STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO.: 2018-526

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 THE APPELLANT – JAMES M. VIRGIN

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(15 Minute Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND AUTHORITIES

I. Statutes

II. New Hampshire Cases

III. Foreign Cases

IV. Federal Regulations

V. Other Authorities

QUESTION PRESENTED FOR REVIEW

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).

Record citation: Interloc. Appeal Stat. at pg. 3.

STATUTORY TEXT

RSA 382-A:2-314

RSA 382-A:2-316

RSA 507:7-d

RSA 507:7-e

RSA 507:7-f

RSA 507:7-g

RSA 507:7-h

The full text of the above statutes is set forth in the Appellant's Appendix at pages 191-200.

STATEMENT OF THE CASE

This is an action to recover for personal injuries sustained when a firework "cake" prematurely detonated. See Appellant's Appendix at 17-18 [hereinafter App.]. The plaintiff, James M. Virgin, pled counts of statutory breach of implied warranty (RSA 382-A:2-314) along with other common law and statutory claims against two defendants. Id. at 3-6. AAH Fireworks, LLC (d/b/a Foursquare Imports, LLC) [hereinafter AAH], one of the two defendants, made a DeBendetto disclosure assigning potential liability to a third party. Id. at 19, 39-40. Prior to trial, the Superior Court (O'Neill, III, J.) allowed the plaintiff's motion for an interlocutory appeal to determine whether apportionment of liability pursuant to RSA 507:7-e applies in breach of implied warranty claims. Interlocutory Appeal Statement at 3.

STATEMENT OF FACTS

On July 6, 2013 the plaintiff, after pooling money with family and friends, went to Fireworks of Tilton and, after the selection of several firework devices by an employee of the store, paid for the fireworks and left to use the fireworks that evening. See App. at 24, 48-49. One of those fireworks was a 19 shot hexagonal "cake" that was labeled

as an "AAH Brand". Id. at 17. AAH is a fireworks retailer and wholesaler, who, in 2015, represented:

> AAH Brand Fireworks is not your average fireworks shop. We don't buy and sell at marked up prices. We are the source. The "AAH" brand was introduced to the US market in 2007. "AAH" Fireworks manufactures all products in China. We are a Manufacturer, Importer, Distributor and Retailer for the US market.

Id. 17-18, 36-37.

A firework cake consists of several tubes contained inside a cardboard box. Id. at 17. The cake is lit by an external fuse which ignites the charge in the first tube. Id. at 18. This charge then ignites an internal fuse which launches the remaining charges in sequence. Id.

Consumer fireworks are regulated by federal law. See 16 C.F.R. §1507, et seq. One requirement is that, in order to allow the operator to get clear of the device, the external fuse must burn for at least three (3) seconds before igniting the firework. 16 C.F.R. §1507.03(a)(2). These external fuses, sometimes called "safety fuses," are usually green in color and are wrapped in a clear or silver plastic covering when sold. App at 18. Firework cakes that do not have an external safety fuse cannot be legally sold in the United States. See 16 C.F.R. §1500.17(a)(9) (fireworks that do not conform to the requirements in 16 C.F.R. §1507 are deemed "banned hazardous substances").

The plaintiff recalls the device firework cake that caused his injury did not have a green fuse, but instead had a white or gray fuse. Id. at 3, 190. He also recalls that the fuse was not covered with any plastic covering. Id. at 190. On the evening of July 6, 2013, when the plaintiff bent down and lit the device, the firework ignited instantly,

leaving him no chance to get away. Id. at 18. One of the projectiles struck him in the face and destroyed his left eye. Id.

The plaintiff filed suit in the Belknap County Superior Court in March of 2016 against Fireworks of Tilton and AAH. Id. at 1-11. The Superior Court set the deadline for DeBenedetto disclosures for November 1, 2016. Id. at 13. AAH made its DeBenedetto disclosure on May 10, 2017, six (6) months after the deadline expired. Id. at 39-40. Fireworks of Tilton made no DeBenedetto disclosure. AAH's disclosure identified a factory in Hunan, China which allegedly made the firework in question. Id. It is unknown if the Chinese factory existed at the time of the disclosure. AAH argued that, if the firework was incorrectly fused, that error occurred during the manufacturing process in China. Id.

On August 23, 2017, the plaintiff moved to strike AAH's DeBenedetto disclosure. Id. at 15-16. In the motion and supporting memorandum, the plaintiff argued:

(i) the disclosure was made beyond the deadline fixed in the structuring conference order,

(ii) the disclosure was inadequate,

(iii) AAH cannot apportion liability to the manufacturer because it affirmatively represented on the product label and in its advertisements that it was the manufacturer,

(iv) DeBenedetto did not apply in a case involving a common plan or scheme,

(v) RSA 507:7-e, I cannot apply to breach of implied warranty actions because those actions sound in contract, not tort,

(vi) DeBenedetto cannot apply when the defendants owe a non-delegable duty of care; and

(vii) DeBenedetto apportionment would be unconstitutional.

Id. at 19-29.

Regarding the breach implied warranty claim, the plaintiff asserted that apportionment of fault was not relevant in contract actions. Id. at 15-17. Instead, the operative question in such a claim is whether the defendants breached the warranty. Id. at 26. The defendants opposed the motion, arguing that, as RSA 507:7-e, I, states it applies to "all actions," it should apply to breach of implied warranty claims. See Id. at 115.

By Order dated December 21, 2017 (Clerk's notice December 21, 2017), the Superior Court (O'Neill, III, J.) denied the plaintiff's motion to strike. Interlocutory Appeal Statement at 17-27. In its order, the Court ruled "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." Id. at 22 (emphasis in original). The Court concluded that "the legislature did not intend to exclude specific causes of action from the statute" and, therefore, it would apply RSA 507:7-e to breach of implied warranty claims. Id. at 23. The Court rejected the remainder of the plaintiff's arguments without discussion. Id.

The plaintiff then moved to reconsider and clarify the above order and for an interlocutory appeal. App. at 126-147. The plaintiff argued, inter alia, that RSA 507:7-e, as part of the 1986 tort reform legislation, was intended to apply to tort actions, not

contract actions. Id. at 135. As New Hampshire law clearly recognized the distinction between tort and contract actions, RSA 507:7-e therefore cannot apply to contract claims. Id. Moreover, an implied warranty can only be waived if a specific statute is followed. Id. at 136. By applying RSA 507:7-e to breach of warranty claims, the Court would allow defendants to effectively ignore this statute. Id.

By Order dated April 17, 2018 (Clerk's notice April 17, 2018), the Superior Court (O'Neill, III, J.) allowed the plaintiff's motion for interlocutory appeal solely on the issue of whether RSA 507:7-e applies to breach of contract actions. Interlocutory Appeal Statement at 14. The Superior Court noted that an implied warranty claim is a contract claim, not a tort claim. Id. Therefore, the Court ruled, it was plausible that RSA 507:7-e, when construed together with subsections 7-d through 7-f which use the phrase "tort" and "tortfeasor", could only apply to tort actions. Id. at 12. The Superior Court also noted that one other superior court has ruled that apportionment of fault did not apply to breach of contract actions. Id. at 12-13. Given this, the Superior Court concluded that interlocutory transfer was warranted and signed the interlocutory appeal statement on September 7, 2018.

SUMMARY OF ARGUMENT

A. Breach of implied warranty claims which seek damages for personal injuries from defective products sound in contract, not tort.

B. When the 1986 tort reform legislation (RSA 507:7-d through RSA 507:7-i) is interpreted as a whole, it is clear that RSA 507-e was intended only to apply to tort actions.

C. Applying RSA 507:7-e to breach of warranty claims would impliedly repeal statutory and common law.

D. Applying RSA 507:7-e to breach of warranty claims would lead to an absurd result that was not intended by the legislature.

ARGUMENT

A. Standard of appellate review

Resolution of this appeal requires the interpretation of various statutes and how these statutes' interplay with common law. These are questions of law which this Court reviews de novo. See State v. Gardner, 162 N.H. 652, 652-3 (2011) (interpretation of statute is a question of law subject to de novo review); cf. Mortgage Specialists v. Davey, 153 N.H. 764, 773-4 (2006) (interplay between statute and common law claims presents a question of law).

The Court must apply the statute in light of the legislature's intent, while keeping in mind the policy which the legislature sought to advance. In re: Liquidation of Home Ins. Corp., 157 N.H. 543, 546-7 (2008). The intent of the legislature is expressed in the statute's plain language read as a whole, not in isolated words or phrases. In re: Silk, 156 N.H. 539, 541 (2007). The phrase "as a whole" is an important qualifier, as "the meaning of statutory language, plain or not, depends on context." United States v. Williams, 648 F.3rd 40, 47 (1st Cir. 2011) (citations omitted); see also In re: Momenta, Inc., 455 B.R. 353, 356 (Bankr. D.N.H. 2011) ("The meaning— or ambiguity— of certain words or phrases may only become evident when placed in context"); F.D.I.C. v. Caia, 830 F.Supp. 60, 64 (D.N.H. 1993) ("a literal interpretation is not placed on a phrase

when doing so removes it from the context of the whole"); State v. Balch, 167 N.H. 329, 332 (2015) ("we do not read words or phrases in isolation, but in the context of the entire statutory scheme").

Where multiple statutes are at issue, the Court will interpret them so they are consistent with one another. See N.H. Assoc. of Counties v. Commissioner, Dept. of Health and Human Serv., 156 N.H.10, 15 (2007). When the legislature uses a specific legal term in a statute, the Court will presume that it was aware of that term's definition. See e.g. United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2010) ("we presume, absent evidence to the contrary, that Congress knew and adopted the widely accepted legal definitions of meanings associated with the specific words enshrined in the statute"); Stormy Weathers, Inc. v. F.D.I.C., 834 F.Supp. 519, 522 (D.N.H.1994) ("where a statute borrows a term of art whose interpretation is derived from the legal tradition and meaning of centuries of practice, it is presumed, absent some indication to the contrary, that the statute adopts the accepted customary definition of the term") (citation and internal quotation omitted). Likewise, the Court also presumes the legislature was aware of prior judicial interpretations of statutory law. See Anderson v. Estate of Wood, 172 N.H. ---, --- (Nov. 28, 2018) (citations omitted).

Just as there are interpretive tools which tell the Court what it can do, there are also maxims which instruct what a Court cannot do when interpreting a statute. Foremost, the Court will not add language to a statute that was not included by the legislation. See Town of Carroll v. Rines, 164 N.H. 523, 528 (2013). The Court "will not construe a statute as abrogating the common law unless the statute clearly expresses such an intention." State v. Hermsdorf, 135 N.H. 360, 363 (1992) (internal quotations

and citations omitted). Further, the Court will not find that one statute has impliedly repealed another because" repeal by implication is disfavored, [i]f any reasonable construction of the two statutes taken together can be found." In re: Regan, 164 N.H. 1, 7 (2012) (citation and internal quotations omitted).

B. New Hampshire recognizes the distinction between tort and contract claims.

New Hampshire law has long recognized the distinction between actions sounding in contract and actions sounding in tort. See e.g. Porter v. City of Manchester, 151 N.H. 30, 39 (2004); Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 613 (1978). For almost fifty (50) years, New Hampshire law has allowed actions for personal injuries that are caused by defective products to be brought as breach of implied warranty actions under RSA 382-A:2-314. See Sheehan v. N.H. Liquor Comm., 126 N.H. 473, 476 (1985); Elliot v. LaChance, 109 N.H. 481, 484-5 (1969); Richard B. McNamara, N.H. Pract. – Tort Law & Proc., § 8.10 (2015).

As early as 1970, this Court held "breach of warranty actions are generally treated as contract actions." Kelley v. Volkswagenwerk Akteingesellschaft, 110 N.H. 369, 371 (1970). In Kelley, the plaintiff filed a breach of warranty action for personal injuries against the manufacturer of an allegedly defective automobile. 110 N.H. at 370. On appeal, the Supreme Court was asked to determine whether a breach of warranty action for personal injuries abated upon the death of the plaintiff. Id. at 369. This Court determined that RSA 556:9, which allowed for the survival of tort actions after the plaintiff's death, did not apply to breach of warranty actions, because those actions sounded in contract. Id. at 371.

Ten years later, in Guerin v. New Hampshire Catholic Charities, 120 N.H. 501 (1980), the plaintiffs filed a contract action seeking to recover for damages sustained when they were mistreated at a nursing home. 120 N.H. at 503. Both plaintiffs died prior to the filing of the suit, and the defendants attempted to dismiss the action pursuant to RSA 556:11, which limited the time in which tort actions could be commenced following the death of the plaintiff. Id. at 503. This Court, consistent with Kelley, held that a contract action was not subject to this limitation. Id. at 505-6. More important, this Court emphasized "the mere fact that the elements alleged would also support an action in tort does not preclude an action founded upon contract." Id. at 506 (citations omitted).

Finally, in Sheehan, the plaintiff filed a statutory breach of implied warranty claim against the State for injuries sustained when a champagne bottle shattered in her hand. 126 N.H. at 474. While immune from tort actions, contract actions could be brought against the State pursuant to RSA 491:8. Id. at 474. The State moved to dismiss the implied warranty claim, arguing that it was, in essence, a tort claim, and the plaintiff was using this claim to avoid the sovereign immunity defense. Id. at 474-5. This Court allowed the warranty claim to proceed, holding that a breach of implied warranty action can be brought in conjunction with a product liability action to recover personal injuries. Id. at 475. This Court went on to hold:

> It is evident that, in enacting these provisions (RSA 382-A), the legislature contemplated precisely the sort of action described in count II of the instant case. Moreover, the language of RSA 382-A:2-314(1) indicates that such an action sounds in contract. The existence of a contractual obligation, here expressly created by statute, brings this case under the waiver of sovereign immunity for contracts in RSA 491:8, and distinguishes it from cases where a claim of "implied contract" was clearly no more than a claim of ordinary negligence.

Id. at 476.

Kelley, Guerin and Sheehan set forth two (2) rules which are relevant the outcome of this case. First, an action for breach of implied warranty that seeks to recover for personal injuries is contract action, not a tort action. Sheehan, 126 N.H. at 476; Kelley, 110 N.H. at 371. Second, statutes which apply to tort actions do not apply to contract actions which seek to recover tort like damages. Sheehan, 126 N.H. at 474; Guerin, 120 N.H. at 505-6; Kelley, 110 N.H. at 371. This distinction in the law, which was established long before the 1986 tort reform legislation, is critical in understanding the scope of RSA 507:7-e.

C. The plain language and interpretive precedent shows RSA 507:7-e can only apply to tort actions.

In 1986, the New Hampshire legislature substantially rewrote parts of RSA 507:7 "as part of a tort reform act and as part of the Legislature's unified and comprehensive approach to comparative fault, apportionment of damages and contribution." McNamara, N.H. Pract. – Tort Law & Proc., at §4.67[1] (internal quotations omitted). "RSA chapter 507 [established] a broad framework governing comparative fault and apportionment of tort liability" and, "a system for contribution among tortfeasors and reinstituted joint and several liability." Goudreault v. Kleeman, 158 N.H. 236, 253 (2009) (emphasis added).

> [U]nder the new statutory scheme, RSA 507:7-e provides for apportionment of damages in all actions, and RSA 507:7-e to -h establish a system for contribution because judgments will be entered based on the rules of joint and several liability. When the legislature repealed RSA 507:7-a to -c and enacted RSA 507:7-d to -i, it clearly intended these provisions to function as a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution."

Jaswell Drill Corp. v. General Motors Corp., 129 N.H. 341, 344-5 (1987). Fourteen (14) years after Jaswell, this Court explained:

> Section 7-e is part of a "comprehensive statutory framework for apportionment of liability and contribution." [citation omitted]. The other provisions in this statutory scheme are: RSA 507:7-d (1997) (comparative fault); RSA 507:7-f (1997) (contribution among tortfeasors); RSA 507:7-g (1997) (enforcement of contribution); RSA 507:7-h (1997) (effect of release or covenant not to sue); and RSA 507:7-i (1997) (inadmissible evidence and post-verdict procedure). The legislature intended these provisions to function as a unified and comprehensive approach to comparative fault, apportionment of damages, and contribution.

Nilsson v. Bierman, 150 N.H. 393, 395 (2001) (internal quotations omitted). These holdings were later echoed in Ocasio v. Federal Express Corp., 162 N.H. 436 (2011), where this Court stated RSA 507:7-e "governs apportionment of fault to both claimants and tortfeasors. It is part of a comprehensive statutory framework for apportionment of liability and contribution." 162 N.H. at 441 (emphasis added). Thus, Ocasio requires that the language of RSA 507:7-e not be read in isolation, but instead in harmony with sections 7-d through 7-i. Indeed, as previously argued by the plaintiff, the very title chosen by the legislature for the subsection of Chapter 507 being 507:7-d through 7-i is "Comparative Fault, Apportionment of Damages, and Contribution Among Tortfeasors," which demonstrates an intent by the legislature to apply those sections to tort not contract actions. See App. at 145.

Looking at the language and interpretive decisions for RSA 507:7-d through 7-i, it is clear these statutes only apply in tort actions. First, RSA 507:7-d, which addresses the issue of comparative fault, reads, in relevant part "contributory negligence shall not bar recovery in an action by any plaintiff or plaintiff's representative, to recover damages in tort, for death, personal injury or property damage." (emphasis added). There 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. See e.g. Kransco v. American Empire Surplus Lines Ins. Co., 2 P.3rd 1, 12-13 (Cal. 2000) (comparative fault defense cannot apply in contract claim); Touro Infirmary v. Sizeler Architects, 900 So.2nd 200, 203-4 (La. App. 2005) (comparative fault statute cannot apply to non-tort claim); Leamington Co. v. Nonprofits Ins. Co., 661 N.W.2nd. 674, 677-8 (Minn. App. 2003) (as a general rule, comparative fault does not apply to contract claims); Klingler Farms, Inc. v. Effingham Equity, Inc., 525 N.E.2nd 1172, 1176 (Ill. App. 1988) (comparative negligence does not apply in contract actions because "concept of fault is one of the major distinctions between contract law and tort law"). Therefore, RSA 507:7-d, by its plan language, can only apply in tort actions, not contract actions.[1],[2]

[1] Any reading of Eastern Mountain Platform Tennis, Inc. v. Sherwin Williams, 40 F.3rd 492, 501 (1st Cir. 1994), which suggests that comparative fault may apply to breach of implied warranty claims brought under RSA 382-A:2-314, which seek recovery for personal injuries, would be in error. The First Circuit cites the case of Thibault v. Sears, Roebuck & Co., 118 N.H. 802 (1978) for support of the proposition that the "[New Hampshire Supreme] Court gave judicial recognition to comparative fault in personal injury cases based on strict liability and breach of implied warranty of merchantability." 40 F.3rd at 501 However, the plaintiff in Thibault only brought claims for negligence and strict product liability, not for breach of implied warranty, and nowhere in Thibault's holding is the any mention of the Uniform Commercial Code, see 118 N.H. at 805. Moreover, the First Circuit opinion did not consider or cite the Sheehan or LaChance cases, which clearly hold that claims under RSA 382-A:2-314 seeking recovery of personal injuries are contract claims that are determined under the UCC. Finally, the First Circuit concluded that "[w]e do not believe that the New Hampshire Supreme Court, in crafting a judicial rule of recovery governing strict liability in tort cases, had any intention of altering the comprehensive statutory provisions of the NHUCC governing sales contracts." (emphasis added) 40 F.3rd at 502.

[2] While the case of Stephen v. Sears, Roebuck & Co., 110 N.H. 248, 251 (1970) held that contributory negligence could be a defense in a breach of implied warranty cases, Stephen predates the 1986 enactment of RSA 507:7-d. Stephen also predated the adoption of an earlier (1969) comparative negligence statute, RSA 507:7-a. Thibault, 118 N.H. at 810. Therefore, Stephen is of no precedential value in this matter.

RSA 507:7-f, which is referenced in RSA 507:7-e, III and is entitled "Contribution Among Tortfeasors." (emphasis added), and RSA 507:7-g, have likewise repeatedly been held to apply in tort actions. See Gray v. Leisure Life Industries, 165 N.H. 324, 330 (2013) ("these principles are consistent with, and reflected in, our comprehensive statutory framework for apportionment of liability and damages among tortfeasors") (emphasis added); Nilson, 150 N.H. at 395; Pike Industries, Inc. v. Hiltz Const., Inc., 143 N.H. 1, 7 (1998); see also McNeil v. Nissan Motor Corp., Ltd., 365 F.Supp. 2nd 206, 212 (D.N.H. 2005); Conners v. Suburban Propane, Inc., 916 F.Supp. 73, 76 (D.N.H. 1996) ("In 1986, the New Hampshire Legislature created the statutory cause of action for contribution among joint tortfeasors") (emphasis added); Unity School Dist v. Vaughn Assoc., Inc., 2016 WL 1171012 at *3 (D.N.H.); Hardie v. Crecco, 2014 WL 1248046 at *4 (D.N.H.) (RSA 507:7-e and g address contribution actions amongst joint tortfeasors). Therefore, the "claim" that is spoken of in RSA 507:7-f, I, and the procedures outlined in RSA 507:7-e and g, must apply only to tort claims, not contract claims. Such a conclusion is supported by other jurisdictions, which have held that contribution claims can only be brought in tort actions, not contract actions. See e.g. North American Van Lines, Inc. v. Pinkerton Security Sys., Inc., 89 F.3rd 452, 457 (7th Cir. 1996); Wagner-Meinert, Inc. v. EDA Controls, Inc., 444 F.Supp. 2nd 800, 803 (N.D. Ohio 2006), aff'd, --- Fed. App. --- (6th Cir. 2007); Hudson School Dist., Bd. of Ed. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2nd 21, 27-9 (N.Y. App. Ct. 1987).

Finally, RSA 507:7-h states "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 from contribution claims. (emphasis added). Again, the

plain language of section 7-h clearly indicates that it applies to persons liable in "tort," not contract. See Nilsson, 150 N.H. at 398 ("both section 7–h and section 7–i provide that when a plaintiff settles in good faith with one of two or more tortfeasors, the non-settling tortfeasor is entitled to a dollar for dollar reduction in the amount of the verdict equal to the consideration the plaintiff received from the settling tortfeasor) and ("Section 7–h provides, in pertinent part, that when a plaintiff has released one of two or more joint tortfeasors, any claim he or she may have against other tortfeasors is reduced "by the amount of the consideration paid for the release") (emphasis added).

The above rationale was adopted in the Merrimack Superior Court decision of Town of Bow v. Provan & Lorber, Inc., 2009-CV-190 (Merrimack Super. Ct. Feb. 14, 2014) (McNamara, J.), which was cited by the Belknap Superior Court in the interlocutory appeal statement. Interlocutory Appeal Statement at 12-13. A copy of this decision is attached to the Appendix to Interlocutory Appeal at pages 46-56.

In Provan & Lorber, the defendants were sued for breach of contract and breach of implied warranty after a bridge failed due to an allegedly defective design. Id. at 46. The defendants filed motions in limine regarding DeBenedetto apportionment. Id. at 47. The Superior Court, after examining the 1986 tort reform legislation, ruled that RSA 507:7-d, et seq. did not apply to contract actions. Id. at 52-53. In support of its rationale, the Superior Court, citing DeBenedetto, stated the tort reform legislation was intended to prevent plaintiffs from "seek[ing] out and su[ing] only deep pocket defendants – torfeasors with significant assets but a potentially low degree of fault." Id. at 53 (emphasis added). It then noted that the plain language of RSA 507:7-d

specifically referenced "damages in tort" and did not mention contract damages. Id. Finally, the Court concluded that contribution actions such as those identified in RSA 507:7-e, III, 7-f and 7-g have been uniformly held to apply only in tort cases, not contract cases. Id. (citing cases).

In sum, as this Court has repeatedly instructed, RSA 507:7-e must be read together with sections 7-d, f – I, and common definitions be used for all sections. See Ocasio, 162 N.H. at 450-1 ("because RSA 507:7–d and RSA 507:7–e are part of an integrated statutory scheme, the word "party" in RSA 507:7–d must have the same meaning as it has in RSA 507:7–e"). Sections 7-d, f – i either have the word "tort" or "tortfeasor" appearing in the statute's title or language, and/or have been repeatedly interpreted to apply to "tort" claims. None of these statutes, to the plaintiff's knowledge, has ever been interpreted to apply to contract claims and, indeed, applying such principles as comparative fault and contribution to contract actions has been rejected by other jurisdictions. Therefore, the phrase "all actions" that appears in RSA 507-e, I must, consistent with Ocasio, be read through the lenses of 507:7-d, f-h and the interpretive case law, to only apply to tort claims.

D. Applying RSA 507:7-e to contract actions would require this Court to find the legislature intended to ignore or abrogate statutory and common law.

Claims for breach of implied warranty of merchantability must satisfy the elements of RSA 382-A:3-214. Sheehan, 126 N.H. at 475; Collella v. Beranger Volkswagen, Inc., 118 N.H. 365, 366-7 (1978). However, the Uniform Commercial Code makes no provision for the allocation of responsibility between the retail seller of the product versus the manufacturer or wholesaler. See, e.g., RSA 382-A:2-318 (lack

of privity between manufacturer, wholesaler and retailer is not a defense and cannot be excluded or limited). Indeed, each entity can be held individually and fully liable to the buyer for a breach of this warranty. See Collella, 118 N.H. at 366.

In Collella, the plaintiff sued the manufacturer and the seller for what turned out to be a defective motor home. 118 N.H. at 366. The manufacturer, who ultimately defaulted, had expressly waived the implied warranty of merchantability. Id. The seller, however, did not, and, at trial, was held fully liable to the plaintiff. Id. at 365-6. On appeal, the seller argued that it should be allowed to "ride the coattails" of the manufacturer's disclaimer and escape liability. Id. at 366. The Supreme Court disagreed, holding that each relationship stands on its own merits, and a disclaimer by one party does not impact the relationship between the plaintiff and another party to the transaction. Id. at 366. As such, the seller was liable for the entire amount of the plaintiff's damages. Id.

Collella demonstrates that DeBenedetto apportionment is inapplicable to breach of implied warranty claims. AAH, Fireworks of Tilton and the Chinese manufacturer have, by operation of law, each made implied warranties of merchantability when the product was purchased. See Dalton v. Stanley Solar & Stove, Inc., 137 N.H. 467, 470-1 (1993) (lack of privity between manufacturer and buyer is not a defense to a claim for breach of implied warranty). As such, all of these entities are equally liable for the plaintiff's injuries if the product's failure constitutes a breach of the implied warranty of merchantability. See Collella, 118 N.H. at 366; see also Provan & Lorber, Appendix to Interlocutory Appeal Statement at 54 (in a breach of contract case, each party's exposure is based upon the contract it has with the plaintiff). Because none of these

entities disclaimed the warranty of implied merchantability in this case, see RSA 382-A:2-316(2), (3); see Dana Commercial Credit Corp v. Hanscom's Truck Stop, Inc., 141 N.H. 131. 132-3 (1991) (implied warranty can only be waived in a manner consistent with statute), under Collella, there can be no apportionment of fault between them.

If this Court holds that RSA 507:7-e applies to breach of warranty cases, then the consumer protection afforded by RSA 382-A:316, Collella, Dalton, and Dana Commercial would be eviscerated. Specifically, the merchant need not provide the conspicuous warranty disclaimers required by statute, or indeed any disclaimer at all, to escape the effect of the implied warranty of merchantability. Instead, each time a defective product injures a plaintiff, the retailer would need only to point the finger of blame at the upstream manufacturer to limit or entirely escape liability. This would allow the retailer to sell any type of defective product he or she wanted to with potentially no liability to the consumer as long as the defect existed when the retailer acquired the product. There is no reason to believe the New Hampshire legislature would create a law that seriously undermined consumer protection from defectively manufacturer products.

It further must be presumed that the legislature was aware of the existence of RSA 382-A:2-314 and the Sheehan decision when it enacted the 1986 tort reform legislation. Indeed, Sheehan was decided one (1) year before the above legislation was passed. It must also be presumed that the legislature knew the distinction between tort and contract actions, and that a contract action, under Sheehan and its progeny could be a viable vehicle to bring a personal injury claim. Thus, the legislature had ample opportunity to clearly specify in RSA 507:7-d through 7-i that breach of implied warranty

actions were included within these sections, but they did not do so. They also had the opportunity to amend the Uniform Commercial Code to state that implied warranty claims seeking personal injury type damages would be governed by RSA 507:7. They did not do so.[3] Instead, the legislature repeatedly used the term "tort" or "tortfeasor" throughout RSA 507:7, and this Court has echoed that language in the cases which interpreted these statutes. Therefore, including implied warranty actions with the umbrella of RSA 507:7-e would effectively rewrite whole sections of RSA 507:7 or add language to the Commercial Code.

In short, adopting the defendants' arguments would require this Court to ignore a number of maxims in statutory construction. First, the Court would have to add language that the legislature did not see fit to include. Then, it would have to assume the legislature intended to abrogate a host of prior decisions, and conflate tort claims into contract claims despite the lack of any language indicating such an intent. Most important, the Court would have to assume the legislature intended to carve a gaping loophole into RSA 382-A:2-316. For these reasons, the plaintiff submits the legislature did not intend for implied warranty of merchantability actions to fall within the reach of RSA 507:7.

E. Applying apportionment of damages to "all actions" whether they be tort, contract or statutory, would lead to an absurd result

It is well understood that the Court will not interpret a statute so that an absurd or illogical result is reached. State v. Kay, 115 N.H. 696, 698-9 (1975). If the Court finds,

[3] The legislature did cite the tort reform act in the Uniform Trust Code, RSA 564-B:10-1002(b), which relates to contribution among trustees for breach of trust (a tort) pursuant to RSA 507:7-f. A similar section was included in the New Hampshire Foundations Act, RSA 564-F:18-1082(b). This demonstrates the legislature knew how to insert RSA 507:7 into other statutes where it deemed fit.

as the defendants appear to contend, that RSA 507:7-e, I applies to any civil action that could be brought in this state, an absurd and illogical situation would arise.

Consider first the clear line this Court has drawn between contract and tort actions. Attempts to meld these two areas of law, such as the claim of "negligent performance of a contract," have been universally rejected by this Court. See PK's Landscaping, Inc. v. New England Tel. & Tel. Co., 128 N.H. 753, 757 (1986) (citing cases). The rationale is simple, the duties set forth in the contractual relationship are different than the duties imposed by the common law in a negligence case. See Dustin v. Curtis, 74 N.H. 266, 268-9 (1907). In other words, they are separate legal concepts. See, e.g., Stone v. Johnson, 89 N.H. 329, 331 (1938).

If RSA 507:7-e, I was allowed to apply to breach of contract actions, tort concepts would spill over into contract law. For example, as shown above, contribution actions cannot be based upon a breach of contract, but instead are only based on tort liability. The rationale, as explained by the New York Court of Appeals, and adopted in the Provan & Lorber decision from the Merrimack Superior Court, is:

> To permit apportionment of liability, . . . arising solely from breach of contract would not only be at odds with the statute's legislative history, but also do violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed . . . . Here, [party being sued for contribution] was entitled to expect at the time it contracted with the [party seeking contribution] that its liability would be determined by its own contractual undertaking. [The party being sued for contribution] should not now be confronted with potential liability based on the promise made by [a separate entity] in its separate contract with the [party seeking contribution].
>
> Hudson School Dist. 71 N.Y. 2d at 28-29 (citations omitted).

However, if the defendants' logic is correct, then contracting parties now can argue that, the terms of the agreement notwithstanding, liability should be apportioned to some entity that was never part of the agreement. For example, if a buyer pays for 1000 parts from a factory, but the factory only delivers 500 items, the factory can now escape its contractual liability to the buyer by arguing the blame rests with a supplier to whom the buyer has no relationship. A party who guarantees a loan can now point the finger of blame at the delinquent primary obligor and thus escape liability, despite signing a contract that states otherwise.

Similarly, it would have to be determined that the legislature would change the laws it creates by statute without a clear expression to do so. For example, it is understood that an employer has an absolute duty to pay wages to an employee when they are due and owing. See RSA 275:45. An employer cannot point to cash flow problems it blames on others to get around that statutory obligation. Protective legislation, in essence would become meaningless.

In sum, applying RSA 507:7-e, I in the manner suggested by the defendants would have far reaching and dramatic (if not bizarre) consequences for New Hampshire law that were never intended by the legislature. The plaintiff submits that the more sensible answer is to interpret RSA 507:7-e, I in the manner the legislature envisioned, that is, to apply only to tort actions. Should the legislature decide RSA 507:7-e, I should reach farther and 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 should clearly state as much.

CONCLUSION

For the reasons set forth above, this Court should conclude that the apportionment of fault allowed for in RSA 507:7-e, I and DeBenedetto cannot apply to breach of implied warranty cases.

Respectfully submitted

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Date: January 10, 2019

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Date: January 10, 2019

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REQUEST FOR ORAL ARGUMENT

Pursuant to N.H. Supreme Ct. R. 16(3)(h) the petitioner requests fifteen (15) minutes of oral argument. Oral argument will be presented by Attorney J. Daniel Marr.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief of the Appellant – James M. Virgin was served in accordance with N.H. Supreme Ct. 2018 Supplement Rule 18(b) to Joseph Mattson, Esq., Jonathan Eck, Esq and John Brooks, Esq.

Date: January 10, 2019

/s/ J. Daniel Marr, Esq.
J. Daniel Marr, Esq.

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

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
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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 April 17, 2018 relative to:

Re: Motion for Clarification; Motion for Interlocutory Appeal and Motion for Reconsideration

April 17, 2018

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 (3/29/18) on the following:

- The plaintiff's Motion for Clarification Regarding Order on the plaintiff's Motion to Strike DeBenedetto Disclosure (filed 12/16/18), the defendant Fireworks of Tilton's Objection to same (filed 1/10/18), the defendant Foursquare Imports' Objection to same (filed 1/10/18), and the plaintiff's Reply (filed 1/19/18); and

- The plaintiff's Motion to Reconsider Order on the plaintiff's Motion to Strike DeBenedetto Disclosure (filed 12/28/17), the defendant Fireworks of Tilton's Objection to same (filed 1/10/18), the defendant Foursquare Imports' Objection to same (filed 1/10/18), and the plaintiff's Reply (filed 1/19/18);

- The plaintiff's Motion for Interlocutory Appeal (filed 12/26/18), the defendant Fireworks of Tilton's Objection to same (filed 1/10/18), the defendant Foursquare Imports' Objection to same (filed 1/10/18), and the plaintiff's Reply (filed 1/19/18).

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 products liability, and negligence against the defendants for injuries sustained as a result of a purportedly defective firework manufactured and sold by the defendants. On December 21, 2017, the Court issued an Order

denying the plaintiff's Motion to Strike the defendant Foursquare's DeBenedetto disclosure. See (Dec. 21, 2017) (Order, O'Neill, J.). The plaintiff now moves to clarify and requests reconsideration of the December 21 Order. The plaintiff also alternatively moves to allow an interlocutory appeal on the issues addressed in the December 21 Order.

The following factual and procedural history is relevant. On May 10, 2017, the defendant, Foursquare, made a DeBenedetto disclosure pursuant to the Case Structuring Order, which identified a Chinese company as the manufacturer for the firework alleged to have caused the plaintiff's injuries and stated that the Chinese manufacturer would likely be at fault for any alleged product defects in the subject firework. The plaintiff thereafter moved to strike Foursquare's DeBenedetto disclosure, arguing, among other things, that the disclosure was facially inadequate, and that substantively, DeBenedetto and apportionment of fault did not apply to breach of warranty and products liability claims or claims involving a common plan or design.

In the December 21 Order, the Court held, in pertinent part, that Foursquare's DeBenedetto disclosure was facially adequate, in that it put the plaintiff on notice as to the basis under which fault could be apportioned to the Chinese manufacturer. See (Id.) at 5. With regard to the plaintiff's substantive arguments, the Court first concluded that it was premature to address such issues on a motion to strike when certain facts necessary to make such determinations were not before the Court. (Id.) at 6. The Court nonetheless set forth the bases upon which the plaintiff's substantive arguments did not appear to be supported by New Hampshire law. Ultimately, the Court denied the plaintiff's motion to strike in its entirety, and the plaintiff thereafter filed the pending Motions.

The Court shall first address the plaintiff's Motion for Clarification. More specifically, the plaintiff seeks to clarify whether Fireworks of Tilton may seek apportionment of fault under

Foursquare's DeBenedetto disclosure, even though Fireworks of Tilton did not make its own separate disclosure of the Chinese manufacturer. The plaintiff contends that Fireworks of Tilton has waived its right to an apportionment defense by failing to make a DeBenedetto disclosure, and requests that the trial be bifurcated so that Fireworks of Tilton does not obtain an unfair advantage over the plaintiff.

Upon review, the Court declines to clarify the December 21 Order as requested by the plaintiff. As an initial matter, the Court notes that this issue was not sufficiently raised in the plaintiff's Motion to Strike for the Court to address in the December 21 Order, so clarification is arguably unwarranted. However, the Court nevertheless finds no legal basis to conclude that Foursquare's DeBenedetto disclosure of a potentially liable nonparty is inapplicable to Fireworks of Tilton potential liability in this case. While the plaintiff is correct that apportionment is "something in the nature of an affirmative defense," this merely meant that a defendant "carries the burdens of production and persuasion" in proving the existence of any fault attributable to a nonparty, not that apportionment of fault to a nonparty should be excluded to any co-defendants that do not separately raise the issue. See Goodreault v. Kleenman, 158 N.H. 236, 256 (2009).

Moreover, as a procedural matter, the Court finds it redundant to require Fireworks of Tilton to make an identical DeBenedetto disclosure, in part because the purpose of such disclosures is simply to put a plaintiff on notice regarding a nonparty in which fault could be apportioned, which was accomplished through Foursquare's disclosure. It is further redundant given that Fireworks of Tilton did not possess the requisite knowledge to make a DeBenedetto disclosure of the Chinese manufacturer. The Court sees no basis to conclude that this lack of knowledge on the part of Fireworks of Tilton should then foreclose the jury from properly determining the apportionment of fault to each party in proportion to their respective liability, as

intended by DeBenedetto. See DeBenedetto v. CLD Consulting Eng'rs, Inc., 153 N.H. 793, 804 (2006). As such, to bifurcate the trial on this basis would arguably violate New Hampshire's general principle that a plaintiff may only recover once for the same loss, even when alleging different theories of recovery against multiple defendants. See Halifax-American Energy Co. v. Provider Power, LLC, __ N.H. __ (Feb. 9, 2018) (slip op. at 10). Accordingly, the plaintiff's Motion for Clarification is DENIED, consistent with the above.

The Court shall next address the plaintiff's Motion for Reconsideration and Motion for Interlocutory Appeal. The plaintiff requests reconsideration of the Court's conclusion that apportionment of fault under RSA 507:7-e applies to "all actions," including contract claims such as the plaintiff's claim for breach of the implied warranty of merchantability. The plaintiff asserts that RSA 507:7-e is only applicable to tort claims, which is supported by the statute's inclusion in a subsection entitled "Comparative Fault, Apportionment of Damages, and Contribution Among Tortfeasors." According to the plaintiff, this subsection's reference to recovering damages "in tort" and contribution among "tortfeasors" implies that RSA 507:7-e was intended only to apply to tort actions. See RSA 507:7-d; RSA 507:7-f. The plaintiff further argues that it would be illogical to apply apportionment of fault to contract actions because "fault" is inapplicable in matters involving contracts. For these reasons, the plaintiff requests the Court reconsider its December 21 Order and rule that DeBenedetto apportionment does not apply to contract actions, such as the plaintiff's claim for breach if implied warranty of merchantability. In the alternative, the plaintiff requests leave to file an interlocutory appeal to the New Hampshire Supreme Court to settle this issue.

The defendants each object, collectively arguing that the language of RSA 507:7-e is clear and unambiguous when it states that apportionment of fault applies in "all actions" and that

the concept of "fault" can still apply in quasi-contract/tort actions, such as products liability claims and breach of implied warranty claims. The defendants further note that the plaintiff seeks "tort damages" such as recovery for personal injury, which further supports the applicability of apportionment of liability. With regard to the plaintiff's request to file an interlocutory appeal, the defendants argue that this request should be denied because the issue is not ripe for such an appeal.

In the December 21 Order, the Court found that "[t]he 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.'" See (Dec. 21, 2017) (Order, O'Neill, J.) at 6. The Court noted that by including the term "all actions" in the statute, "it [was] clear the legislature did not intend to exclude specific causes of action from the statute." (Id.) at 7. The Court reached this conclusion by construing the statutory language according to its plain and ordinary meaning, mindful that courts "must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words." (Id.) (quoting State v. Wilson, 169 N.H. 755, 761 (2017)). In light of this standard, the Court finds this interpretation plausible, even when construing the subsection as a whole, particularly given that the legislature included the words "torts" or "tortfeasors" in RSA 507:7-d and RSA 507:7-f, while RSA 507:7-e simply included the phrase "all actions" without such a qualifier. The plain language on the face of the statute does not appear to exclude specific causes of action, and the legislature clearly could have done so.

However, the Court acknowledges that this issue has never been specifically addressed by the New Hampshire Supreme Court. The Court further acknowledges that at least one New Hampshire Superior Court has concluded that apportionment of fault is inapplicable in contract

actions. See Town of Bow v. Provan and Lorber, Inc., et al., Merrimack County Superior Ct., 09-C-0190 (Feb. 14, 2014) (Order, McNamara, J.) at 8 (relying on cases from Pennsylvania, Ohio, and Wyoming). This decision noted that RSA 507-7:e "was enacted as part of a comprehensive statutory framework for apportionment of liability and contribution," which included RSA 507:7-d through RSA 507:7-i. (Id.) at 7–8. In this context, that RSA 507:7-d and RSA 507-7:f apply to actions in "tort" and among "tortfeasors" could be evidence that the entire subsection applies only to actions in tort. Given the multiple plausible interpretations, the Court finds there is a clear difference of opinion on the question of whether apportionment of fault under RSA 507:7-e and DeBenedetto applies in contract actions. Therefore, consideration of an interlocutory appeal at this juncture is appropriate.

New Hampshire Supreme Court Rule 8 ("Rule 8") governs interlocutory appeals from trials court rulings. It grants the New Hampshire Supreme Court broad discretion to determine whether to take an interlocutory appeal, stating that "[t]he supreme court may, in its discretion, decline to accept an interlocutory appeal, or any question raised therein, from a trial court order or ruling." Sup. Ct. R. 8. Among the numerous requirements for interlocutory appeal statements articulated in Rule 8 is the following language:

> [A] statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.

Id. 8(1)(d). Superior courts have focused on this language when considering whether to grant a party leave to bring an interlocutory appeal to the New Hampshire Supreme Court. See, e.g., Yates v. Me. Yankee Airboats, Inc., Cheshire County Superior Ct., 07-C-0047 (Mar. 17, 2010) (Order, Mangones, J.) (agreeing to sign the interlocutory appeal statement based on the Rule

8(d)(1) requirements); Estate of Kenison v. Dartmouth-Hitchcock Med. Ctr., Coos County Superior Ct., 00-C-0042 (Dec. 12, 2003) (Order, Perkins, J.) (declining to sign the interlocutory appeal statement because it would not "materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial or irreparable injury or present . . . the opportunity to decide, modify, or clarify an issue of general importance for the administration of justice").

Upon review, the Court finds that, based upon the plaintiff's arguments at the hearing, in his Motion for Interlocutory Appeal, and his proposed Interlocutory Appeal Statement, the requirements of Rule 8(1)(d) are satisfied in the present matter with respect to the issue of whether apportionment of fault under RSA 507:7-e and DeBenedetto applies to contract actions. As discussed above, there is a substantial basis for a difference of opinion as to the interpretation of the term "all actions" in RSA 507:7-e and whether this is limited to "tort" actions given the statute's inclusion in the larger statutory framework. As the plaintiff's breach of implied warranty of merchantability action "sound[s] in contract," an interlocutory appeal provides the opportunity to decide or clarify an issue of general importance to the present case. See Sheehan v. N.H. Liquor Comm'n, 126 N.H. 473, 476 (1985). The New Hampshire Supreme Court is the "final arbiter of the intent of the legislature as expressed in the words of [a] statute considered as a whole." Halifax-American Energy Co., __ N.H. at __ (slip op. at 14). It therefore appears more appropriate for the Supreme Court to render a final determination on this issue, which will provide certainty for the parties and may significantly streamline this case for trial.

Therefore, with respect to the applicability of apportionment of fault pursuant to RSA 507:7-e and DeBenedetto in contract actions, the Court finds that it is properly the subject of an interlocutory appeal. The Court notes that the plaintiff moves for interlocutory appeal on several

other issues not addressed in the December 21 Order. With respect to those issues, the Court finds the plaintiff has not met the standard outlined above and declines to approve the transfer of the remaining issues for interlocutory appeal. Accordingly, the plaintiff's Motion for Interlocutory Appeal is GRANTED in part and DENIED in part, consistent with the above. The plaintiff shall submit a revised Interlocutory Appeal Statement, limited to the issue outlined above, **within ten (10) days of the date of this Order.**

The Court further finds that the necessity of determining the plaintiff's Motion for Reconsideration will be contingent upon whether the Supreme Court decides to grant the plaintiff interlocutory review of the apportionment issue, and if so, the Supreme Court's final disposition on same. Accordingly, the plaintiff's Motion for Reconsideration shall be HELD IN ABEYANCE, pending resolution of the plaintiff's interlocutory appeal.

Conclusion

In sum, the plaintiff's Motion for Clarification is DENIED, consistent with the above. The plaintiff's Motion for Interlocutory Appeal is GRANTED in part and DENIED in part, consistent with the above. The plaintiff's Motion for Reconsideration is HELD IN ABEYANCE, pending resolution of the plaintiff's interlocutory appeal to the New Hampshire Supreme Court. In light of the above, the Hearing on Pending Motions that is presently scheduled for April 26, 2018 is STAYED, pending resolution of the plaintiff's interlocutory appeal.

SO ORDERED.

4/17/18
Date

James D. O'Neill, III
Presiding Justice