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)**

# REPLY BRIEF OF THE APPELLANT – JAMES M. VIRGIN

---

J. Daniel Marr, Esquire
jdmarr@hamker.com
N.H. Bar No. 4091

Andrew J. Piela, Esquire
apiela@hamker.com
N.H. Bar No. 10518

HAMBLETT & KERRIGAN, PA
20 Trafalgar Square; Suite 505
Nashua, NH 03063
(603) 883-5501

Attorney J. Daniel Marr
will represent the Appellant
at Oral Argument

(15 Minute Oral Argument Requested)

## I. TABLE OF AUTHORITIES

### A. Statutes



### B. Caselaw



## II. ARGUMENT

### A. New Hampshire case law confirms that a breach of implied warranty action is not an action in tort.

One of the central themes in the defendants' briefs is their theory that a breach of implied warranty claim under RSA 382-A:2-314 can or should be treated like a tort claim. See e.g. Brief of Foursquare Imports [hereinafter Foursquare] at pg. 18; Brief

of Fireworks of Tilton [hereinafter FoT] at pg. 32. For the reasons that follow, this argument is erroneous.

Sheehan v. N.H. Liquor Comm., 126 N.H. 473 (1985) controls this question. Sheehan involved a claim for personal injuries caused by a defective product that was brought as a breach of implied warranty action under RSA 382-A:2-314. 126 N.H. at 474. The Supreme Court properly held such an action sounded in contract, not tort. Id. at 475. Further, the Sheehan Court clearly stated that a claim of breach of implied warranty was separate and distinct from a tort claim for strict liability. See Id. ("we have held that a plaintiff is entitled to proceed on a theory of express and implied warranty, as well as strict liability in tort") (emphasis added); see also Buttrick v. Lessard, 110 N.H. 36, 38 (1969) ("[a]lthough the plaintiff is entitled on the basis of his opening statement to proceed on his counts of express and implied warranty he may also proceed on strict liability") (emphasis added); accord Guerin v. New Hampshire Catholic Charities, 120 N.H. 501, 506 (1980) ("the mere fact that the elements alleged would also support an action in tort does not preclude an action founded upon contract.") Sheehan rejected a New Hampshire Federal District Court decision which ruled that implied warranty of merchantability claims have no place in the personal injury/product liability setting. Id. This holding has never been reversed and remains binding precedent. Neither defendant has cited any New Hampshire decision which applied the tort principles in RSA 507:7-d through i to an implied warranty claim under RSA 382-A:2-314 or questioned the holding of Sheehan.

FoT cites Lempke v. Dagenais, 130 N.H. 782 (1988), for the proposition that implied warranty actions can be treated as a "hybrid" tort claims. See FoT Brief at

pg. 32. A careful reading of Lempke shows the case does not support this theory. Lempke was an action involving a common law breach of warranty of workmanship and negligence in a construction defect case. 130 N.H at 784. The plaintiffs in Lempke never brought an action under the Uniform Commercial Code [hereinafter UCC], id., and the Supreme Court never cited Sheehan in its decision. Instead, the primary issues in Lempke were whether privity was required between the parties in such an action (it was not), whether economic loss could be recovered in such claims (it could), and the appropriate limitations period. Id. at 785, 792, 794. The Lempke court acknowledged that RSA 382-A:2-318 abolished privity in UCC implied warranty suits and found no privity was required implied warranty of good workmanship for latent defects so that innocent homeowners have a remedy. Id. at 788-9. Lempke does not challenge the continuing viability of Sheehan and in no way espouses the theory that breach of implied warranty claims under the UCC are or can be considered tort claims.

The defendants also raise Thibault v. Sears Roebuck & Co., 118 N.H. 802 (1970) for the proposition that comparative fault would apply to breach of implied warranty claims. See FoT Brief at pg. 29; Foursquare Brief at pg. 21. However, the plaintiffs in Thibault did not bring a breach of implied warranty action. 118 N.H. at 804-5. Instead, the only claims before the court were for negligence and strict product liability, both of which are unequivocally tort claims. See Buttrick, 110 N.H. at 40 (strict product liability claim is a tort claim). The Thibault holding focused entirely

on strict liability in tort, see 118 N.H. at 813, and never discussed whether the concepts of comparative fault would apply in a claim under the UCC[1].

**B. Comparative fault would not apply to the implied warranty claim.[2]**

If the Court were to consider this argument, the commentary found in RSA 382-A:2-314 indicates that it would not. Foremost, there is no New Hampshire Supreme Court opinion which has stated that RSA 507:7-d applies to UCC claims. The closest decision on this issue is Stephan v. Sears, Roebuck & Co., 110 N.H. 248 (1970), where in this Court held that "contributory negligence is a defense to an action for breach of warranty under RSA 382-A:2-314." 110 N.H. at 251. However, as noted in the plaintiff's brief, that decision interpreted a since repealed version of RSA chapter 507 and is of doubtful precedential value today. Pltf's Brief at pg. 16, n. 2. It also bears noting that the Stephan predates the drafting of RSA 507:7-D and the Sheehan decision.

Further, the holding in Stephan is based upon the commentary in the UCC. 110 N.H. at 251. UCC commentary is persuasive precedent in interpreting the act. See Rabbia v. Rocha, 162 N.H. 734, 737-8 (2011). The Stephan decision cites to comment 13 of section 2-314, comment 8 of section 2-316 and comment 5 of section 2-715 to support its holding that contributory negligence would be a defense in a UCC claim. 110 N.H. at 251. Comments 5 and 13 state that the plaintiff must show

[1] Trull v. Volkswagen of America, Inc., 145 N.H. 259 (2000) was a decision in which the breach of warranty claim was dismissed on summary judgment, and the Supreme Court's opinion deals solely with strict liability and tort, 145 N.H. at 260, 264. That decision, like Thibault, does not provide a viable argument that implied warranty of merchantability claims are actions in tort.

[2] The interlocutory appeal statement does not ask this Court to make a ruling on whether comparative fault under RSA 507:7-d would apply to a breach of implied warranty claim yet it is acknowledged that this Court can consider this issue if it chooses to do so.

the breach of warranty was caused the loss[3], and the seller, as a defense, may argue (1) it exercised due care in the manufacturing process, (2) the defect should have been detected by the buyer, or (3) the loss was caused by some post sale event. Comment 8 allows the seller to argue the buyer unreasonably failed to inspect the goods as a defense. While the above defenses related to actions or inactions of a plaintiff in an implied warranty of merchantability action are available to the defendants, the comparative fault defense which may be otherwise available in actions for tort under RSA 507:7-d, is not a defense available under the UCC in the above cited comments.

The plaintiff submits that, consistent with Stephan, the Court should find that the UCC (statute and commentary) would set out the defenses in a breach of warranty action, not RSA chapter 507. Such a holding would be consistent with Sheehan, which stands for the proposition that statutes which apply to tort claims cannot also apply to contract actions. Further, such a holding would be consistent with the overall purpose of the UCC, which states:

> [T]he Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may supplement provisions of the Uniform Commercial Code, they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.

[3] Causation is an issue in a contract action as the plaintiff in such a claim must show the defendant's breach caused the plaintiff's loss. See Audette v. Cummings, 165 N.H. 763, 770 (2013). To the extent RSA 382-A:2-314, comment 13 uses the term "proximate cause," such requires a showing that there is causal link between the breach and the plaintiff's injury and the breach was the substantial factor in bringing about the harm. See Carignan v. N.H. Int'l. Speedway, 151 N.H. 409, 414 (2004).

RSA 382-A:1-103, cmt. 2 (emphasis added); see also cmt. 1 (UCC should be interpreted as a whole). In sum, as the above UCC commentary does not state that comparative fault would be a defense in an implied warranty action, and our legislature has passed no statute which incorporates comparative fault into the UCC, the plaintiff submits this defense is not available in a breach of warranty of merchantability claim.

### C. RSA 507-D demonstrates the Legislature was aware that claims for injuries from defective products could be brought as breach of implied warranty claims.

Foursquare cites to the former RSA chapter 507-D for the proposition that the legislature was aware that contract actions could be brought to recover for personal injuries. Foursquare Brief at pgs. 18-19. Foursquare concludes that, based upon that knowledge, the term "all actions," as used in RSA 507:7-e, should be read to include contract actions. Id. In RSA 507-D:1, the legislature specifically included breach of warranty actions in its definition of actions that were covered by this statute. Id. at pg. 19. While that entire statute was declared unconstitutional in 1983, RSA 507-D:1 shows the legislature knew the distinction between product liability actions brought under strict liability in tort and those brought in breach of warranty when that statute was enacted in 1978. However, the 1986 tort reform act of RSA 507:7-d through i did not, after the 1985 Sheehan decision, assert that the tort reform act equally applied to product liability actions asserting the implied warranty of merchantability.

In the words of the title to the statute RSA 507:7, the legislature wanted to pass a law concerning tort reform, not contract reform. The use of the words tort and

tortfeasor throughout RSA 507:7 shows the legislature only envisioned these statutes to apply to tort cases, not contract actions. The legislature knew that implied warranty of merchantability claims could be brought for personal injuries related to defective products and made the right choice in not including such claims from RSA 507:7.

## III. CONCLUSION

For the reasons set forth in the plaintiff's opening and reply briefs, this Court should hold that RSA 507:7 does not apply to contract actions such as a breach of implied warranty brought under RSA 382-A:2-314.

Respectfully submitted,
**JAMES M. VIRGIN**
By His Attorneys,
**HAMBLETT & KERRIGAN, P.A.**

DATED: MARCH 1, 2019

By: /s/ J Daniel Marr
**J. DANIEL MARR, ESQUIRE**
NH Bar No.: 4091
20 Trafalgar Square; Suite 505
Nashua, NH 03063
(603) 883-5501
jdmarr@hamker.com

DATED: MARCH 1, 2019

By: /s/ Andrew J. Piela
**ANDREW J. PIELA, ESQUIRE**
NH Bar No.: 10518
20 Trafalgar Square; Suite 505
Nashua, NH 03063
(603) 883-5501
apiela@hamker.com

## CERTIFICATE OF SERVICE

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

DATED: MARCH 1, 2019

/s/ J. Daniel Marr
**J. DANIEL MARR, ESQUIRE**