THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018-0526

JAMES M. VIRGIN

V.

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

N.H. SUPREME COURT RULE 8 INTERLOCUTORY APPEAL FROM RULING (BELKNAP COUNTY SUPERIOR COURT)

BRIEF OF APPELLEE FOURSQUARE IMPORTS, LLC (D/B/A AAH FIREWORKS, LLC)

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QUESTION PRESENTED

Is apportionment of fault pursuant to RSA 507:7-e and as interpreted in *DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793 (2006) and its progeny—specifically with respect to interpretation of the phrase "in all actions" in RSA 507:7-e—limited to tort actions or does it also apply to contract actions, such as breach of implied warranty of merchantability claims, which "sound in contract"? *See Sheehan v. N.H. Liquor Comm.*, 126 N.H. 473, 476 (1985).

TEXT OF PERTINENT STATUTES

14 M.R.S. § 156 Comparative negligence

When any person suffers death or damage as a result partly of that person's own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage may not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof must be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

When damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages that would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent considered just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

Fault means negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.

If such claimant is found by the jury to be equally at fault, the claimant may not recover.

In a case involving multiparty defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant has the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant. If a defendant is released by the plaintiff under an agreement that precludes the plaintiff from collecting against remaining parties that portion of any damages attributable to the released defendant's share of responsibility, then the following rules apply.

> **1. General rule.** The released defendant is entitled to be dismissed with prejudice from the case. The dismissal bars all related claims for contribution assertable by remaining parties against the released defendant.
> **2. Post-dismissal procedures.** The trial court must preserve for the remaining parties a fair opportunity to adjudicate the liability of the released and dismissed defendant. Remaining parties may conduct discovery against a released and dismissed defendant and invoke evidentiary rules at trial as if the released and dismissed defendant were still a party.
> **3. Binding effect.** To apportion responsibility in the pending action for claims that were included in the settlement and presented at trial, a finding on the issue of the released and dismissed defendant's liability binds all parties to the suit, but such a finding has no binding effect in other actions relating to other damage claims.

Minn. Stat. § 604.01 Comparative fault; effect

Subdivision 1. ***Scope of application.* —** Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of

damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Subd. 1a. ***Fault.* —**

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. 2. ***Personal injury or death; settlement or payment.* —** Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. ***Property damage or economic loss; settlement or payment.* —** Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. ***Settlement or payment; admissibility of evidence.* —** Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. ***Credit for settlements and payments; refund.* —** All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.

Source. 1969 c 624 s 1; 1978 c 738 s 6,7; 1986 c 444; 1990 c 555 s 19-21.

N.D. Cent. Code § 32-03.2-02 Modified comparative fault

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid

injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

Source. S.L. 1987, ch. 404, § 2; 1993, ch. 324, § 2.

RSA 382-A:2-314 Implied Warranty: Merchantability; Use 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.

RSA 382-A:2-715(2) Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
(b) injury to person or property proximately resulting from any breach of warranty.

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

RSA 507-D:1 Definitions.

As used in this chapter:

I. "Product liability action" means any action brought for or on account of personal injury, death or property damage or other damage caused by or resulting from the development, manufacture, construction, design, formula, preparation, assembly, testing, warning, instructing, advertising, marketing, certifying, packaging, or labeling of any product. The term includes all such actions, regardless of the legal theory relied upon, whether strict liability in tort, negligence, breach of warranty, breach of or failure to discharge a duty to warn or instruct, misrepresentation, concealment, nondisclosure or any other theory whatsoever.

II. "Risk" means any risk, danger, hazard, defect, condition or adverse effect or side effect of the product in question.

III. "User" means a purchaser, or any individual who uses or consumes the product. Where the user is under legal disability, the term also includes the user's legal representative. Where the user is an employee who has been using the product while acting within the scope of employment, the term

also includes the employee's employer or co-employee. The term also includes any person who, while acting on behalf of the user, was in possession and control of the product in question.

Source. 1978, 31:1, eff. Aug. 22, 1978.

RSA 556:12 Damages for Wrongful Death, Elements.

I. If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to the estate by the injury, the probable duration of life but for the injury, and the capacity to earn money during the deceased party's probable working life, may be considered as elements of damage in connection with other elements allowed by law, in the same manner as if the deceased had survived.

II. In addition, the trier of fact may award damages to a surviving spouse of the decedent for the loss of the comfort, society, and companionship of the deceased; however, where fault on the part of the decedent or the surviving spouse is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d. In no event shall damages awarded under this paragraph exceed $150,000.

III. In addition, where the decedent is a parent of a minor child or children, the trier of fact may award damages to such child or children for the loss of familial relationship, whether caused intentionally or by negligent interference; where the decedent is a minor child with a surviving parent or parents, the trier of fact may award damages to such parent or parents for the loss of familial relationship, whether caused intentionally or by negligent interference. However, where fault on the part of the decedent or the claimant is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d. For purposes of this paragraph, loss of familial relationship shall include the loss of the comfort, society, affection, guidance, and companionship of the deceased. In no

event shall damages awarded under this paragraph exceed $50,000 per individual claimant.

Source. 1887, 71:1. PS 191:12. PL 302:12. RL 355:12. RSA 556:12. 1971, 490:1, eff. Aug. 31, 1971. 1997, 260:1, eff. Jan. 1, 1998. 1998, 348:1, eff. Jan. 1, 1999.

RSA 556:9 Survival of Tort Actions

Actions of tort for physical injuries to the person, although inflicted by a person while committing a felony, and the causes of such actions, shall survive to the extent, and subject to the limitations, set forth in RSA 556:10–14, and not otherwise.

Source. 1850, 953:7. CS 150:66. GS 264:14. GL 282:14. 1879, 35:1. 1885, 11:1. 1887, 71:1. PS 191:8. PL 302:9. RL 355:9.

STATEMENT OF THE CASE

The Appellant, James M. Virgin, seeks to recover for personal injuries sustained after a firework allegedly detonated prematurely. *See Appellant's Appendix,* at 17-18 (hereinafter "*App*."). In his Complaint, dated March 24, 2016, Appellant pleaded six (6) Counts, including Breach of Implied Warranties, Strict Product Liability-Defective Manufacturing, Strict Product Liability-Failure to Warn, Violation of RSA Chapter 160-C, and Negligence. *Id*., at 3-9. Defendant AAH Fireworks, LLC (d/b/a Foursquare Imports, LLC) (hereinafter "AAH Fireworks") asserted that Plaintiff's injuries were the result of the fault of the upstream manufacturer. *Appellant's Brief*, at p. 28.

After the Appellant moved to strike AAH Fireworks' *DeBenedetto* disclosure, motion practice occurred and arguments were heard prior to the

Superior Court issuing its order. In the Order, dated December 21, 2017 (Clerk's Notice December 21, 2017) (hereinafter, "*December Order*"), the Superior Court (O'Neill, III, J.) found that AAH Fireworks' *DeBenedetto* disclosure was timely and facially adequate, and that the plain language of RSA 507:7-e does not foreclose the applicability of apportionment from particular claims; rather it denotes that its provisions apply to "<u>all actions</u>." *Appellant's Brief*, pp. 29-34.

Subsequently, the Appellant filed his Motion for Clarification and Reconsideration of the December Order and, alternatively, an Interlocutory Appeal. *Appellant's Brief*, at p. 40. Again, motion practice occurred and arguments were heard and, by Order dated April 17, 2018, the Superior Court (O'Neill, III, J.) denied the Appellant's Motion to Clarify, held in abeyance the Motion to Reconsider, and granted the Appellant's Motion for Interlocutory Appeal to determine if apportionment of liability pursuant to RSA 507:7-e and *DeBenedetto* applies in breach of implied warranty claims. *Appellant's Brief*, at pp. 46-47.

<u>STATEMENT OF FACTS</u>

On July 6, 2015, the Appellant purchased fireworks from Fireworks of Tilton, one of which was allegedly labeled as an "AAH Brand" item. *Appellant's Brief*, pp. 5-6. The Appellant has argued that AAH Fireworks was the firework's manufacturer because it made certain representations on its website regarding the process by which such fireworks are imported into the United States. *Id.*, p. 6. The Appellant nevertheless correctly describes

AAH Fireworks as “a fireworks retailer and wholesaler” as opposed to a manufacturer. *Id*.

The Appellant has claimed that the firework was defective and, due to this alleged defect, AAH Fireworks has breached the implied warranty of merchantability and should be held strictly liable for the Appellant’s damages. *App*., pp. 5-7.

Prior to the incident in question, the Appellant had been shooting fireworks since he was a young adult, or about twenty years. *Appellee’s App*., p. 4. Over those years, he had encountered many types of fuses on consumer firework cake items, some were gray, others green, others like the fuse on a firecracker. *Appellee’s App*., p. 5. In the past, Appellant always believed he had sufficient time to get away from the device, regardless of the color of the fuse. *Appellee’s App*., p. 6. Regarding the specific device at issue, Appellant alleges that he noticed that it had a different color fuse than he expected, but he had seen different colors in the past and he did not question the coloring. *Appellee’s App*., pp. 8-9. Appellant did not wonder why the fuse was a different color and the color of the fuse did not stop him from using the device. *Appellee’s App*., p. 10. On the night of the incident, Appellant bent down on one knee to light the device. *Appellee’s App*., pp. 7-8. Appellant was struck in the face by a projectile from the device. *App.*, p. 18. According to Appellant’s/Plaintiffs’ retained causation expert, in order for Appellant to have been struck in the face by a projectile from the device, he would have had to have had his head over the top of the device when he lit it. *Appellee’s App*., pp. 12-13.

In light of the Appellant's allegations regarding the potential fuse irregularity, AAH Fireworks' disclosed the identity of the firework's Chinese manufacturer and stated that if the firework was incorrectly fused, that error occurred during the manufacturing process in China and was the error of a *DeBenedetto* party. *App*., p. 40.

SUMMARY OF ARGUMENT

The Appellant's attempt to draw a distinction between tort and contract claims in this matter is not dispositive of whether apportionment applies to breach of warranty claims.

When interpreted in the context of its entire statutory scheme, it is clear that RSA 507:7-e was intended to apply to all actions as opposed to actions premised solely on tort-based theories of recovery.

Not allowing RSA 507:7-e to apply to a breach of warranty theory of recovery would effectively abrogate the apportionment statute in product liability actions and lead to an absurd result unintended by the New Hampshire Legislature.

ARGUMENT

Standard of Review

This appeal is based on an interpretation of a particular statute and its resolution requires this Court to reconcile that statute with other sections of New Hampshire's Revised Statutes.

"The trial court's interpretation of a statute is a question of law, which [the Supreme Court] review[s] *de novo*." *Crowley v. Frazier*, 147 N.H. 387, 389 (2001). In matters of statutory interpretation, the Supreme Court is "the final arbiter of the legislature's intent." *Franklin Lodge of Elks v. Marcoux,* 149 N.H. 581, 585 (2003).

Statutory interpretation begins "by examining the language of the statute and ascribing the plain and ordinary meanings to the words the legislature used." *Nilsson v. Bierman*, 150 N.H. 393, 395 (2003) (citing *Franklin Lodge of Elks,* 149 N.H. at 585). "Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." *Rodgers v. Colby's Ol' Place, Inc.*, 148 N.H. 41, 44 (2002) (citation omitted). Statutes are interpreted "in the context of the overall statutory scheme and not in isolation." *Big League Entm't, Inc. v. Brox Indus.*, 149 N.H. 480, 483 (2003). "When interpreting two statutes which deal with a similar subject matter, [the Supreme Court] will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." *Pennelli v. Town of Pelham*, 148 N.H. 365, 366 (2002) (quoting *Nault v. N & L Dev. Co*., 146 N.H. 35, 38 (2001)). "The legislative intent is to be found not in what the legislature might have said, but rather in the meaning of what it did say." *Appeal of Public Serv. Co.*, 141 N.H. 13, 17 (1996) (citation omitted).

A. New Hampshire recognizes the distinction between tort and contract claims—and Appellant has pleaded both; however, product liability actions occupy a unique/hybrid area of New Hampshire law regardless of the theory of recovery.

From the outset, the Appellant is generally correct in stating that "New Hampshire law has long recognized the distinction between actions sounding in contract and actions sounding in tort." *Appellant's Br.,* p. 12 (citations omitted). It is critical to point out, however, that the Appellant has not filed a suit sounding solely in contract.[1] Breach of warranty claims have been referred to as "a freak hybrid born of the illicit intercourse of tort and contract." *Kelley v. Volkswagenwerk Aktiengesellschaft*, 110 N.H. 369, 371 (1970) (quoting Prosser, *Strict Liability to the Consumer*, 69 Yale L.J. 1099, 1126 (1960)).

1. Tort Claims in the Context of Product Liability Actions

The distinction between contract and tort-based actions is also blurred in product liability actions, such as the case at hand. In 1978 the New Hampshire Legislature adopted RSA 507-D:1, defining a product liability action as "any action brought for or on account of personal injury, death or property damage or other damage caused by or resulting from the development, manufacture, construction, design, formula, preparation, assembly, testing, warning, instructing, advertising, marketing, certifying, packaging, or labeling of any product. The term includes all such actions,

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[1] As a preliminary matter, because there is no question that RSA 507:7-e applies to tort claims, as long as the Appellant continues to pursue a mixed theory of recovery case there is no basis to deny the defendants a right to present evidence regarding apportionment of fault.

regardless of the legal theory relied upon, whether strict liability in tort, negligence, breach of warranty, breach of or failure to discharge a duty to warn or instruct, misrepresentation, concealment, nondisclosure or any other theory whatsoever." RSA 507-D:1.

RSA Chapter 507-D was ultimately deemed unconstitutional on the basis of an equal protection violation resulting from the statutes of repose and limitations. *See Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 531 (1983). Nevertheless, the statutory definition of "product liability action" clearly demonstrates the legislature's intent to recognize that a product liability claim combines multiple theories of recovery, including both tort and contract theories. As is directly applicable to this appeal, the Court in *Heath* concluded there was an equal protection violation specifically because the statute denied certain injured plaintiffs the same right to apportionment enjoyed by all other products liability plaintiffs. *Heath,* 123 N.H. at 528-29.

Indeed, prior to adopting the comparative fault statute as a replacement for contributory negligence, this Court held 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." *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 251 (1970). The *Stephan* decision, having never been explicitly overturned, demonstrates the intent of the legislature and the courts to balance the fault attributed to plaintiffs with the fault attributed to defendants in breach of warranty actions.

Stephan also raises an additional distinction applicable to product liability claims—namely, the applicability of the Uniform Commercial Code (hereinafter "UCC"). *See Stephan*, 110 N.H. at 250-51. The UCC requires that a plaintiff's injuries be proximately caused by the breach of implied warranty, rather than a plaintiff's own conduct. As indicated in the comments to UCC Article 2, Section 314:

> In an action based on breach of warranty, it is of course necessary to show not only the existence of a warranty but the fact that the warranty was broken and that the breach of warranty was the proximate cause of the loss sustained. In such an action an affirmative defense showing by the seller that the loss resulted from some action or event following his own delivery of the good can operate as a defense. Equally, evidence 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.

RSA 382-A:2-314 (Comment 13). Questions of proximate cause, breach, and whether a seller exercised care are readily apparent within the text of section 314. The breach in question must be the proximate cause of the plaintiff's injuries. Additionally, there is a notable distinction in RSA 382-A:2-715(2), which deals with consequential damages in UCC cases:

> . . .
>
> (2) Consequential damages resulting from the seller's breach include
>
> > (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
> >
> > (b) injury to person or property *proximately resulting* from any breach of warranty.

RSA 382-A:2-715(2)(a)-(b) (emphasis added). Therefore, in a claim for consequential damages under the UCC, some determination must be made as to whether a plaintiff's injuries were proximately caused by the breach of warranty, or if the injuries resulted from some other cause. For example, in *Dakota Grain Co. v. Ehrmantrout*, 502 N.W.2d 234 (1992), the Supreme Court of North Dakota applied comparative fault in a breach of warranty action and reduced the plaintiff's consequential damages because the plaintiff was found to be 49 percent at fault, with "fault" being described as causation: "[w]e conclude that the trial court's finding of 49 percent causation of the consequential damages by the [plaintiff] is not clearly erroneous." *Id.* at 238-39.

Here, by arguing that a breach of implied warranty claim should be treated differently than any other product liability action, the Appellant is asking this Court to ignore the guidance provided by the drafters of the UCC. Many jurisdictions have rejected this view, and this Court has already held that in strict liability and breach of warranty actions that seek damages for personal injury, the comparative fault statute applies as "comparative causation" instead. *See, e.g.*, *Bohan v. Ritzo*, 141 N.H. 210, 216 (1996) ("We interpret 'comparative fault' slightly differently, however, in the context of a strict liability case than in a negligence case. . . [C]ourts should look to 'comparative causation' in evaluating damages in strict liability cases." (citing *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 813 (1978) (holding that comparative fault applies in dual-theory personal injury cases based on strict liability and breach of warranty)); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 423, 427 (Tex. 1984) ("In Texas, a

plaintiff can predicate a product liability action on one or more of three theories of recovery: (1) strict liability under § 402A, (2) breach of warranty under the U.C.C., and (3) negligence." . . . "We agree with the analysis of the New Hampshire [S]upreme [C]ourt in *Thibault v. Sears*. . . . Judicial adoption of a comparative apportionment system, independent of statutory comparative negligence, is a feasible and desirable means of eliminating confusion and achieving efficient loss allocation in strict liability cases."); *Horstmeyer v. Golden Eagle Fireworks*, 534 N.W.2d 835, 839 (1995) (confirming that North Dakota's products liability comparative fault statute applies in breach of warranty actions) (*see* N.D. Cent. Code § 32-03.2-02); *Thomas v. EDI Specialists, Inc.*, 437 Mass. 536, 539 (2002) ("[A] defendant may seek contribution in connection with a claim of implied warranty of merchantability"); *Maietta v. International Harvester Co.*, 496 A.2d 286, 291 (Me. 1985) (affirming jury reduction of damages based on comparative negligence statute where the jury found both negligence and breach of implied and express warranties, because plaintiff was guilty of contributory negligence that was a proximate cause of the accidents).

The idea of comparative causation in breach of warranty cases conforms to both the UCC and the legislative and judicial goal of apportionment: a plaintiff must demonstrate the proximate cause of the injury in question. *See* RSA 382-A:2-314; RSA 382-A:2-715(2)(b). A defendant must have an opportunity to attribute liability for damages to "all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." *Ocasio v.*

Fed. Express Corp., 162 N.H. 436, 446 (2011) *(*quoting *DeBenedetto*, 153 N.H. at 804).

2. Inapplicability of the Appellant's Otherwise Misinterpreted "Rules"

The Appellant summarizes his arguments regarding the distinction between tort and contract claims by broadly proclaiming that there are two rules, set forth by the Appellant, that ostensibly dictate the outcome of this appeal. *Appellant's Br.*, p. 14. As is discussed in detail below, however, the Appellant's distillation of these two critical rules either incorrectly summarizes New Hampshire law, or is simply inapplicable to this appeal.

First, Appellant relies upon a single appellate opinion for the broad claim that this Court differentiates between tort and contract actions; ultimately concluding that a statute allowing for the survival of tort actions after death did not apply to breach of warranty actions. *Appellant's Br.*, p. 12 (citing *Kelley, supra*, 110 N.H. 369). While the Court in *Kelley* did issue that holding, it did so specifically because the applicable statute used the word "tort." *Kelley,* at 371 (citing RSA 556:9, which provided and still provides, "Actions of tort for physical injuries to the person …") Thus, while the statute at issue in *Kelley* did not apply to non-tort-based claims, the Court nevertheless looked to the specific statutory language to make its determination. *Id*.

In this respect, the *Kelley* opinion further bolsters the argument that apportionment applies to more than just tort actions because, not only is the word "tort" entirely absent from the apportionment statute, but the statute

explicitly states that apportionment applies to "*all actions*." RSA 507:7-e (emphasis added). The Court in *Kelley* made this same word-specific "tort claims only" determination in regards to RSA 556:9 while also noting the fact that the same limitation did not apply to the companion statutes within the same chapter. *Kelley,* 110 N.H. at 372. Needless to say, the statutory scheme at issue in the *Kelley* opinion is strikingly similar to the scheme at issue in this appeal.

The statutes at issue in the *Kelley* case, which apply to suits by and against estate administrators, include a section which, as discussed above, applies only to tort claims. *Kelley,* 110 N.H. at 371; *see also* RSA 556:9. Like the Appellant here, the defendant in *Kelley* argued that RSA 556:12 was "integrally related to RSA 556:9 and that by the terms of RSA 556:9, RSA 556:12 applies only to tort actions." *Kelley,* 110 N.H. at 372. Again, like the statute at issue in this appeal, RSA 556:12 does not include the word "tort" at any point and, consequently, the Court in *Kelley* came to the conclusion that:

> RSA 556:9, by its terms, applies to all actions of tort for physical injuries to the person . . . *There is nothing specific in RSA 556:12 which would limit its application to tort actions*. 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.

Kelley, 110 N.H. at 372 (emphasis added).

This same line of reasoning has applied when interpreting RSA 507:7-e, such as the definition of "parties" in subsection a. "[T]he legislative history of RSA 507:7-e plainly demonstrates that an underlying

purpose of the 1989 amendment was to relieve defendants involved in personal injury lawsuits from damages exceeding their percentages of actual fault." *Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 446 (2011) (quoting *DeBenedetto,* 153 N.H. at 807). "Therefore, we held [in *DeBenedetto*] that 'for apportionment purposes under RSA 507:7-e, the word 'party' refers not only to parties to an action, including settling parties, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court.'" *Ocasio,* 162 N.H. at 443 (citing *DeBenedetto,* 153 N.H. at 804). Certainly, if the Court feels that the word "party" in RSA 507:7-e was intended to include "all parties" regardless of their status in the lawsuit, then the phrase "[i]n all actions" is intended to mean *in all actions*, regardless of whether they sound in tort or contract.

Finally, it is worth pointing out that, while supportive of an argument that contract actions are distinguishable from tort actions, not one of the three major cases cited by the Appellant addresses, or even references, apportionment. *See Appellant's Br*., pp. 12-14 (citing *Kelley,* 110 N.H. 369 (abatement of contract-based claims upon death); *Guerin v. N.H. Catholic Charities*, 120 N.H. 501 (1980) (applicability of tort-based statute of limitation); *Sheehan v. N.H. Liquor Comm.,* 126 N.H. 473 (applicability of sovereign immunity to contract-based claim)). Thus, the ultimate conclusion reached by the Appellant from these three cases is irrelevant in this matter because the issue is not whether a contract claim is distinguishable from a tort claim, but whether the word "tort" in one statute overrides the phrase "[i]n all actions" in the apportionment statute.

Accordingly, there is no persuasive merit to the Appellant's contention that New Hampshire recognizes a distinction between actions sounding in contract and those sounding in tort. *Appellant's Br.*, p. 12. Such a distinction is simply inapplicable to this controversy. A recognized distinction between contract and tort actions—which appears nowhere in the statutory scheme of RSA 507:7-e through -i—does not support Appellant's conclusion that RSA 507:7-e must somehow apply only to tort claims. This is because, by its own terms, the statute explicitly and unequivocally applies to "all actions"—not to mention a notable absence of the word "tort" from the entire apportionment statute.

B. The plain language of RSA 507:7-e shows that apportionment applies to "all actions" and not just those actions seeking "to recover damages in tort."

The trial court concluded that the use of the words "all actions" in the apportionment statute clearly demonstrated that "the legislature did not intend to exclude specific causes of action from the statute" and that no case seemed to indicate otherwise or limit the statute's applicability. *Appellant's Brief*, pp. 34. Nevertheless, the Appellant argues the apportionment statute is inapplicable to contract claims because the word "tortfeasor" is included in the subchapter's title which, according to the Appellant, indicates that the statute should apply only to tort claims. *Appellant's Br.*, p. 15. The Appellant's analysis, however, fails to appreciate the statutory language in light of the entire statutory scheme.

The Appellant argues that the subchapter's title "demonstrates an intent by the legislature to apply those sections to tort [*sic*] not contract actions." *Appellant's Br.*, p. 15. This Court has held that "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. Cos.*, 143 N.H. 270, 274 (1998) (citation and quotation omitted). The language of RSA 507:7-e clearly and unambiguously applies "[i]n all actions." Moreover, the Appellant fails to note that the subchapter's title is simply a word-for-word recitation of the first three section headings; *i.e.,* 1) Comparative Fault; 2) Apportionment of Damages; and 3) Contribution Among Tortfeasors. *See* RSA 507:7-d, -e, -f. Stated differently, the Appellant claims that, because the words "Among Tortfeasors" are used in the heading of RSA 507:7-f, those words also apply to RSA 507:7-d and RSA 507:7-e as well simply by association, despite their blatant omission from -d and -e. (*i.e.,* they are not entitled 507:7-d. Comparative Fault *Among Tortfeasors* or 507:7-e. Apportionment of Damages *Among Tortfeasors*). The Appellant's reading is an incorrect interpretation of the subchapter's title and hardly supports the argument that the apportionment statute applies only to tort claims. To the extent the word "tortfeasor" matters in the greater statutory scheme, at least one court has defined the word "tortfeasor" to include "those whose liability is based on strict products liability, breach of warranty, and negligence." *See Duncan,* 665 S.W.2d at 430.

The Appellant then spends a considerable amount of time arguing that the apportionment statute applies only to tort-based claims due to the

absence of any specific language regarding contract-based claims. *Appellant's Br.,* pp. 15-19. This argument, however, fails for two reasons. First, a specific reference to contract-based claims is unnecessary as such claims would clearly fall within the ambit of "all actions," as the phrase is used in RSA 507:7-e. And second, failing to reference contract-based claims or contract actions is of no consequences because the dispositive fact is that the legislature chose to omit a specific reference to "torts" in RSA 507:7-e and, instead, uses the phrase "all actions." Stated differently, the Appellant is of the opinion that the phrase "all actions" is, in fact, meant to mean all actions *other than* those based in contract. If that is what the legislature meant, it would have said so; "[t]he legislature is presumed to choose the words of a statute advisedly." *Appeal of Public Serv. Co.*, 141 N.H. at 17.

The Appellant attempts to support a limited application of the apportionment statute to only tort-based claims because "[t]here is no mention in section 7-d of comparative fault being applicable in contract actions, and indeed, many courts have limited the comparative fault defense only to tort actions." *Appellant's Br.*, pp. 15-16. The Appellant then goes on to cite various non-New Hampshire cases which stand for the proposition that comparative fault only applies to tort-based claims. *Id.*, at p. 16 (citations omitted). However, many jurisdictions apply comparative fault (or comparative causation) to breach of warranty claims, including New Hampshire. *See Bohan,* 141 N.H. at 215-16; *Duncan*, 665 S.W.2d at 427; *see also* 14 M.R.S. § 156 (". . . Fault means negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or

would, apart from this section, give rise to the defense of contributory negligence"); Minn. Stat. § 604.01, Subd.1a ("Fault" includes breach of warranty). The operative question is whether a damages award, if any, can be apportioned to all responsible parties based on causation of consequential damages. Even if this Court finds that the concept of comparative fault is intertwined with the apportionment statute, this Court interprets the comparative fault statute as comparative causation in cases where fault does not seem to apply. *See Bohan*, 141 N.H. at 216.

Finally, it is important to point out that not only did the legislature fail to use the word "tort" in RSA 507:7-e, but this Court explicitly held that apportionment applies "to all parties contributing to the *occurrence* giving rise to an action[.]" *DeBenedetto,* 153 N.H. at 804 (emphasis added). As clearly recognized by this Court, a single "occurrence" may very well give rise to multiple theories of recovery beyond just tort claims. As such, to limit its application to only tort-based claims would be inapposite to the legislature's intent for the apportionment statute, which is to protect defendants with minimal fault "from bearing the entire weight of a damages verdict." *Id*. at 804.

C. Applying RSA 507:7-e to all actions, whether tort-based, contract-based, or otherwise, would result in the apportionment statute being applied as the legislature intended and eliminate the possibility of an otherwise absurd result.

The Appellant argues that apportionment is inapplicable to breach of warranty claims because "the Uniform Commercial Code makes no provision for the allocation of responsibility between" a product's retailer,

its wholesaler, or its manufacturer. *Appellant's Br*., pp. 19-20. The Appellant's argument, however, is based on deeply flawed reasoning and a general misunderstanding of implied warranty claims.

To start, the Appellant argues that, based on the case of *Collella v. Beranger Volkswagen, Inc.*, "apportionment is inapplicable to breach of implied warranty claims." *Appellant's Br*., p. 20 (citing *Collella v. Beranger Volkswagen, Inc.*, 118 N.H. 365 (1978)). In *Collella*, the contract for the motor home at issue contained a provision from the manufacturer disclaiming its implied warranty liability in accordance with the UCC, but the disclaimer made no mention of the dealer. *Collella,* 118 N.H. at 366. When problems arose with the motor home, the buyer sued both the dealer and the manufacturer and, after the manufacturer defaulted, the dealer sought to invoke the disclaimer in order to avoid liability by claiming it was equally entitled to avoid liability using the manufacturer's disclaimer. *Id*. The Court, however, determined that the disclaimer applied only to the manufacturer and, because the dealer failed to disclaim the implied warranty, it was liable for the plaintiff's damages. *Id*.

As stated, the Appellant reads this Court's holding in *Collella* to stand for the proposition that apportionment does not apply in breach of warranty claims. The Appellant's reading, however, misinterprets the *Collella* holding because it confuses the situation where one of two defendants is held fully liable after the other disclaimed any warranty claims, with the general concept of apportionment of damages. Despite the Appellant's understanding, *Collella* actually stands for the proposition that

a defendant can completely avoid any liability by disclaiming the warranties pursuant to the Uniform Commercial Code and has nothing to do with apportionment. In fact, this position finds support from the rule in a separate case accurately summarized by the Appellant as being "in a breach of contract case, each party's exposure is based upon the contract it has with the plaintiff." *Appellant's Br.*, p. 20 (citing *Town of Bow v. Provan & Lorber, Inc.*, No. 2009-CV-0190, 2014 N.H. Super. LEXIS 2, *14 (N.H. Super. Ct. Feb. 14, 2014) (recognizing that with a breach of contract claim, "[e]ach party may, of course, argue that damage was caused by breach of another contract to which it was not a party" and that "each party's exposure is limited by the contract it made"). In other words, because liability in contract actions is based on each party's particular contract, damages would inherently be apportioned just as they are in non-contract-based tort claims.

A ruling that apportionment pursuant to RSA 507:7-e is only available for tort claims would all but eliminate any tort-based theories of recovery for future product liability cases. This is because plaintiffs would be incentivized to seek recovery on nothing more than a breach of implied warranty claim since defendants in such cases would be prohibited from seeking apportionment simply because the sole theory of recovery "sounds in contract" rather than tort.

Such a holding would eviscerate the legislative intent of RSA 507:7-e and the reasoning of *DeBenedetto*: "to relieve defendants involved in personal injury lawsuits from damages exceeding their percentage of actual

fault." *DeBenedetto*, 153 N.H. at 807; *see also Ocasio,* 162 N.H. at 442 ("The joint and several liability rule enabled injured plaintiffs to seek out and sue only 'deep pocket' defendants. . ."). It would also allow plaintiffs to separately sue a retailer, distributor, and manufacturer for an injury arising from one single product, without apportionment to avoid potential double recovery for the same injury. Under New Hampshire law, "a plaintiff cannot claim multiple recoveries for the same loss even though different theories of liability are alleged. . . [w]hen a plaintiff's theories of recovery arise from the same set of operative facts, the plaintiff is entitled to only a single recovery." *Halifax-American Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 581-82 (2018) (internal citation and quotation omitted); *see also Phillips v. Verax Corp.*, 138 N.H. 240, 248-49 (1994). Moreover, "[c]oncerns relating to judicial economy also militate against allowing plaintiffs to litigate their cases over and over, against one defendant at a time." *Kathios v. General Motors Corp.*, 862 F.2d 944, 949 (1st Cir. 1988).

Ultimately, the inapplicability of apportionment in contract claims is essentially premised on the general notion that where the claim is based purely on the parties' contractual relationship, a separate cause of action for negligence is not available. *See Plourde Sand & Gravel Co. v. JGI E., Inc.*, 154 N.H. 791, 794 (2007). Prohibiting apportionment in a claim based solely on breach of contract is logical because contracting parties "have the power to specifically delineate the scope of their liability at the time the contract is formed." *Town of Bow v. Provan & Lorber, Inc.*, No. 2009-CV-0190, 2014 N.H. Super. LEXIS 2, *13-14 (N.H. Super. Ct. Feb. 14, 2014)

(quoting *Bd. of Educ. v. Sargent, Webster, Crenshaw & Folley*, 517 N.E.2d 1360, 1365 (N.Y. 1987)); *see also Penta Corp. v. Town of Newport*, No. 212-2015-CV-00011, 2018 N.H. Super. LEXIS 7, *21-22 (N.H. Super. Ct. Apr. 23, 2018) (quoting identical passage from *Sargent,* 517 N.E.2d at 1365).

Consequently, when a contracting party's liability for breaching the contract is established by the contract itself, it only makes sense to prohibit that party's ability to seek apportionment of damages. Nevertheless, the fact remains that, where two defendants enter into identical contracts with a plaintiff and provide identical performance, "there is authority for the proposition that a trier of fact would be required to apportion liability." *Provan & Lorber,* 2014 N.H. Super. LEXIS 2, at 14, n. 2 (citing Joseph M. Perillo, CORBIN ON CONTRACTS § 55.9 (2005)).

Applying the reasoning of Corbin on Contracts, *see Provan & Lorber*, to this case, the Appellant, as purchaser of the firework, has effectively entered into an identical implied contract with the firework's retailer, wholesaler, and manufacturer because each owes identical warranty duties to the purchaser under the UCC. Thus, if the firework were to fail, as alleged by the Appellant, the firework's retailer, wholesaler, and manufacturer would be subject to liability for the same injury, which should be appropriately apportioned. Not applying apportionment in these circumstances would lead to "an unfair and inequitable result" as described by the Rhode Island Supreme Court in its analysis of whether to apply Rhode Island's comparative negligence statute to breach of warranty cases:

> 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 the 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, 646 A.2d 719, 726-28 (R.I. 1983).

In light of the foregoing, it is clear that prohibiting apportionment in this matter would produce an absurd result because it would effectively demand that all future product liability claims proceed as actions based solely on a contract. Such a result would eliminate the possibility of apportioning damages in all such actions because plaintiffs would forgo tort-based claims, allowing negligent parties to escape liability, and plaintiffs would instead pursue solely deep-pocket defendants through breach of warranty claims. Because this is clearly not the result intended by the legislature when enacting RSA 507:7-e and for all the additional reasons set forth herein, this Court should not prohibit apportionment in this matter.

CONCLUSION

For the reasons set forth above, this Court should conclude that the apportionment of fault permitted pursuant to RSA 507:7-e and *DeBenedetto*

applies to breach of implied warranty cases, and affirm the trial court's orders.

REQUEST FOR ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), Appellee AAH Fireworks requests fifteen (15) minutes of oral argument before the full Court. Attorney John H. Brooke will present the oral argument.

Respectfully submitted,

FOURSQUARE IMPORTS, LLC,
D/B/A AAH FIREWORKS, LLC

By its Attorneys,

Devine, Millimet & Branch, P.A.

Date: February 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that electronic service of the Brief of Appellee Foursquare Imports, LLC (d/b/a AAH Fireworks, LLC) will be made through the Court's electronic filing system in accordance with Rule 18(b) of the 2018 Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing on all registered e-filers in this case.

Date: February 11, 2019

/s/ Jonathan M. Eck
Jonathan M. Eck, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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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).

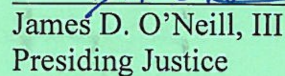
Accordingly, the defendant Fireworks of Tilton's Motion to Exclude the Supplemental Report of Anthony Albright, CPA is DENIED, consistent with the above.

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