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Updates in New Hampshire Case Law

2012 to 2013

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2012

MacLearn v. Commerce Insurance Company
N.H. Supreme Court
No. 2010-880
January 27, 2012

AREAS OF INTEREST: Automobile Insurance Coverage.

LEGAL IMPACT: Automobile policy effectively excluded liability coverage for insured while operating a vehicle owned by his spouse and not listed as an insured vehicle on the policy.

FACTUAL SUMMARY:

The petitioner, MacLearn, was involved in an automobile accident while driving a Toyota Prius owned by his wife and insured under a policy issued by GEICO. At the time of the accident, MacLearn owned an Audi A6 that was insured under a policy issued by Commerce. The injured party sued MacLearn, who sought liability coverage for the claims under his Commerce policy.

Commerce denied any obligation to provide liability coverage for the accident, relying on an exclusion which provided:

> B. We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> ...
>
> 2. Any vehicle, other than "your covered auto", which is:
>   a. Owned by you; or
>   b. Furnished for your regular use.

The policy defined "your covered auto" as "Any vehicle shown in the Declarations" and defined "you" and "your" as: 1)The named insured shown in the Declarations; and 2) The spouse if a resident of the same household.

Since the Prius was owned by MacLearn's spouse and was not listed on the policy, Commerce denied any obligation to defend or indemnify MacLearn. The trial court granted summary judgment in favor of Commerce.

HOLDING: Affirmed.

The Court held that the policy exclusion (B.2) was unambiguous and that it served to prevent an insured from purchasing a policy to insure against the risk of operating one vehicle while at the same time obtaining coverage for another vehicle that is regularly used in the household but not listed as an insured vehicle under the policy. MacLearn argued that the words "you" and "your" as used in the exclusion must be read to refer to *either* MacLearn *or* Mrs. MacLearn *exclusively* and, therefore, since *he* did not own or regularly use the Prius the exclusion did not apply. The Court rejected that argument, ruling that MacLearn and his spouse could be substituted in the exclusion *alternatively* for "you" and "your". Since the vehicle was owned by "you" [MacLearn's wife] and furnished for "your" [MacLearn's wife's] regular use, and was not "your [MacLearn's] covered auto", the exclusion applied.

Although MacLearn argued that an exception to another exclusion (B.3), applicable to vehicles owned by a "family member", supported a finding of coverage, the Court declined to address the argument because that exception applied to a different exclusion not relied on by Commerce. Since Exclusion B.2 barred coverage, no further analysis was required.

Burbank v. Philadelphia Insurance Companies

Hillsborough County Superior Court, Northern District
Docket No. 216-2010-EQ-00066
January 31, 2012
(J. Brown)

AREAS OF INTEREST: Automobile insurance, "occupying" vehicle.

LEGAL IMPACT: A passenger may still be "occupying" a vehicle while in the process of moving to a place of safety for purposes of entitlement to coverage under the vehicle's automobile insurance policy.

FACTUAL SUMMARY:

On May 6, 2008, a school bus operated by the Manchester Transit Authority ("MTA") dropped Liam Burbank, a minor, off at his designated bus stop on Union Street. In order to reach his house located at the corner of Union Street and Whitford Street, Liam had to walk north on Union Street with his back to traffic. Access to the property on which Liam's house was located was blocked by a stone wall that ran parallel to Union Street.

As he was walking on a grass path that runs alongside Union Street toward his driveway, Liam was struck by an underinsured motorist. The accident occurred about 12-27 seconds after Liam exited the bus and approximately 45-100 feet from the bus stop. By that time the school bus had proceeded to its next designated stop.

A Department of Safety ("DOS") regulation requires school bus drivers to wait until exiting passengers have "cleared the danger zone of the bus" - consisting of the ten foot area immediately surrounding the stopped school bus - before proceeding.

The MTA bus was insured under a Business Auto Policy and a Commercial Excess Policy issued by Philadelphia Insurance Companies. Coverage under the policies was dependent on whether Liam was an "insured" at the time of the accident. The policy defined "insured" as "[a]nyone 'occupying' an 'insured motor vehicle'". "Occupying" was defined as "in, upon, getting in, on, out or off."

The Court held a bench trial to determine whether at the time of the accident Liam was "occupying" the school bus as defined under the Philadelphia policy. Philadelphia's expert testified that Liam was beyond the ten foot danger zone at the time he was struck and that under the DOS regulation it was safe for the bus to proceed. Liam's expert testified that the purpose of the DOS regulation was only to prevent the bus from striking its passengers and that Liam was not at a place of safety with respect to other vehicles until he reached his driveway.

HOLDING:

The Court ruled that Liam was "occupying" the school bus at the time of the accident because he had not yet reached a place of safety. Therefore, he was entitled to underinsured motorist coverage under the Philadelphia policies.

New Hampshire courts apply a "vehicle-orientation test" in interpreting whether a passenger is "occupying" a vehicle for purposes of insurance coverage. This test requires that the claimant is "engaged in an activity essential to the use o the vehicle" at the time of the accident. This activity may include "the process of moving away from the vehicle to a place of safety."

The Court found to be persuasive the testimony of Liam's expert that a student remains on the bus trip from the moment he exits until he reaches a place of safety. The Court determined that Liam had not yet reached a place of safety at the time of the accident since there was no sidewalk or paved shoulder on which to walk, and he was required to walk on a busy street with his back to traffic in order to get home. It ruled that the term "occupying" was ambiguous because it was reasonably susceptible of more than one interpretation and, therefore, would be interpreted in favor of coverage.

Antosz v. Allain

N.H. Supreme Court
No. 2011-445
February 24, 2012

AREAS OF INTEREST: "Fireman's Rule" – RSA 507:8-h.

LEGAL IMPACT: The Fireman's Rule only applies when the negligently-created risk that caused the firefighter's injury was the reason for his presence on the scene, and it does not bar claims arising from other negligent conduct regardless of whether the conduct occurs during or prior to the firefighter's official engagement.

FACTUAL SUMMARY:

The plaintiff, a volunteer firefighter, was injured when he slipped and fell on an icy driveway while responding to a call related to a hot water heater fire at property owned by the defendant. At the time of his fall the plaintiff was walking down the driveway toward the fire truck to retrieve a fire extinguisher. The plaintiff's wife brought a loss of consortium claim.

The defendant moved for summary judgment arguing that the claim was barred by the "Fireman's Rule" as adopted in RSA 507:8-h. The plaintiffs objected, arguing that the statute did not apply to volunteer firefighters. They also argued that even if the Fireman's Rule applied to volunteer firefighters it did not apply to an injury caused by a slip and fall on ice because the injury did not arise from the conduct which created the reason for the firefighter's "official engagement" at the scene.

The trial court granted summary judgment in favor of the defendant, ruling that: 1) the plaintiff's volunteer status did not preclude application of the Fireman's Rule; and 2) confronting an icy driveway at the scene of a fire was incidental to and inherent in the plaintiff's performance of his normal duties and, therefore, fell within the scope of the Fireman's Rule. The plaintiffs appealed.

HOLDING: Reversed and remanded.

RSA 507:8-h provides that firefighters "shall have no cause of action for injuries arising from negligent conduct which created the particular occasion for the [firefighter's] official engagement." The statute also provides that it does not affect "causes of action for unrelated negligent conduct occurring during the firefighter's official engagement, or for other negligent conduct…" The Court ruled that under the "plain language" of the statute, the only relevant inquiry is "whether the negligently-created risk that caused the firefighter's injury was the reason for his presence on the scene."

The firefighter was present on the defendant's property because of the home's hot water heater. Since the injury was caused by ice on the driveway, a condition unrelated to the fire, the Fireman's Rule did not apply to bar the claim. The defendant argued that the statute did not apply to icy conditions that occurred *before* the firefighter arrived on the scene because it only bars unrelated negligent conduct that occurs *during* the firefighter's official engagement. The Court rejected this argument, relying on the second sentence of the statute providing generally that claims based on "other negligent conduct" are not affected. The Court held that the statute permits a firefighter to pursue causes of action for injuries arising from negligent conduct that did not create the occasion for his presence regardless of whether that conduct occurs during or prior to his official engagement at the scene.

Noting that other jurisdictions differ as to whether the Fireman's Rule applies to volunteer firefighters, the Court declined to address the issue since it had already determined that the statute was not applicable under the facts.

Ford v. N.H. Dept. of Transportation

N.H. Supreme Court
No. 2011-262
February 24, 2012

AREAS OF INTEREST: Municipal Immunity, Discretionary Function Immunity, State Highways, Stare Decisis.

LEGAL IMPACT: 1) A municipality has no duty to maintain or warn of hazardous conditions on State highways even though town police officers travel and regulate traffic on them; 2) Governmental agencies are entitled to discretionary function immunity with respect to decisions regarding allocation of limited resources in response to widespread weather emergencies.

FACTUAL SUMMARY:

The plaintiff was injured in a motor vehicle accident at the intersection of Routes 111 (a Class II highway) and 28 (a Class I highway) in Windham after a severe ice storm caused a power outage that rendered the intersection's traffic lights inoperable. Both the Town and the State DOT had received notice that the lights were inoperable several hours before the accident occurred.

The trial court granted motions to dismiss filed by both the Town and the State. The court ruled that the Town did not owe a duty to the plaintiff because both roads were state highways. It also ruled that the State was entitled to discretionary function immunity with respect to decisions concerning allocation of resources in responding to a severe widespread weather emergency.

The plaintiff appealed.

HOLDING: Affirmed.

I. Municipal Immunity

Relying on its decision in *Trull v. Town of Conway*, 140 N.H. 579 (1995) (town had no duty to warn of icy conditions on state highway), the Court held that since the Town did not own and had no duty to maintain the state highways, it also had no duty to warn motorists that the lights at the intersection were inoperable. The fact that Town police officers traveled and regulated traffic on the state highways did not create a duty to warn the public about dangerous conditions on them. The Court rejected the argument that the Town voluntarily assumed a duty to motorists by "rendering services to the public." It also declined to overturn *Trull* because the plaintiff failed to explain how the four *stare decisis* factors applied to justify overruling established precedent.

The Court also rejected the plaintiff's argument that since the Town police officers patrolled the highways, the Town both occupied and operated them within the meaning of RSA 507-B:2, which provides that a governmental unit may be held liable for injury caused by its fault and arising out of the occupation or operation of premises. According to the Court, RSA 507-B:2 must be read in conjunction with RSA 231. Since RSA 231:93 specifically provides that municipalities do not have a duty to maintain highways other than Class IV and V, and town-maintained portions of Class II highways, no duty was owed by the Town in this case.

II. Discretionary Function Immunity

The State and its agencies are immune from liability for conduct that involves the exercise of a discretionary or planning function. Such functions involve conduct characterized by the exercise of a high degree of discretion and judgment that requires the weighing of alternatives and making choices with respect to public policy and planning, as opposed to functions that are merely ministerial in nature. The Court held that deciding how to allocate limited State resources in response to widespread power outages caused by a severe ice storm is a discretionary function for which the State is entitled to immunity. The Court rejected the argument that the U.S.D.O.T.'s *Manual on Uniform Traffic Control Devices ("MUTCD")*, which provides that the responsible agency "should" provide for alternate operation of traffic control signals in the event of a power failure, imposed a mandatory requirement that rendered the State's failure to comply ministerial rather than discretionary, ruling that the use of the word "should" instead of "shall" meant that the *MUTCD* provisions were guidelines or recommended practices that did not eliminate the State DOT's discretion with regard to traffic control.

Chatman v. Strafford County, et al.

N.H. Supreme Court
No. 2011-162
March 9, 2012

AREAS OF INTEREST: Municipal liability under RSA 507-B:2; "arising out of" operation of motor vehicle.

LEGAL IMPACT: For purposes of RSA 507-B:2, the phrase "arising out of the operation of a motor vehicle" includes injuries that occur while loading or unloading the vehicle.

FACTUAL SUMMARY:

The plaintiff was injured while participating in a work program under the control of the Corrections Department. His assignment was to assist with cleaning the Lee County Fair by loading tables and chairs onto a trailer. After the trailer was fully loaded, the plaintiff was instructed to lift it and hitch it to a pick up truck. While the plaintiff was trying to hitch the trailer to the truck, a weld on the trailer jack and/or hitch failed, causing the trailer to fall and injure his leg and ankle.

The plaintiff sued the owner of the truck and trailer, and also filed suit against the County and Corrections Department alleging that they were vicariously liable for the vehicle owner's negligence.

The County and Corrections Department moved to dismiss, arguing that the claims were barred by RSA 507-B:2 because they did not arise out of the County's ownership, occupation, maintenance or operation of a motor vehicle. The plaintiff argued that: 1) the claims arose out of the operation of the truck; and, in the alternative, that 2) RSA 507-B:2 was unconstitutional. The trial court granted the motion to dismiss and the plaintiff appealed.

HOLDING: Reversed.

Under RSA 507-B:2, a governmental unit may be held liable for personal injury caused by its fault and "arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises." The phrase "operation of all motor vehicles" means "the operating of or putting and maintaining in action of something." The Court noted that in the context of insurance coverage, the term "arising out of" means that the injury "must originate from, grow out of, or flow from" the operation or use of the vehicle. Although it is not necessary to show that the injury was proximately caused by the operation or use of the vehicle, a "tenuous connection" with the vehicle (i.e. when the vehicle is simply the place where the injury occurred) is not sufficient. However, "when the injuries stem from an act that is part of using a motor vehicle, the causal connection is established." The Court found that the insurance coverage cases addressing "arising out

of the use of a motor vehicle" were helpful in determining the meaning of "arising out of …operation of all motor vehicles" in RSA 507-B:2.

The Court held that "the entire range of activities inherent in the loading and unloading process must be considered to determine whether a vehicle was being operated" and that the operation of a vehicle "includes participation in loading and unloading activities." It concluded that the plaintiff was involved in the loading operation when he attempted to hitch the fully-loaded trailer to the truck and, therefore, his injuries arose out of the County's operation of a motor vehicle within the meaning of RSA 507-B:2. Viewing the loading operation as a whole, the Court ruled that the truck was being operated at the time of the injury and the County was not entitled to immunity.

Since the Court held that the claims fell within the scope of RSA 507-B:2, it ruled that it need not address the plaintiff's argument that the statute was unconstitutional.

Wentworth-Douglas Hospital v. Young & Novis, P.A.

U.S. Dist. Court, Dist. of N.H.
10-cv-120-SM
March 30, 2012
(J. McAuliffe)

AREAS OF INTEREST: Consumer Protection Act ("rascality test").

LEGAL IMPACT: The "rascality test" requirement under the Consumer Protection Act may be more difficult to satisfy in the context of a transaction between two business entities in comparison to claims involving a business to consumer transaction.

FACTUAL SUMMARY:

The hospital alleged that after it declined to renew the defendants' contract to provide pathology services, the defendants misappropriated and erased important computer data belonging to the hospital. The hospital filed suit against the defendants under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and also asserted various state law claims, including violation of the Consumer Protection Act, RSA 358-A. The defendants filed counterclaims based on false light invasion of privacy, defamation, misappropriation of trade secrets and conversion.

The parties filed cross motions for summary judgment.

HOLDING:

The court held that there existed several fact issues that precluded entry of summary judgment in favor of the hospital, including whether the hospital was entitled to prevail under the Computer Fraud and Abuse Act, whether the defendants violated hospital policy, whether they damaged the hospital's computers intentionally or without authorization, and the identify of the person who may have deleted hospital data from the network drives. The court also denied motions for summary judgment on the counterclaims for defamation, false light invasion of privacy, trade secrets misappropriation and conversion due to the existence of fact issues.

However, the court ruled that the defendants were entitled to summary judgment as to the hospital's Consumer Protection Act claims. The hospital had alleged that the defendants violated the CPA by scrubbing and removing patient data in order to thwart the hospital's efforts to provide pathology services to its patients. The court noted that both parties had "fairly colorable" and contradictory claims as to their ownership and possession of the data.

An unfair and deceptive business practice under the CPA is that which "attains a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." The court ruled that the defendants were entitled to summary judgment because the hospital's allegations failed to meet the "rascality test" requirement of the CPA. The court noted that conduct which may constitute "rascality" in a transaction between a business and a consumer may be nothing more than "rough and tumble" in a transaction between two business entities. According to the court, in the business world disputes over electronic data ownership, possession, copying and deletion that arise during the break-up of a long-term contractual relationship are to be expected and do not rise to the level of a CPA violation.

Brown v. Concord Group Insurance Company

N.H. Supreme Court
No. 2011-385
April 20, 2012

AREAS OF INTEREST: Commercial liability insurance – "your work" exclusion; "occurrence".

LEGAL IMPACT: The "your work" exclusion in a commercial general liability policy applies separately, on a job-by-job basis, to work performed by an insured. When an insured performs work that causes damage to work the insured had previously completed, the damage does not fall within the "your work" exclusion.

FACTUAL SUMMARY:

In 2005 the plaintiffs purchased a home that was built by Concord Group's insured, Eugene Spencer, two years earlier in 2003.

In 2007 the plaintiffs discovered water leaking into the house near a sliding glass door and they contacted Spencer to repair the problem. Spencer discovered black mold when he removed the exterior siding. He fixed what he believed to be the source of the leak, installed flashing and reinstalled the siding.

Two years later, in 2009, the plaintiffs again observed evidence of water leaking into the house near the same sliding door. They contacted a different contractor who discovered substantial water damage that was caused by additional leaks that Spencer did not discover during his 2007 repair. The plaintiffs paid $16,205 for the 2009 repairs.

The plaintiffs filed a declaratory judgment petition against Concord Group, arguing that it was obligated to provide coverage for the damage resulting from its insured's defective repairs under a commercial general liability policy issued to Spencer. That policy provided coverage for "property damage" caused by an "occurrence," which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy also contained an exclusion for "'property damage to 'your work' arising out of ['your work'] or any part of ['your work'] and included in the 'products-completed operations hazard'".

Concord Group argued that coverage was excluded under the "your work" exclusion because: 1) regardless of whether the damage was to its insured's 2003 original construction or his 2007 repairs, the defective work did not cause damage to anything other than the insured's own work product; and 2) any damage caused by the insured's 2007 repair work was excluded since it was damage to his own work – the original 2003 construction work.

The plaintiffs argued that: 1) the damage in 2009 was caused by the insured's negligent repair work in 2007; and 2) although the damage was to the insured's 2003 work, it was not excluded because it was caused by the subsequent 2007 repair work, which was a separate act from the original construction in 2003.

The trial court granted summary judgment in favor of Concord Group, ruling that there was no evidence that the 2007 repair work resulted in the damage in 2009 and, furthermore, that the policy did not place a time limit on when the work must occur so that both the 2003 and 2007 work were excluded as "your work". The plaintiffs appealed.

HOLDING: Reversed and remanded.

The primary issue before the Court was whether the "your work" exclusion encompassed both the 2003 and 2007 work for purposes of determining whether the damage was to the insured's "work".

The Court examined the policy definitions of "your work" and determined that the exclusion was triggered only if the damage at issue: 1) was to work performed by the insured; and 2) was included in the "products-completed operations hazard". Damage falls within the "products-completed operations hazard" only if the damage is to work that has been completed. This means that "your work" has a limitation since it contemplates "discrete jobs that have an endpoint". The exclusion applies on a job-by-job basis, rather than to all work ever performed by an insured. If the previous work was completed, it is not part of the work at issue. If the insurer intended to apply the exclusion to all work ever performed by the insured it could have included language such as "work performed at any time".

Thus, the Court ruled that the 2007 repair work was separate from the 2003 construction for purposes of applying the "your work" exclusion. If the damage was caused by the 2003 construction, it was to the insured's work and would be excluded. If, however, the damage was caused by the 2007 repair work, coverage would not be excluded for damage to the 2003 construction work.

The Court also addressed whether the damage was caused by an "occurrence". To constitute an "occurrence" the damage must be to work other than the insured's work product. The Court ruled that "work product" also means "discrete jobs demarcated by their completion" and, therefore, the 2003 work and 2007 work are separate work products.

The Court concluded that whether the damage was caused by the 2003 work or the 2007 work was determinative of the coverage issue and presented a genuine issue of material fact to be decided by the trier of fact, therefore, the case was remanded for resolution of this fact issue.

Bartlett v. Mutual Pharmaceutical Co., Inc.

First Circuit Court of Appeals,
No. 10-2277
May 2, 2012

AREAS OF INTEREST: Products liability, hedonic damages.

LEGAL IMPACT: Largest verdict in New Hampshire history upheld in products liability case based on design defect of generic drug.

FACTUAL SUMMARY:

The plaintiff suffered severe, permanently disfiguring and debilitating injuries caused by an adverse reaction to sulindac, a generic non-steroidal anti-inflammatory ("NSAID") drug manufactured by the defendant. The case was tried before a jury in the New Hampshire federal district court based on the theory that the drug was defective in its design because the risks outweighed its benefits, making it unreasonably dangerous to consumers. The jury awarded the plaintiff $26.01 million, including $16.5 million for pain, suffering and loss of enjoyment of life. The defendant appealed.

HOLDING: Affirmed.

In New Hampshire a manufacturer is liable for selling a product in a defective condition unreasonably dangerous to the user. The court held that the plaintiff is not required to show that there exists an alternative, safer design for the product and, therefore, it was not necessary to prove that the drug could be made in a different and safer form.

Since sulindac is a generic drug, the manufacturer cannot alter the warning label required by the FDA and, therefore, the plaintiff did not have the ability to bring a state law failure to warn claim. However, the court held that since the manufacturer can choose not to make the drug at all, users injured as a result of taking the drug can pursue a design defect claim. The court also ruled that the warning label was relevant insofar as its inadequacy made the product itself more dangerous under a risk-benefit test.

The court also ruled that several "missteps" by plaintiff's counsel during trial, including leading their own witnesses, mischaracterizing the record, and attempting to use demonstrative aids in a misleading or prejudicial manner, were not sufficient to have influenced the verdict given the severity of the plaintiff's injuries and strength of her expert evidence.

Finally, the court held that although the verdict was by far the largest award in New Hampshire history, it was not so clearly disproportionate to the harm suffered that it must be set aside.

Jenks v. New Hampshire Motor Speedway

U.S. Dist. Court, Dist. N.H.
09-CV-205-JD
April 23, 2012
(J. DiClerico)

AREAS OF INTEREST: Product Liability – "continuing or post-sale duty to warn".

LEGAL IMPACT: The N.H. federal district court predicts that New Hampshire Supreme Court would impose a post-sale continuing duty to warn on manufacturers under a strict liability theory in product liability cases.

FACTUAL SUMMARY:

The plaintiff was seriously injured when he fell from the back of a golf car while it was being used at the New Hampshire Motor Speedway during the race weekend in July of 2006.

The golf car was originally sold by Textron in 1997, but was subsequently repurchased and then resold by Textron to its authorized dealer, A.B.L., Inc. in 2001. A.B.L. leased the car, along with several others, to the Speedway for use during the race weekend. The only warning provided by Textron about riding on the back of the car was a decal located on the dashboard, which was not visible to a person riding on the back.

The parties presented evidence showing that Textron was aware of the danger of riding on the back of the car when the car was sold, and that after selling the car it received additional information about that danger, including a letter from an attorney representing the family of a person who was killed when he fell off a Textron golf car in 2003. In addition, Textron began putting warnings on the back of its golf cars in 2008.

The plaintiff and remaining defendants sought a ruling that they were entitled to introduce evidence and the jury would be instructed that a product manufacturer has a continuing duty to warn after it sells a product.

HOLDING:

The court acknowledged that the New Hampshire Supreme Court has not decided whether a manufacturer has a continuing, post-sale duty to warn, but stated that where there is no governing precedent a federal court is required to predict how the issue would be decided by the Supreme Court.

Under the Restatement: PL § 10 (1998), a seller or distributor is liable for damages caused by "the seller's failure to provide a warning after the time of sale or distribution of

a product if a reasonable person in the seller's position would provide such a warning." The court also noted that the Supreme Court, while not directly addressing the continuing duty to warn issue, has in an earlier case "assumed it to be a valid theory".

The court observed that other jurisdictions addressing the issue have concluded, under both strict liability and negligence causes of action, that the seller or manufacturer of a defective product has a continuing or post-sale duty to warn of the defect, at least when it would be reasonable to provide such a warning. Whether a reasonable person would provide such a warning depends on proof that: 1) the seller knows or reasonably should know of the substantial risk of harm; 2) those to whom the warning should be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; 3) a warning can be effectively communicated to and acted on by those to whom the warning is provided; and 4) the risk of harm is sufficiently great to justify the burden of providing a warning. In deciding whether a claim based on breach of a post-sale duty to warn should be submitted to the jury, the court must determine whether these four factors are supported by proof.

Although the court found that it was not necessary to predict whether the Supreme Court would find a continuing duty to warn under a negligence theory, it ruled that such a duty would be recognized under § 10 of the Restatement as a strict liability claim. The court then analyzed the four factors against the facts and concluded that there was a sufficient showing to allow the parties to introduce evidence based on the continuing duty to warn theory during the trial.

Rivera v. Liberty Mutual Insurance Company

N.H. Supreme Court
No. 2011-406
May 11, 2012

AREAS OF INTEREST: Automobile insurance; uninsured motorist coverage.

LEGAL IMPACT: Owned vehicle exclusion violated RSA 264:15 when its application would have resulted in denial of uninsured motorist coverage to insured driver whose passenger caused accident by engaging in conduct that fell within liability coverage exclusion.

FACTUAL SUMMARY:

The plaintiff, Rebecca Rivera, was driving a Toyota Matrix when her front seat passenger, Timothy Chateauneuf, grabbed the steering wheel, causing the vehicle to leave the roadway and strike a tree. Chateauneuf was convicted of assault by means of a deadly weapon.

At the time of the accident the Toyota was insured under a policy issued by Liberty Mutual to Rivera's parents. Under the policy's liability coverage, the insurer was obligated to pay damages for bodily injury for which any "insured" becomes legally responsible because of an automobile accident. It was undisputed that Chateauneuf was an "insured" under the policy. However, the policy excluded liability coverage for any insured who intentionally causes injury or who uses a vehicle without a reasonable belief that he was entitled to do so.

The policy's uninsured motorist provisions required Liberty Mutual to pay damages which an insured is legally entitled to recover from the operator of an uninsured motor vehicle arising out of the ownership, maintenance or use of the uninsured motor vehicle. For purposes of uninsured motorist coverage "insured" was defined as "you or any family member" and "any other person occupying your covered auto". The policy defined "uninsured motor vehicle" as including a vehicle to which a liability policy applies, but the insuring company denies coverage. The policy also provided that "uninsured motor vehicle" does not include "any vehicle…owned by or furnished for the regular use of you or any family member."

After Rivera was denied coverage for her injuries by Chateauneuf's insurance carrier she submitted a claim to Liberty Mutual. Liberty Mutual denied the claim based on the owned vehicle exclusion. Rivera filed a declaratory judgment action seeking a ruling that she was entitled to coverage under either the uninsured motorist provisions or the liability provisions of her policy.

Both parties filed summary judgment motions. The trial court ruled that the liability coverage did not apply because Chateauneuf could not have a reasonable belief that he

was entitled to use the car as he did. However, it found that Rivera was entitled to uninsured motorist coverage because the vehicle fit within the policy definition of "uninsured motor vehicle." Liberty Mutual appealed and Rivera filed a cross appeal.

HOLDING: Affirmed.

The Court found that the Toyota was insured for liability coverage, but since Liberty Mutual denied such coverage pursuant to the entitlement exclusion, the Toyota was an "uninsured motor vehicle" as defined in the policy. It went on to rule that even if the owned vehicle exclusion was interpreted as excluding uninsured motorist coverage, that interpretation would be inconsistent with the purpose of the uninsured motorist statute, RSA 264:15, which is intended to provide innocent victims a source of restitution when the full amount of damages cannot be recovered from the tortfeasor. The goal of the statute is to place insured persons in the same position that they would have been in if the uninsured motorist had possessed comparable liability insurance.

If Liberty Mutual's position that Chateauneuf was not entitled to liability coverage was correct, then he was a driver of an "uninsured motor vehicle" from whom Rivera was "legally entitled to recover" under RSA 264:15. Although an insurer can limit its coverage through an exclusion, such as the owned vehicle exclusion within the policy's uninsured motorist provisions, it cannot do so if the result violates the statute or public policy. The Court held that the plain language of RSA 264:15 prohibited the exclusion from applying under the facts before it. As to Rivera, both the driver and the vehicle were effectively uninsured and, therefore, the uninsured motorist coverage applied. To apply the owned vehicle exclusion under the circumstances of this case would violate the statutory requirements.

The Court distinguished an earlier decision, Wegner v. Prudential Property & Casualty Ins. Co., 148 N.H. 107 (2002), in which it held that a passenger who was killed in an accident while riding in a vehicle operated by a driver with a suspended license was not entitled to uninsured motorist coverage under the driver's policy. The policy in that case excluded uninsured motorist coverage to any person claiming that a car was uninsured under the policy because coverage was excluded or denied under another provision in the policy, and the policy excluded coverage for the insured while his license was suspended. The Court ruled that, unlike Rivera, the plaintiff in *Wegner* was a passenger and, therefore, he did not fall within the express terms of RSA 264:15. Rivera was an authorized operator of the vehicle and, therefore, fell within the policy's liability coverage. As a result, RSA 264:15, I required that she be afforded uninsured motorist coverage regardless of any contrary policy exclusions.

The Court concluded that although there is a split among jurisdictions as to the validity of policy provisions excluding the insured automobile from the definition of "uninsured motor vehicle", the owned vehicle exclusion as applied to these facts violated RSA 264:15. Having decided that Rivera was entitled to uninsured motorist coverage, the Court declined to consider whether she was entitled to recover under the liability portion of the policy.

Michalski v. Town of Center Harbor

N.H. Supreme Court
No. 2011-0725
June 13, 2012

AREAS OF INTEREST: Municipal liability, official immunity.

LEGAL IMPACT: A police officer engaged in road clearance activities, such as directing traffic around a disabled vehicle, is not liable in the absence of willful or wanton disregard for safety or gross negligence. In the absence of a breach of this standard of care, the municipality is not liable even though it has applicable liability insurance.

FACTUAL SUMMARY:

The plaintiff was riding his motorcycle on Route 25B in Center Harbor when he struck the side of a vehicle being operated by his wife and was thrown from the motorcycle. He alleged that a police officer, who had parked his cruiser with his lights activated and was directing traffic around a disabled vehicle, signaled his wife to stop suddenly without sufficient warning.

The Town filed a Motion to Dismiss the claims against it based on official immunity. It argued that police officers are immune from liability for decisions, acts or omissions that are made within the scope of their official duties while in the course of employment, in the exercise of discretion, provided that they are not made recklessly, there were no facts to support a claim of recklessness, and since the police officer was entitled to official immunity, the Town was also immune from liability for the vicarious liability claims.

The plaintiff objected, arguing that the Town had a liability insurance policy and RSA 507-B:7-a precludes a municipality from asserting an immunity defense when it has procured an insurance policy to cover the risk involved. The plaintiff also argued that official immunity does not apply to reckless acts committed by government employees and the police officer's actions involved conduct that was ministerial and not discretionary.

The trial court granted the Town's Motion to Dismiss and the plaintiff moved for reconsideration primarily based on the Town's insured status. The Town objected arguing that where, as here, statutory standards of care govern the conduct of municipal employees, such as police officers responding to emergency situations, there is no waiver of immunity simply because the municipality has procured an insurance policy. The Town argued that RSA 154:7-b applicable to "expeditious clearance of roadways", established a gross negligence standard of care for emergency responders which was not breached by the police officer in this case. The trial court denied the motion for reconsideration and the plaintiff appealed.

HOLDING: Affirmed.

RSA 507-B:7-a provides that an insured municipality may not plead immunity as a defense and "its liability shall be determined as in the case of a private corporation *except when* a standard of care differing from that of a private corporation is set forth by statute." The Court assumed, without deciding, that the Town's procurement of an insurance policy waived its immunity from both direct and vicarious liability and instead addressed the Town's argument that RSA 154:7-b established a gross negligence standard of care that was not breached by the officer.

RSA 154:7-b exempts agencies and officials engaged in road clearance activities from liability provided that they do not act with willful or wanton disregard or gross negligence. The statute provides that the officer in charge shall act "subject to the authority and limitations granted in RSA 154:7, I(c) with respect to a propelled vehicle accident, natural disaster, or special event." The Court rejected the plaintiff's argument that the statute applied only to accidents involving transportation of hazardous material, fuel spills or accidents involving injury because the statute also applied to "special events". Since the statute did not define "special event", the Court interpreted it within the context of the statute as including a roadway incident that calls for a police response. The Court concluded that the removal of a disabled vehicle from the roadway constituted a "special event" that entitled the officer to invoke the gross negligence standard of care. Because the plaintiff failed to allege facts constituting a breach of this standard of care, his claims were properly dismissed.

Phaneuf Funeral Home v. Little Giant Pump Co.

N.H. Supreme Court
No. 2011-151
June 29, 2012

AREAS OF INTEREST: Statute of Repose (RSA 508:4-b, I); products liability.

LEGAL IMPACT: The statute of repose does not apply to product liability claims against manufacturers whose products happen to be incorporated by another entity into an improvement to real estate, but it may apply to bar claims against an entity that is directly involved in the transformation of the product into an improvement that enhances the real estate's value or use.

FACTUAL SUMMARY:

In 1998, Phaneuf Funeral Home hired Boyer Interior Design to provide interior design services and light renovation work, including installation of a wall-mounted water fountain. Boyer purchased the fountain, which was manufactured by Little Giant Pump Company, from Elegant Earth, Inc. The fountain's power cord was supplied by Leviton Manufacturing Company.

The water fountain was designed to be hung from a wall and plugged into an existing wall power outlet. However, Phaneuf asked Boyer to undertake a more permanent installation. To accommodate this request Boyer designed a back plate to be affixed to the wall, attached the fountain to it, and painted it so as to blend it in with the wall. The installation was complete in 1999.

On March 17, 2007, a fire caused damage to the funeral home. Phaneuf brought a negligence and strict product liability action against Boyer, Little Giant, Elegant and Leviton alleging that the fountain's defective pump and power cord caused the fire.

All of the defendants filed summary judgment motions based on RSA 508:4-b, I, arguing that the 8-year statute of repose applicable to damages from construction barred the claims. The trial court granted the motions and Phaneuf appealed.

HOLDING: Affirmed as to Boyer; reversed as to remaining defendants.

RSA 508:4-b, I provides:

> Except as otherwise provided in this section, all actions to recover damages …arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within

> 8 years from the date of substantial completion of the improvement, and not thereafter.

Phaneuf conceded that the claims were not filed within 8-years of the date of substantial completion, but argued that: 1) the statute did not apply to product liability actions; 2) the fountain did not constitute an improvement to real property; and 3) the statute applies only to those who provide products and services specifically designed for the improvement into which they are incorporated.

The Court noted that the statute applied to "all actions" and declined to rule that all products liability claims were categorically excluded from its coverage. However, it held that "improvement to real property" meant an alteration to or development of real property that either enhances or is intended to enhance its value or improves or is intended to improve its use for a particular purpose. Since the water fountain was custom-designed by Boyer to become a permanent installation in the building's structure and was intended to improve the home's aesthetics, it constituted an "improvement to real property". Therefore, Boyer was entitled to rely on the statute of repose and the claims against it were barred.

The claims against the remaining defendants, however, were not encompassed by the statute. Since the statute applies to actions arising out of a deficiency in the "*creation* of an improvement", it was intended to protect only entities that were involved in some way in the transformation of a product into an enhancement to the value or use of the real estate based on their role in that transformation. The water fountain was a "generic product" intended to be hung on a wall - it was not designed or manufactured to become an improvement to real property. The statute of repose was not intended to protect all manufacturers whose products are fortuitously incorporated into an improvement. Elegant, Little Giant and Leviton were not involved in the process of improving the real estate and the statute did not apply as to them.

In a footnote, the Court stated that it need not decide whether some products are so inherently related to the construction industry that their manufacturers could claim the protection of RSA 508:4-b, leaving that issue open for another case.

Walter H. Brady, III v. PMC Corp. & Travelers Ins. Co.

Merrimack County Superior Court
No. 2011-CV-0616
July 24, 2012
(J. McNamara)

AREAS OF INTEREST: Insurance; Breach of Duty of Good Faith & Fair Dealing; Workers' Compensation.

LEGAL IMPACT: Bad faith claims against insurer based on handling of worker's compensation claims were barred by exclusivity provision of workers' compensation act, RSA 281-A:8.

FACTUAL SUMMARY:

On September 3, 2008, the plaintiff was found on the floor at his workplace bleeding from the back of his head. There were no eyewitnesses and he could not recall what caused the accident.

The plaintiff's employer, PMC, filed a "First Report of Occupational Injury" stating that the plaintiff had fainted. PMC notified its workers' compensation insurer that the injuries were "self-inflicted" and the insurer denied benefits based on lack of causal relationship to employment. The plaintiff then sent the insurer a letter from his physician advising that although the exact circumstances of the injury were unclear, the injury was not self-inflicted. The insurer, however, continued to deny benefits.

The plaintiff then filed suit against the workers' compensation insurer based on breach of contract, breach of the duty of good faith and fair dealing and violation of the Consumer Protection Act. The defendant moved to dismiss on several grounds, including applicability of the exclusivity provisions of the workers' compensation act, RSA 281-A:8.

HOLDING: Defendant's motion to dismiss granted as to all claims.

While the New Hampshire Supreme Court has not addressed the applicability of the exclusivity provision to an employee's claims based upon the implied covenant of good faith and fair dealing, the issue has been extensively litigated in other jurisdictions. The First Circuit Court of Appeals, applying Maine law, has adopted the majority view that lawsuits alleging bad faith in the handling of worker's compensation claims are barred. This position is supported by public policy considerations including the availability of remedies under the worker's compensation statute for addressing claims that an insurer has engaged in bad faith by making false representations or delaying payment. The court noted that New Hampshire's exclusivity provision is broad in that it bars "all rights of

action" against employers and insurers except for those specifically listed and ruled that all of the plaintiff's claims were barred.

French v. Time Warner Entertainment Co., L.P.

U.S. Dist. Court, Dist. of N.H.
No. 10-cv-498-JL
(October 5, 2012)

AREAS OF INTEREST: Indemnification.

LEGAL IMPACT: The manufacturer of a product does not have an implied duty to indemnify a defendant against claims that the defendant negligently failed to discover a defect in the product where the manufacturer did not provide the defendant with a product or service.

FACTUAL SUMMARY:

The decedent, James French, sustained fatal electrocution injuries while installing cable on a utility pole when a forty-year old porcelain insulator holding the power line to the pole broke. His estate brought a wrongful death action against the manufacturer of the insulator, Lapp Insulators LLC ("Lapp"), the owner of the utility pole and insulator, Public Service of New Hampshire ("PSNH"), and Time Warner, who had hired the decedent's employer, NextGen, to install the cable.

The plaintiff alleged that Time Warner negligently instructed NextGen to begin hanging cable without first completing "make ready" work required under its contract with PSNH. Plaintiff also alleged that Time Warner breached its duty to take reasonable steps, including an inspection of the pole, before allowing work to begin.

Lapp and PSNH entered into a settlement with the plaintiffs, leaving Time Warner as the sole remaining defendant. Time Warner had filed cross claims for contribution and indemnification against Lapp. Since the plaintiffs settled their claims against Lapp, Time Warner stipulated to the dismissal of its contribution claim pursuant to RSA 507:7-h. Lapp filed a motion for summary judgment against Time Warner as to the remaining claim for indemnification.

HOLDING: Summary judgment granted.

One joint tortfeasor can obtain indemnification, or a complete shifting of liability, against another only where the indemnitee's liability is derivative or imputed by law, or where an express or implied duty to indemnify.

Time Warner acknowledged that it did not have an express indemnity agreement with Lapp, but argued that it was entitled to indemnification because plaintiffs' only claim against it was its failure to discover an alleged defect in the insulator manufactured by Lapp.

The Court ruled that the New Hampshire Supreme Court had specifically rejected an effort to impose an indemnity obligation on a manufacturer under similar facts in Consolidated Utility Equipment Servs., Inc. v. Emhart Mfg. Co., 123 N.H. 258 (1983), a case which was controlling and mandated entry of summary judgment in favor of Lapp. In that case, the decedent was killed when a bucket-lift device collapsed. The estate alleged that CUES, an inspection company hired by the decedent's employer, negligently failed to discover a defect in the equipment that caused the accident. CUES sought indemnification from the manufacturer, arguing that the manufacturer's role was "active" while CUES' failure to discover the defect was only "passive". The Supreme Court, however, declined to extend a general right of indemnity to passively negligent tortfeasors.

The Court noted that in a subsequent case, Jaswell Drill Corp. v. General Motors Corp., 129 N.H. 341 (1987), the Supreme Court seemed to recognize a right of indemnity running "downstream" from a manufacturer of a defective component part to a manufacturer who incorporates the part in its product. However, in this case Lapp did not provided Time Warner with either a service or a product. Applying CUES, the Court concluded that a manufacturer is not required to indemnify parties who neither bought nor used its product.

2013

Great American Dining, Inc. v. Philadelphia Indem. Insur. Co,
N.H. Supreme Court
No. 2012-088
February 25, 2013

AREAS OF INTEREST: Interpretation of Insurance Policy, Additional Insured Coverage.

LEGAL IMPACT: Insurance policy construed against insurer to afford additional insured coverage under ambiguous policy.

FACTUAL SUMMARY:

The plaintiff in the underlying case (Dr. Wyly) was injured when he fell through a porch railing on property owned by DW Ray and leased to Webster Place. At the time of the accident, Webster Place was the named insured under a CGL policy issued by Philadelphia Indemnity that contained a provision listing as an additional insured "[a]ny person or organization with respect to their liability arising out of the ownership, maintenance or use of that part of the premises leased or rented to [Webster Place]."

Dr. Wyly filed suit against DW Ray and Webster Place. After the trial court ruled that DW Ray was an additional insured under the Philadelphia policy, the parties settled with Dr. Wyly. DW Ray and Webster Place then brought a contribution action against Great American Dining (GAD) based on claims that GAD negligently constructed, installed and maintained the porch railing. A jury found that GAD was 45% at fault.

GAD then filed a declaratory judgment action seeking a determination that it was an additional insured under the Philadelphia policy and, therefore, entitled to reimbursement of defense costs it incurred in the contribution action, the amount of the judgment against it, and costs and attorneys' fees incurred in the declaratory judgment action pursuant to RSA 491:22-b.

The trial court determined that GAD was an additional insured under policy Provision 2f entitled "Managers, Landlords or Lessors of Premises" because the provision applied to "any person or organization" whose liability "arise[es] out of ownership, maintenance or use" of the leased premises. Since GAD's liability arose from its maintenance of the leased premises, it was an additional insured under the Philadelphia policy and entitled to reimbursement for the defense costs and judgment rendered in the contribution action, as well as attorney's fees and costs in the declaratory judgment action.

Philadelphia appealed arguing that: 1) GAD was not an additional insured since it was not a manager, landlord or lessor of the premises; 2) GAD's liability did not arise out of

the ownership, maintenance or use of the premises; and 3) since GAD was a stranger to the policy, ambiguities need not be construed in its favor.

HOLDING: Affirmed.

1) Reading the policy as a whole, the Court found that it was ambiguous since two plausible interpretations of the additional insured provisions were possible. The policy could be construed to afford additional insured coverage only to "Managers, Landlords or Lessors of Premises" in accordance with the title of Provision 2f. Or coverage could also extend to "*any* person or organization with respect to their liability arising out of the ownership, maintenance or use" of the premises leased to the insured as stated in the body of Provision 2f. Since ambiguities must be construed against the insurer and in favor of the insured, the policy must be construed as affording additional insured coverage to GAD. The Court rejected Philadelphia's claim that since GAD was a stranger to the policy it was not entitled to have ambiguities construed in its favor, ruling that when determining who is an insured under a policy, the policy terms are construed against the insurer since it controls the policy language.

2) The Court also rejected Philadelphia's position that Provision 2f did not apply because GAD's work constituted "renovation" rather than "maintenance". Since the policy did not define either term, the Court considered definitions from a number of sources and found that "maintenance" may reasonably be understood to include "renovation". Therefore, GAD was an additional insured.

3) The Court then reviewed the allegations in the contribution action against GAD and in the underlying action by Dr. Wyly, and found that a reasonable intendment of the pleadings lead it to infer that the negligence claims flowed directly from the actions of GAD and its employees in performing maintenance on the property leased to Webster Place. Since "factual allegations that potentially support a covered claim is all that is needed to invoke the insurer's duty to defend", the Court concluded that Philadelphia owed GAD a duty to defend.

4) Whether Philadelphia also owed GAD a duty to indemnify depended on the facts actually established in the underlying suit. The Court rejected Philadelphia's argument that the evidence at the contribution trial established that GAD's work involved only new construction and renovation rather than "maintenance". Evidence showed that GAD performed maintenance and repair on the property from the time it was acquired up to the time of the accident. Furthermore, after being instructed to determine whether any of the parties, including GAD, failed to "construct, operate *or maintain* the premises in accordance with the duty of due care, the jury found GAD 45% at fault. Due to the general verdict it was not certain whether the jury found that GAD was liable due to its "maintenance" as opposed to construction or operation, however, certainty was not necessary since the burden of proof was on the insurer instead of the insured. Thus, Philadelphia also owed a duty to indemnify.

Lessard v. Vermont Mutual Ins. Co.

U.S. Dist. Court, Dist. of N.H.
No. 12-CV-236-SM
February 27, 2013
(J. McAuliffe)

AREAS OF INTEREST: Insurance Coverage for Motorcycle accident.

LEGAL IMPACT: Breach of implied covenant of good faith and fair dealing dismissed where plaintiffs did not alleged facts that insurance company acted in bad faith.

FACTUAL SUMMARY:

The plaintiffs were injured when their motorcycle was struck from behind by another motorist. They settled their claims for the tortfeasor's liability policy limits of $100,000. They then sought underinsured motorist benefits under a motorcycle policy issued to them by EMC Insurance with policy limits of $250,000, and also sought underinsured motorist benefits under their Vermont Mutual umbrella policy with coverage up to $1 million and a retained limit of $250,000.

Vermont Mutual declined to participate in mediation based on its position that the claims did not exceed the $250,000 retained limit. The plaintiffs settled their claims against EMC for an undisclosed amount and then brought claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Vermont Mutual. They alleged that one of them sustained permanent impairment and incurred medical bills exceeding $150,000. However, they did not allege that Vermont Mutual denied their claims in order to coerce them into accepting less than full performance of the insurer's contractual obligations, nor did they claim that the insurer delayed payment on a legitimate claim beyond a commercially reasonable time.

The court ruled that although the allegations were sufficient to state a viable claim for breach of contract, they did not state a claim for breach of the implied covenant of good faith and, therefore, the insurer was entitled to dismissal of that count.

Reed v. City of Portsmouth

U.S. Dist. Court, Dist. of N.H.
No. 12-cv-164-JD
April 3, 2013
(J. DiClerico)

AREAS OF INTEREST: Municipal Liability.

LEGAL IMPACT: Recreational use statute bars claims for injuries that arise during a visit to a public park for the purpose of reading a plaque on an outdoor statute.

FACTUAL SUMMARY:

The plaintiff was walking along a public street near Haven Park in Portsmouth when she noticed a statute with a plaque that she was unable to read from the street. As she entered the park and approached the statute, the plaintiff stepped into a hole in the grass and injured her foot and ankle. She filed suit against the City of Portsmouth alleging that the hole was essentially invisible because it was either covered or filled with grass and mowed over.

The City filed a motion for summary judgment, arguing that it was entitled to immunity under New Hampshire's recreational use statutes, RSA 508:14 and RSA 212:34. The plaintiff objected, arguing that: 1) the statutes do not apply to municipal owners of public property; 2) Haven Park was not the type of land covered by the statutes; 3) she was not engaged in a "recreational activity"; and 4) even if the statutes applied, the City voluntarily assumed and breached the duty of maintaining the park.

The trial court ruled that RSA 508:14 applied to render the City immune from liability and granted summary judgment in favor of the defendant. RSA 508:14 provides:

> An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.

The court was not persuaded by the argument that the statute applies to municipalities only when they are lessees, ruling that such a limitation would conflict with the plain language of the statute. The court also dismissed the claim that the statute did not apply to Haven Park because it was established as a public park prior to enactment of the statute, ruling that such an interpretation was contrary to the statutory language.

The plaintiff's argument that she was not engaged in a "recreational activity" was likewise rejected. The plaintiff had argued that RSA 212:34, I(c), which defines "recreational activity" as several delineated "outdoor recreational pursuits", did not include her brief detour into the park. The court ruled that although walking in a park

was not specifically listed in the statute, it was still recreational and, furthermore, the statute did list "sightseeing" as a "recreational activity".

Finally, the court rejected the argument that the City could be held liable even if RSA 508:14 applied because it assumed a duty to maintain the park due to its extensive and regular maintenance, landscaping, regulation and patrolling of it. The court ruled that the only statutory exception was for intentionally caused injury, and no such allegation was made in this case.

Bourget v. NCI Group, Inc., et al.

U.S. Dist. Court, Dist. of N.H.,
No. 11-CV-088-SM
(9/27/13)
(J. McAuliffe)

AREAS OF INTEREST: Construction Statute of Repose – RSA 508:4-b.

LEGAL IMPACT: Substantial completion of a storage building was on the date the plaintiff began using it for storage pursuant to a rental agreement regardless of the fact that the owner of the building had additional improvements to complete on the building.

FACTUAL SUMMARY:

The plaintiff, owner of an outdoor amusement business, brought this action seeking compensation for damage to his equipment that occurred due to the collapse of a prefabricated metal building in which he had it stored. The building was owned by a charitable foundation which hosted various agricultural events and activities on its fairgrounds. The plaintiff stored his equipment in the building pursuant to a winter rental agreement with the Foundation.

The metal building shell was manufactured by the defendant, NCI Group, and delivered to the Foundation by defendant, General Steel, in 2001. It was erected by the Foundation in the summer of 2002 and by the fall it was completely enclosed. The plaintiff began storing his equipment in the building for the winter starting in November of 2002. However, it was not until September of 2003 that the Foundation completed improvements on the building by adding amenities such as electricity and water and, at that time, a certificate of occupancy was issued.

The roof collapse and ensuing damage to the plaintiff's property occurred on March 2, 2008. He filed suit against the defendants in February of 2011.

General Steel and NCI filed a motion for summary judgment arguing that the claims were barred under the statute of repose, RSA 508:4-b, I, which requires that lawsuits arising out of any deficiency in the creation of an improvement to real property be filed within 8 years from the date of substantial completion of the improvement. "Substantial completion" means that "the construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended." RSA 508:4-b, II.

The Court held that the building was "substantially complete" in November of 2002 when the plaintiff began storing his equipment there. Since both the plaintiff ("possessor") and the Foundation ("owner") intended the building to be used for winter storage, that was the relevant intended use for purposes of applying the statute of repose in this case. The Court ruled that it was irrelevant that the Foundation intended to use the building for additional uses and had made subsequent improvements for that purpose.

The plaintiff was required to bring his claims within 8 years of the date he began storing his equipment – by November of 2010 – and, therefore, the claims against NCI and General Steel were barred.

Gray v. Leisure Life Industries

N.H. Supreme Court,
No. 2012-406
(10/1/13)

AREAS OF INTEREST: Indemnification.

LEGAL IMPACT: When a party that seeks indemnification from another based derivative liability, any settlement with the underlying plaintiff must also extend to the party from whom indemnification is sought, otherwise the duty to indemnify will be extinguished.

FACTUAL SUMMARY:

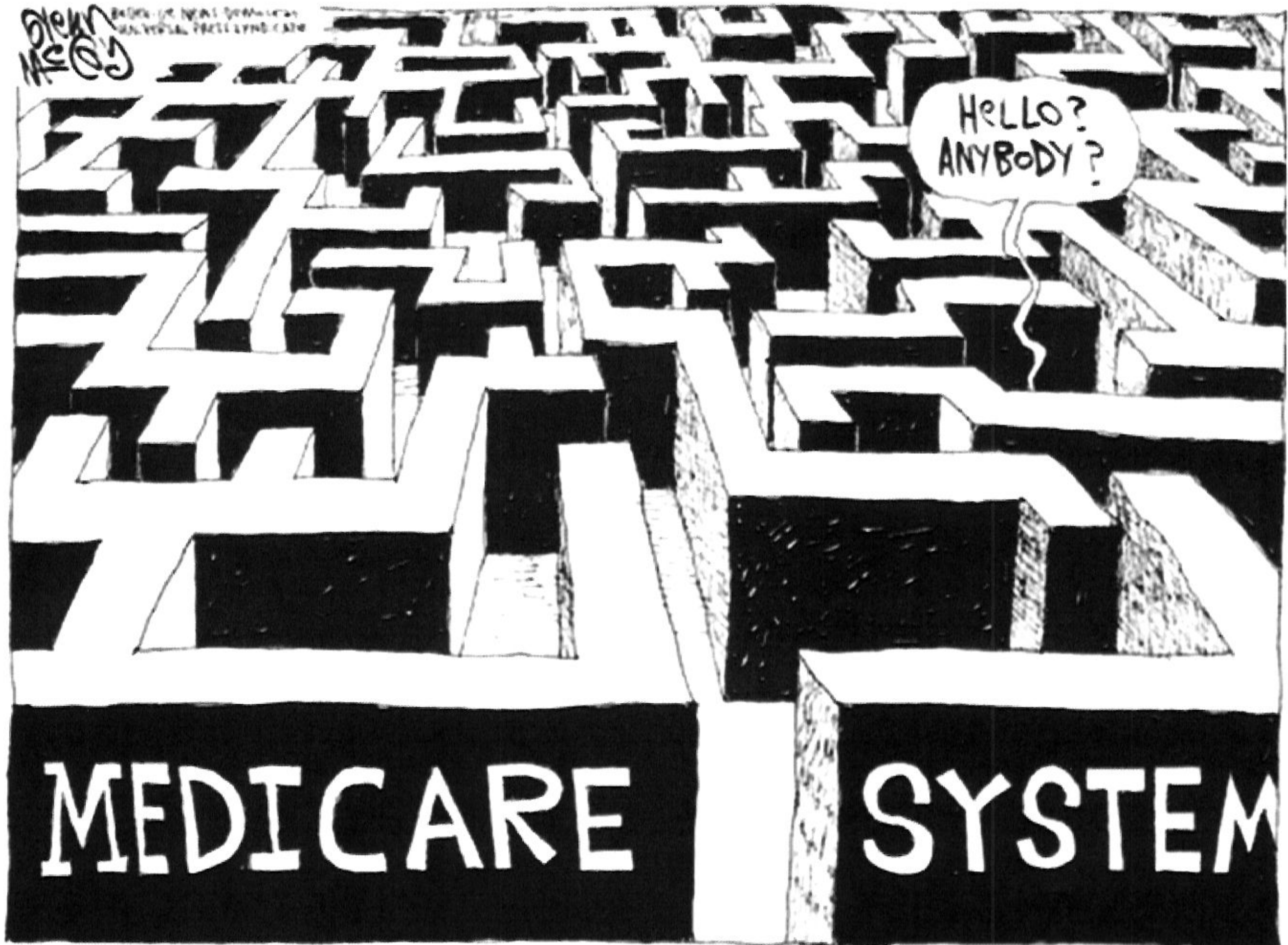
The plaintiff, Mrs. Gray, sustained severe burn injuries when her bathrobe ignited while she was adding firewood to her wood stove. Mrs. Gray, her husband and two sons filed suit against the manufacturer of the robe (Leisure Life) and the company from which the robe was purchased (Orvis Company). They also filed suit against companies involved in the manufacture and sale of the wood stove.

The plaintiffs' claims against Orvis included claims of direct liability as well as a strict liability claim. Orvis successfully moved to add third-party claims against Leisure Life for indemnification and contribution. Orvis argued that it was not involved in the design and manufacture of the robe, but was simply a "pass-through entity" entitled to be indemnified by Leisure Life as to any damages it owed the plaintiff. Orvis also claimed that it was entitled to recover from Leisure Life all attorney's fees and costs Orvis incurred in defending against the claims.

Shortly before trial, the plaintiffs settled their claims against all defendants other than Leisure Life. Orvis paid $1,000,000 and assigned to the plaintiffs all rights to indemnity it had against Leisure Life. The plaintiffs, as assignees of Orvis, moved for summary judgment against Leisure Life based on an implied indemnity theory, however, the court deferred ruling on the motion until after the trial of the plaintiffs' claims against Leisure Life. The jury then returned a defense verdict in favor of Leisure Life.

After prevailing at trial, Leisure Life moved for summary judgment as to the indemnity claims, arguing that the plaintiffs were precluded from recovering due to the defense verdict in its favor. The plaintiffs objected and filed a cross motion for summary judgment. The trial court ruled that plaintiffs only had to prove Orvis' potential liability at the time of settlement and that the verdict did not affect the plaintiffs' right to indemnity. Finding that the plaintiffs had satisfied their burden, the trial court awarded them $1,000,000 based on Leisure Life's obligation to indemnify Orvis for the settlement. The trial court also ruled that since the plaintiffs prevailed on their claim for indemnity, they were also entitled to reimbursement of the attorney's fees and costs that were incurred by Orvis up to the time of the settlement – an additional $298,811.73.

The Supreme Court reversed the decision on appeal. The Court found that any obligation on the part of Leisure Life to indemnify Orvis would be based on the theory that Orvis' liability was derivative of Leisure Life's liability. This form of implied indemnity is based on principles of restitution – that is, it applies when one party (the indemnitee) has discharged a liability that was the responsibility of the other (the indemnitor) to pay and has, therefore, provided a benefit to the indemnitor. Under those circumstances, the indemnitee's payment protects the indemnitor from any future liability. That, however, did not occur in this case. When Orvis settled with the plaintiffs it extinguished its own liability, but did not extinguish the liability of Leisure Life, which remained potentially liable to the plaintiffs. As a result, there was no basis for Orvis (or the plaintiffs as its assignees) to obtain indemnity from Leisure Life and, therefore, Leisure Life was entitled to judgment as a matter of law on the indemnity claim. For the same reasons, the trial court erred in awarding attorney's fees and costs to the plaintiffs.



2013 MEDICARE UPDATE

Strengthening Medicare and Repaying Taxpayer's Act of 2011 ("Smart Act")

The purpose of the Smart Act is to improve efficiencies in Medicare's current reimbursement procedures. The following is a summary of the Smart Act's key provisions:

1. **Medicare to provide final lien information prior to settlement:**

   Section 201 of the Smart Act creates a new early reporting system whereby parties can notify Medicare of an anticipated settlement or judgment. Upon, Medicare is required to provide a final conditional payment letter or final statement of reimbursement in advance of receiving a signed release or proof of a "final" settlement or judgment. If parties notify Medicare of an anticipated settlement within 120 days of an actual settlement, Medicare has up to ninety five (95) days to respond.

2. **Medicare Portal:**

Medicare portal allows parties to access Medicare's claim payment summaries, lien information, and downloadable versions of the final conditional payment letter or final statement of reimbursement.

This information would be treated as a final conditional payment amount subject thereafter to negotiations by plaintiff counsel to reduce Medicare's lien. Medicare is also required to maintain a current claim payment summary by updating its site within fifteen (15) days of a Medicare medical expense payment

3. **New Exemption Threshold for Small Settlements or Judgments:**

A new maximum safe harbor settlement or judgment amount is required annually whereby a settlement/judgment under the threshold would be exempt from having to reimburse or report to Medicare.

4. **Medicare Penalty Language Less Punitive**

Pursuant to the current law, a RRE that fails to report "shall be subject to a civil monetary penalty of $1,000 per each day of non-compliance with respect to each claimant". The SMART Act modifies the statutory language to provide that an RRE may be subject to a civil monetary penalty of up to $1000 for each day and allows for a penalty exemption for good faith reporting efforts.

5. **Social Security and HICN Information to be Optional:**

The Smart Act requires no later than eighteen (18) months after the date of enactment (June, 2014) that the Secretary of Health and Human Services modify reporting requirements so that Responsible Reporting Entities (RRE's) are permitted, but not required, to report a Medicare beneficiary's social security or HICN number.

6. **New Statute of Limitations:**

Three Year Statute of Limitations states that where Medicare is owed payment, the United States must file a complaint within three years after notification of a settlement or judgment to assert its lien recovery right. *See* Eleventh Circuit's decision in United States v. Stricker, *et al.*

7. **Medicare Lien Dispute Resolution to Be Improved**

If a Medicare beneficiary provides Medicare with documentation explaining a discrepancy and offers a proposal to resolve it, Medicare must in turn determine whether there is a "reasonable basis" to include or exclude the claims at issue. Medicare will have a deadline of eleven (11) business days after receipt of such documentation to respond and address the dispute. Medicare beneficiary retains right to an administrative appeal to contest Medicare's final conditional payment demand.

CMS' Interim Final Rule As Required by the Smart Act

CMS is now soliciting public comment regarding the Interim Final Rule.

Web Portal:

1. Expanding the current Medicare Secondary Payer Recovery Contractor (MSPRC) Web Portal increasing security features to increase the amount of information available through the portal no later than January 1, 2016.

2. Requiring the requesting party(s) to provide "initial notice" of settlement, judgment or award at least 185 days before the anticipated date of settlement.

3. Compilation of "related claims" by CMS/MSPRC to be posted within 65 days of initial notice with an additional 30 days for system failures, and/or cases that require the contractor to manually examine claims.

4. A method to request a "claims refresh" at any time with confirmation to be received within 5 business days of the request (to be available on or before January 1, 2015); and for CMS to refresh on its own.

5. Developing a dispute process within the Portal, wherein the parties are restricted to a *single dispute* that CMS must resolve within 11 business days.

6. Developing a process to provide a Final Conditional Payment summary form only when disputes have been resolved and settlement is reached within 3 days of the date of the summary form (to be implemented no later than January 1, 2016).

Reporting Claim Resolution

1. Providing a method of reporting a settlement within 30 - 90 days

    - If 3 days *before* settlement, the Final Conditional Payment summary form is dispositive
    - If 30 days or less *after* settlement, information must be requested through the portal and a Final Demand is generated
    - If reported more than 90 days after settlement, the Final Conditional Payment amount received through the Portal is void and a new Final Demand is generated

    Exception: Implementing a specific notice requirement in cases involving exposure to toxic substances, environmental hazard, ingestion and implants.

Comparison between Smart Act and Rule

Deadlines ignore Smart Act's desire for faster resolutions and better "customer" service.

- Implementation dates in 2016
- Restricts requests for Conditional Payment amounts to a single request within a given 120 day period prior to settlement
- CMS's ability to refresh the lien amount(s) on its own despite risk of detrimental reliance.
- Nothing about fines and penalties associated with Mandatory Insurer Reporting
- Nothing about threshold amounts / safe harbor amounts
- Nothing about the use of Social Security numbers or Health Insurance Claim numbers
- Parties restricted to a single dispute barring administrative appeal or judicial review
- Parties may only be able to rely on the Final Conditional Payment Summary form if they settle or conclude the matter within 3 days of the generation of the form or otherwise await a Final Demand letter