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NEWSLETTER

New Hampshire, Massachusetts, Maine & Vermont

February 2019 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

EQUINE ACTIVITY STATUTE

Franciosa v. Hidden Pond Farm, Inc.

(September 21, 2018)

The plaintiff's minor child was severely injured when she was stepped on by a horse while trying to dismount. She was 13 years old and had been riding horses for 8 years. She had been taking weekly riding lessons for 2 years and also sometimes went on a "free ride" without supervision. At the time of the accident the minor plaintiff was on an unsupervised "free ride".

Under New Hampshire's equine activities statute RSA 508:19, equine activity sponsors and equine professionals are immune from liability for injuries resulting from the inherent risks of equine activities, including the propensity of equines to behave in ways that may result in injury. The statute, however, also provides for exceptions for failure to make reasonable efforts to determine the ability of the participant to safely engage in the equine activity and for acts constituting willful or wanton disregard for safety.

The trial court granted summary judgment in favor of the defendants and the plaintiff appealed. After engaging in an extensive analysis of the equine activity statute and its exceptions, the Supreme Court affirmed the trial court's decision. Parties to lawsuits involving equine activities should review this case for guidance relative to the interpretation and application of the statute.

STATUTE OF LIMITATIONS CLAIMS AGAINST DECEDENTS

Anderson v. Estate of Wood

(November 29, 2018)

The plaintiff was injured in a motor vehicle accident on April 5,

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New Hampshire
Superior Court
E-FILING
September 18, 2018

2013 involving another vehicle driven by Mary D. Wood. On March 25, 2016, the plaintiff filed a complaint alleging that Wood negligently rear-ended her vehicle, however, the complaint was mistakenly served on Wood's daughter who was also named Mary D. Wood. The intended defendant had died intestate on January 22, 2015 and no estate was opened following her death.

Wood moved to dismiss the complaint since she was not the administrator of the estate. The plaintiff moved to amend her complaint alleging that she had filed a petition for estate administration and sought to substitute the Estate of Mary D. Wood as the defendant. The court dismissed the complaint based on lack of jurisdiction because the plaintiff did not submit proof that a grant of administration of the estate had been issued by the court and, as a result, there was no legal entity to substitute for the daughter.

In August of 2016 a certificate of appointment was issued naming an administrator for the estate. On April 4, 2017, the plaintiff filed her complaint against the Estate of Mary D. Wood. The Estate moved to dismiss based on the statute of limitations. The trial court granted the motion ruling that since the action was one for personal injury and it was not pending at the time of death, RSA 556:11 controlled and the three-year statute of limitations under RSA 508:4 applied. The court ruled that the statute of limitations ran on April 5, 2016 and the claims were barred.

The plaintiff appealed arguing that the trial court misapplied RSA 556:11 which states that "If an action is not then pending, one may be brought for such cause at any time within 6 years after the death of the deceased party, subject to the provisions of RSA 508." The plaintiff argued that her claims were timely because three years had not yet passed at the time of the death and because her complaint was filed less than six years after the death. The defendant argued that under the Court's decision in Cheever v. Southern New Hampshire Regional Medical Center, 141 N.H. 589 (1997), RSA 556:11 is subservient to the three-year statute of limitations in RSA 508:4 and, therefore, the claim was barred.

The Court held that under Cheever the statute of limitations for claims against decedents is three years, not six years as plaintiff contended. However, the Court also held that under RSA 556:11 the limitations period begins to run on the date of death. Thus, a claim is time-barred by RSA 556:11 unless brought within three years after the decedent's death. Since the plaintiff's claims were not time-barred by RSA 508:4 at the time of Wood's death and the lawsuit was brought within three years after the death, the action was timely.

DEFAMATION - "GOLDEN RULE" ARGUMENT

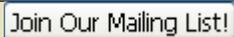
MacDonald v. Jacobs
(January 15, 2019)

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The plaintiffs owned a vacation home near the defendant's property. The defendant engaged in a letter writing campaign accusing the plaintiffs of a variety of illegal activities, including assertions that the plaintiffs were liars and sociopaths, had a deceptive rental business, attempted to kill her, engaged in witness tampering, stalked her, vandalized her property, drive drunk, use illegal drugs and are alcoholics. The plaintiffs filed a defamation lawsuit against the defendant which resulted in a jury finding that the statements were defamatory and made with malice, warranting an award of special damages. The trial court also issued a permanent injunction prohibiting the defendant from going within a five-mile radius of the plaintiffs' home. The defendant appealed.

First, the defendant argued that the trial court erred when it denied her motion for a mistrial based on statements made by plaintiffs' counsel in closing argument. Defendant argued that statements asking the jury to imagine what it would be like to have to deal with anxiety caused by "the neighbor from hell who wants to drive you away" while trying to relax in your "perfect summer home" was an improper "golden rule" argument because it asked the jurors to put themselves in the shoes of the plaintiffs. Without addressing the propriety of "golden rule" arguments, the Court held that the statement made by plaintiffs' counsel was not an "appeal to passion, prejudice or sympathies" but was instead a permissible "fair comment on the evidence" in light of the plaintiffs' testimony about their anxiety and fear caused by the defendant's actions.

The defendant also argued that the plaintiffs failed to establish that they sustained any damages, either general or specific, as a result of the alleged defamation because they could not identify anyone who actually believed her statements and formed a negative opinion of the plaintiffs based on those statements. The Court disagreed, ruling that proof of specific damages is not required when defamatory statements charge the plaintiff with a crime or with activities that would tend to injure the plaintiff in a trade or business. The defendant's statements were defamatory per se, entitling the plaintiffs to damages.

Next, the defendant argued that the plaintiffs were required to prove "actual malice" to support an award of enhanced compensatory damages. However, in defamation cases the "actual malice" requirement applies only in the case of a public official or public figure. Private persons such as the plaintiffs can recover damages based on proof of negligent publication of defamatory statements. Furthermore, enhanced compensatory damages may be awarded when, as in this case, the defendant's conduct is "wanton, malicious, or oppressive."

The Court also rejected the plaintiff's argument that her statements were protected under the First Amendment because they involved matters of "public concern", triggering a requirement of "actual malice" and heightened judicial review. Matters of public concern relate to "any matter of political, social, or other concern to the community" and subjects of "legitimate news interest" that is "of general interest and of value and concern to the public." The defendant's unfounded personal attacks on the plaintiffs involved solely matters of private concern, were "wholly false and clearly damaging" to the plaintiffs' reputation, and were not

constitutionally protected.

Finally, the Court upheld the injunction as a proper exercise of the trial court's discretion to grant equitable relief in light of statements the defendant had made to law enforcement authorities to the effect that she had "fears of homicidal ideation" of killing the plaintiffs, referred to neighbors killing one another, etc. which demonstrated that she was irrational and capable of inflicting harm.

UNITED STATES DISTRICT COURT NEW HAMPSHIRE

LIABILITY INSURANCE - LATE NOTICE

Nautilus Ins. Co. v. Gwinn Design & Build LLC, et al

(December 11, 2018)

A lawsuit was filed against Gwinn Design in state court for breach of contract and construction defects. Gwinn Design defaulted and a judgment in the amount of \$252,665.17 was entered against it.

Although Gwinn Design was insured under a commercial general liability policy issued by Nautilus, it failed to provide notice of the lawsuit until after the default judgment was entered. The plaintiff's attorney notified Nautilus of the default judgment approximately seven months after it was entered. Five months after that an attorney hired by Nautilus to represent Gwinn Design filed a motion to have the default set aside, alleging that the company's owner failed to respond to the lawsuit due to personal reasons, including his wife's divorce action against him. The trial court denied the motion.

Nautilus then filed a declaratory judgment action seeking a ruling that Gwinn Design waived any entitlement to coverage by failing to comply with the policy's notice requirements which provided that the insured must notify it "as soon as practicable" of an occurrence, claim or suit.

In New Hampshire, breach of a policy's notice requirements in an occurrence-based policy precludes coverage only if the breach is substantial. The court will consider the length of the delay, the reasons for the delay and whether the insurer is prejudiced as a result of the delay.

The court ruled that the delay was significant since notice was not provided until two years after Gwinn Design learned of its client's dissatisfaction with its work and ten months after suit was filed. The court also found that the owner's personal circumstances did not explain why notice was not provided in a timely manner. Finally, the court ruled that the uncontested default judgment constituted prejudice and resulted in a forfeiture of coverage.

