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NEWSLETTER

New Hampshire, Massachusetts, Maine & Vermont

December 2018 Edition

Dear Michael,

This newsletter discusses updates and changes in the law. Should you have questions, please contact Larry Getman at lgetman@gssp-lawyers.com or (603) 634-4300 x 703. Larry Getman's V-Card

NEW HAMPSHIRE SUPREME COURT

WORKERS' COMPENSATION - CAUSAL RELATIONSHIP

Appeal of Damata
(July 20, 2018)

On July 25, 2016, the claimant injured her back while filling a soda machine with ice in the course of her employment as a cook and kitchen helper with a food service management company at Colby-Sawyer College. She was not scheduled to work during the month of August and assumed her back injury would resolve on its own before she had to return to work in September.

The claimant first sought medical treatment with a nurse practitioner at the end of September. She was referred to Dr. Jeffrey who completed a Workers' Compensation Medical Form stating that she was unable to return to work due to an employment-related injury. In February of 2017, the claimant sought a second opinion from Dr. Gennaro who determined that she had an unrelated arthritic spine, but appeared to have been asymptomatic prior to her injury which aggravated the underlying condition.

The Compensation Appeals Board found that there was conflicting medical evidence as to causal relationship and ruled that the claimant failed to meet her burden of proof.

The Supreme Court reversed the CAB's decision ruling that it was unreasonable and not supported by the evidence. The Court noted the absence of an independent medical examination and the Board's failure to identify any specific conflict in the medical evidence. Although the Board is entitled to ignore uncontradicted medical evidence it must identify the competing evidence or considerations supporting its decision. The claimant testified that she had suffered a minor back injury ten years earlier that had resolved and there was no evidence to the contrary. Furthermore, although there was conflicting evidence as to whether the claimant complied with the company policy requiring employees to report work-related injuries within 24 hours, under the circumstances of the case the timing of the report was immaterial and was within the two-year requirement

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New Hampshire Superior Court
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of RSA 281-A:19.

The Court also noted that the physicians' uncontroverted medical opinions were supported by objective evidence, including x-rays and an MRI, in addition to the claimant's medical history and narrative.

PRODUCT LIABILITY
CAUSATION
HEDONIC DAMAGES

Stachulski v. Apple New England, LLC

(July 18, 2018)

The plaintiff alleged that he contracted salmonella as the result of eating a hamburger at Applebee's. The defendant denied that the hamburger was the source of the salmonella illness and argued that the plaintiff's pet lizard or some other food source could just as likely be the cause. The jury returned a plaintiff's favor and awarded $750,000 in damages.

The defendant appealed, arguing that the court erred by: (1) admitting unfairly prejudicial evidence; (2) admitting plaintiff's expert's testimony; (3) submitting the issue of causation to the jury; (4) instructing the jury on hedonic and future pain and suffering damages; (5) allowing plaintiff's counsel to make certain statements in his opening and closing arguments; and (6) denying its request for remittitur. The decision was affirmed on appeal.

First, the Court ruled that the defendant failed to meet its burden of establishing that the trial court erred in admitting plaintiff's testimony that he offered to have his lizard tested for salmonella.

Next, the Court held that the plaintiff's expert witness testimony met the requisite threshold level of reliability. The expert, an infectious disease physician, relied on sufficient facts or data, including the type of salmonella contracted, the presentation of symptoms within the known incubation period for salmonella, the fact that other family members exposed to the lizard and the same home-cooked food eaten by the plaintiff did not become ill, and the onset of gastrointestinal symptoms in another family member who also ate a hamburger at the restaurant.

For the same reasons, the Court rejected the defendant's argument that there was insufficient causation evidence to prove that the hamburger was the source of the salmonella.

The Court also held that the plaintiff's medical records, ongoing symptoms and treatment more than two years later, and expert witness testimony that up to one-third of those contracting salmonella have prolonged gastrointestinal complaints, together provided sufficient evidence to establish that the salmonella illness would result in future pain and suffering.

The Court also decided for the first time that hedonic damages or loss of enjoyment of life damages may be awarded for non-permanent impairments. The Court ruled that because there was "some evidence" that would allow an award for hedonic and future pain and suffering damages there was no error in the trial court's instructions.

Finally, the Court held that an award of $750,000 when the plaintiff's medical expenses totaled only $43,000 was not manifestly exorbitant and plainly excessive in light of the plaintiff's testimony regarding the effects of his illness and its impact on his life. Therefore, the trial court did not err in denying the defendant's motion for remittitur.

CONSTRUCTION INJURY
NO LIABILITY TO SUBCONTRACTOR EMPLOYEE

INHERENTLY DANGEROUS ACTIVITY
VICARIOUS LIABILITY

Grady v. Jones Lang LaSalle Construction Company, Inc.
(August 8, 2018)

Liberty Mutual contracted with Jones Lang to complete a construction project on its property. Jones Lang subcontracted the roofing work for the project to A&M Roofing and Sheet Metal Company. The plaintiff, Steven Grady, was an employee of A&M.

Grady began to perform flashing and insulation work on the roof on a cold and windy day in February. Prior to installing the installation, he had to use a cleaning solvent to remove dirt from the roofing membrane. He also needed to use a torch to melt ice on the areas to be cleaned. This work required the use of rubber gloves and fire-proof leather gloves to protect the workers' hands, however there were no gloves in the on-site job box. Grady asked the A&M supervisor for gloves and was told that there were none at the site. Because it was cold, Grady wore cotton gloves while he worked. As he was using the torch, a gust of wind caused one of the gloves to ignite resulting in injuries to his right hand.

Grady received workers compensation benefits. He also filed a personal injury action against both Jones Lang and Liberty Mutual. The trial court ruled that neither defendant owed a duty to the plaintiff and granted summary judgment in their favor.

The Supreme Court affirmed the decision on appeal. The Court held that a general contractor's duty to maintain reasonable conditions of safety on the premises does not include a duty to provide training, equipment and oversight to employees of

subcontractors. The subcontract required A&M to assume full responsibility for complying with its safety programs and furnishing all necessary safety equipment. In addition, RSA 281-A:64 required the plaintiff's employer to provide him with personal protective equipment and to ensure his safety. Furthermore, it was A&M, not Jones Lang, who actually provided the plaintiff with equipment and supervision on the day of the accident. The Court distinguished its decision in Butler v. King, 99 N.H. 150 (1954) based on the general contractor's creation of a dangerous condition on the premises in that case and explained that the case did not establish a duty on the part of a general contractor to provide training, equipment or oversight to subcontractor employees.

The Court found that provisions in the general contract between Jones Lang and Liberty Mutual which required Jones Lang to supervise and assume responsibility for the work and to indemnify Liberty Mutual for losses or damage caused by its subcontractors were intended solely to benefit Liberty Mutual and did not create a third party beneficiary relationship with subcontractor employees or give rise to a duty of care toward A&M or the plaintiff.

The Court also assumed without deciding that Section 324A of the Restatement (Second) of Torts was a valid statement of the law in New Hampshire, but ruled that it did not impose a duty on Jones Lang because although the general contract required Jones Lang to assume supervisory and safety responsibility over the project, it also provided that Jones Lang must require its subcontractors to assume the same responsibility for subcontracted work and A&M in fact did so under the subcontract. The Court also noted that as the subcontracted roofing company, A&M was in the best position to comprehend the particular dangers involved in its specialty work and to provide the necessary equipment and supervision.

The Court also held that Liberty Mutual did not owe a duty to the plaintiff under an inherently dangerous activity theory. To be inherently dangerous a construction activity "must be dangerous in and of itself and not dangerous simply because of the negligent performance of the work" and "the danger must be naturally apprehended by the parties when they contract." Although the trier of fact usually decides whether an activity is inherently dangerous, the decision can be made by the court as a matter of law when the danger derives not from the nature of the work but from the negligence of the contractor. When the plaintiff used the torch while wearing cotton gloves he created a new risk not inherent in the work itself and, therefore, the inherently dangerous activity doctrine was inapplicable as a matter of law.

Additionally, the Court held that Liberty Mutual was not vicariously liable to the plaintiff for A&M's negligence based on a non-delegable duty as the owner of business premises. If the plaintiff was able to recover against Liberty Mutual, A&M would be obligated to indemnify Liberty Mutual. Such a result would undermine the exclusivity provisions of the workers compensation statute. Therefore, the Court held that a premises owner's vicarious liability does not extend to a subcontractor's employee who received workers' compensation benefits from the subcontractor for an injury caused by the subcontractor's acts or omissions.

FIRST CIRCUIT COURT OF APPEALS

PROFESSIONAL LIABILITY POLICY - DUTY TO DEFEND

Medical Mutual Ins. Co. of Maine v. Burka

(August 10, 2018)

The defendant's ex-wife filed a state court lawsuit alleging that the defendant improperly used his status as a medical doctor at Southern Maine Healthcare (SMHC) to gain access to her medical records in order to harass and embarrass her. The defendant sought coverage under a professional liability policy issued by Medical Mutual Insurance Company (MMIC) to SMHC. MMIC filed a declaratory judgment action in federal district court and obtained a ruling that it had no obligation to provide coverage for the lawsuit.

The MMIC policy contained a "Slot Policy Endorsement" that extended coverage to listed physicians, including the defendant, for claims arising from "medical incidents" or from "non-patient incidents which result from their professional services rendered within the scope of their duties as a physician employee or contractor" of SMHC provided that the "medical incident" arises from the physician's "professional services". The policy defined "medical incident" as "any act, failure to act, or omission in the furnishing of professional services to a patient" and defined "professional services" as including an insured's "obligation to maintain patient confidentiality in the handling of patient records in the direct course of providing professional services to that patient."

The court ruled that although under Maine law the duty to defend is extremely broad, it is not unbounded. In order to determine whether there is a duty to defend under the MMIC policy the court must consider whether the allegations in the complaint reveal any potential factual or legal basis for concluding that the defendant's actions resulted from professional services rendered within the scope of his duties as a physician of SMHC. The court held that based on a sensible reading of the policy together with a fair reading of the complaint there was no duty to defend. Although the policy's definition of "professional services" was poorly drafted, the court found that coverage was dependent on the existence of a doctor/patient relationship and no such relationship existed as between the defendant and his ex-wife.

MASSACHUSETTS APPEALS COURT

FORESEEABILITY - UNATTENDED VEHICLES

R. L. Currie Corp. v. East Coast Sand and Gravel, Inc.

(August 21, 2018)

At approximately 10:00 p.m. during a snowstorm, an employee of the defendant left a front-end loader running idle, unlocked and

unattended with the keys in the ignition, in order to charge the battery. When he returned at 2:00 a.m. he found that someone had driven the front-end loader into two of the plaintiff's trucks, causing extensive damage.

Prior to this incident it was the defendant's practice to leave keys to its front-end loaders, usually hidden, inside the vehicles. Although there had been incidents in which items had been stolen from within the vehicles, this was the first incident involving unauthorized use.

The trial judge granted summary judgment in favor of the defendant, ruling that it did not owe a duty of care to the plaintiff and the damage to the plaintiff's vehicles was not a reasonably foreseeable consequence of the defendant's actions.

The appeals court reversed the decision, ruling that a jury could find that it was reasonably foreseeable that the front-end loader, a large vehicle capable of causing damage in the hands of inexperienced drivers, when left unlocked, unattended, running idle, and with keys in the ignition, might be operated by an unauthorized person so as to cause damage to plaintiff's property on a shared lot. In Massachusetts, "[t]he act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen." The defendant was aware that there had been prior unauthorized entry into its vehicles, failed to follow its usual practice of hiding keys, and knew that the plaintiff's equipment was stored on a shared lot.

The court rejected the defendant's argument that, while theft and negligent operation might have been foreseeable, intentional vandalism was not. The foreseeability standard requires only that the general character and probability of the injury be foreseeable and does not require that the particular injury-causing conduct be foreseen.