "must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words." State v. Wilson, 169 N.H. 755, 761 (2017). When giving effect to the term "all actions" it is clear the legislature did not intend to exclude specific causes of action from the statute. Further, none of the cases cited by the plaintiff in support of this argument appear to supplant this statutory language or limit the applicability of RSA 507:7-e. See e.g. State v. Exxon Mobile Corp., 168 N.H. 211 (2015); Trull v. Volkswagen of Am., Inc., 145 N.H. 259 (2000); Thibault v. Sears, Roebuck & Co., 118 N.H. 802 (1978). As such, the plaintiff's argument that DeBenedetto cannot apply to product liability or breach of warranty claims appears to be without merit.

Finally, the Court also finds no support for the plaintiff's assertion that permitting apportionment of damages in this case would violate his right to recover for personal injuries. Rather, the Supreme Court has specifically found that a plaintiff is not deprived of a remedy under Part I, Article 14 of the New Hampshire Constitution by permitting the apportionment of liability between parties and nonparties to an action. Ocasio v. Fed. Express Corp., 162 N.H. 436, 448–49 (2011); see also DeBenedetto, 153 N.H. at 805 (apportioning fault to nonparty did not violate New Hampshire Constitution because RSA 507:7-e does not "restrict a plaintiff's right to seek a remedy for personal injuries, limit a plaintiff's ability to bring an action against any party, or cap the amount of damages that a plaintiff may seek."). As such, the Court finds the plaintiff's claim that permitting Foursquare to raise a DeBenedetto defense in this case would violate his rights under the New Hampshire Constitution is also without merit.

Accordingly, the plaintiff's Motion to Strike Defendant Foursquare Imports DeBenedetto Disclosure is DENIED, consistent with the above.

II. Defendant Fireworks of Tilton's Motion to Exclude the Supplemental Report of Anthony Albright, CPA

The defendant Fireworks of Tilton moves to exclude the supplemental report of the plaintiff's expert witness, Anthony Albright, CPA. Specifically, Fireworks of Tilton contends that after timely filing an expert disclosure and Mr. Albright's expert report on economic damages, the plaintiff impermissibly provided a second expert report by Mr. Albright, which included unemployment benefits and SSDI payments in the damages calculation. Fireworks of Tilton asserts that it suffered prejudice, because the supplemental report was filed on the eve of Mr. Albright's deposition, causing a last-minute cancellation of the deposition and wasting preparation time. Fireworks of Tilton also avers that the supplemental report is impermissible under RSA 519:20-b because it is substantively different than Mr. Albright's initial report, containing new expert opinions and a new formula on which to calculate the plaintiff's economic damages. Finally, Fireworks of Tilton contends that a jury should be able to consider the plaintiff's unemployment benefits and SSDI payments when considering damages, and the collateral source rule does not mandate a different result. In the alternative, Fireworks of Tilton requests the ability to cross-examine Mr. Albright regarding the two expert reports at trial.

The plaintiff objects, arguing that the supplemental report should not be excluded because he timely produced Mr. Albright's initial expert report, and the supplemental report was produced to "correct" the initial report and incorporate the collateral source rule into his calculations. The plaintiff further asserts that, pursuant to the collateral source rule, the jury may not consider the plaintiff's receipt of unemployment or SSDI benefits.

The Court will first consider Fireworks of Tilton's argument that Mr. Albright's supplemental report is impermissible pursuant to RSA 519:20-b and the Case Structuring Order.

RSA 519:29-b sets forth specific requirements for expert reports, stating that a report must disclose all opinions to be expressed, the basis and reasons therefore, and the data and other information considered by the expert in forming his opinion. RSA 516:29-b, II (a)–(b). "A party is entitled to disclosure of an opposing party's experts, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions." Laramie v. Stone, 160 N.H. 419, 425 (2010). "The trial court has broad discretion in the management of discovery, and its decisions will be reviewed under an unsustainable exercise of discretion standard." Id.

Upon review, the Court concludes that Mr. Albright's supplemental report should not be excluded as untimely or impermissible under RSA 519:20-b. First, the Court notes that the plaintiff disclosed Mr. Albright as an expert and provided his initial expert report prior to the June 1, 2016 deadline. See Case Structuring and ADR Order, (July 11, 2016) (Order, O'Neill, J.) There is no dispute that the initial report comported with the requirements of RSA 516:29-b as set forth above. However, the Court disagrees with Fireworks of Tilton's characterization of the supplemental report as an "entirely new report" with "new expert opinions" and which "completely change[d] the formula" used to calculate the plaintiff's economic loss. (Def.'s Mot. Exclude, ¶ 13.) Mr. Albright's supplemental report is nearly a verbatim replica of the initial report, with the primary change being the removal of the plaintiff's "replacement earning capacity" in Table 4, and the exclusion of such replacement income when calculating the plaintiff's "loss of earnings" in Table 5. See (Def.'s Mot. Exclude, Ex. C at pp. 8–9.) There is no indication the expert will provide a new opinion as to the basis of the plaintiff's economic loss, and the method of calculation remains the same between the two reports.

The Court further finds that Fireworks of Tilton suffered minimal prejudice as a result of the supplemental report. The plaintiff indicated that he informed the defendant of his intention to

argue exclusion of collateral source benefits, so it appears the defendant was aware of this prior to the filing of the supplemental report. Further, while the Court recognizes the inconvenient timing of receiving the supplemental report on the eve of Mr. Albright's scheduled deposition, with five months remaining until trial at the time, there was ample opportunity to reschedule the expert's deposition prior to trial. Given the minimal differences between the initial report and the supplemental report, as described above, any impact on the preparation time for Mr. Albright's deposition appears minimal as well. For these reasons, the Court declines to exclude Mr. Albright's supplemental report as untimely or impermissible under RSA 519:20-b.

The Court will next address Fireworks of Tilton's argument that the supplemental report should be excluded because the collateral source rule does not apply to the plaintiff's replacement income. The collateral source rule provides that "an award of damages may not be reduced by the amount of benefits a plaintiff receives from a collateral source." Cyr v. J.I. Case Co., 139 N.H. 193, 195 (1994). "If a plaintiff is compensated in whole or in part for his damages by some source independent of the tortfeasor he is still permitted to make full recovery against him." Moulton v. Groveton Papers Co., 114 N.H. 505, 509 (1974). The underlying premise of the collateral source rule is that "payments by sources other than the tortfeasor do not act as an excuse by him to avoid payment to the injured party." Merchants Mut. Ins. Group v. Orthopedic Prof'l Ass'n, 124 N.H. 648, 656 (1984). This rule has been applied to certain benefits paid to a plaintiff, including employment benefits, gratuitous payments, and social legislation benefits such as social security, welfare, pensions, and retirement acts. Moulton, 114 N.H. at 509 (citations omitted).

Upon review, the Court concludes it is premature to make an evidentiary ruling on the admissibility of collateral source replacement income evidence on the present Motion to

Exclude. The Court notes, however, that the law summarized above indicates that the plaintiff's employment and SSDI benefits should be excluded from jury consideration pursuant to the collateral source rule. Fireworks of Tilton also cites no binding New Hampshire precedent to support its conclusion that the collateral source rule is inapplicable when a plaintiff receives certain benefits for reasons unrelated to the injury at issue. Nonetheless, without additional facts or documentation, the Court cannot determine whether the collateral source rule applies to the plaintiff's replacement income. For a similar reason, it is also premature for the Court to address Fireworks of Tilton's alternative argument that it be permitted to cross-examine Mr. Albright about the differences in the two expert reports. However, it appears that, if the collateral source rule does apply to the plaintiff's replacement income, then Mr. Albright cannot be questioned regarding those benefits. See Clausen v. Sea-3, Inc., 21 F.3d. 1131, 1192–93 (1st Cir. 1994) (evidence of collateral benefits was inadmissible under New Hampshire law).

Accordingly, the defendant Fireworks of Tilton's Motion to Exclude the Supplemental Report of Anthony Albright, CPA is DENIED, consistent with the above.

III. Conclusion

In sum, for the reasons described above, the plaintiff's Motion to Strike Defendant Foursquare Imports DeBenedetto Disclosure is DENIED, consistent with the above. The defendant Fireworks of Tilton's Motion to Exclude the Supplemental Report of Anthony Albright, CPA is also DENIED, consistent with the above.

SO ORDERED.

12/21/17
Date

James D. O'Neill, III
Presiding Justice