

Getman,
Schulthess,
Steere &
Poulin, P.A.



1838 Elm Street
Manchester, NH 03104
603-634-4300
www.gssp-lawyers.com

**TELEPHONE
EXTENSIONS**

Laurence W. Getman
x 703
Stephen J. Schulthess
x 702
Douglas N. Steere
x 704
Christopher J. Poulin
x 799
Jill A. DeMello
x 766
Naomi L. Getman
x 732
Elizabeth L. Hurley
x 788
Clara E. Lyons
x 725
Debbie L. Makris
x 726
Tracy L. McGraw
x 735
Edwinna Vanderzanden
x 742
Heather S. Ward

NEWSLETTER

New Hampshire, Massachusetts, Maine & Vermont

November, 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

RESTATEMENT (SECOND) OF TORTS §324A APPLICABLE TO CLAIMS AGAINST SNOWPLOW CONTRACTORS

Bloom v. Casella Construction, Inc.

(October 16, 2019)

The plaintiff, a nurse at Dartmouth-Hitchcock Medical Center (DHMC), was injured when she slipped and fell on ice in the employee parking lot. The plaintiff claimed that it had snowed a couple of inches the night before, that some of the snow had melted and refrozen overnight, and there was no sand or ice melt applied to the lot.

Casella Construction had contracted with DHMC to provide certain snow removal services in accordance with "Snow Plowing Guidelines" attached to the contract. The contract stated that DHMC would perform all salting and sanding unless its grounds supervisor requested assistance. The contract provided that salt is applied at the start of plowing operations and after storm cleanup or as directed by

x731
Brendan L. Wile
x 708

**Massachusetts
Licensed Attorneys:**

Laurence W. Getman
Christopher J. Poulin
Debbie L. Makris
Tracy L. McGraw
Clara E. Lyons
Heather S. Ward

**Vermont
Licensed Attorneys:**

Debbie L. Makris

**Maine
Licensed Attorneys:**

Douglas N. Steere
Elizabeth L. Hurley
Edwinna Vanderzanden

**New Hampshire
Licensed Attorneys:**

Laurence W. Getman
Stephen J. Schulthess
Douglas N. Steere
Christopher J. Poulin
Jill A. DeMello
Naomi L. Getman
Elizabeth L. Hurley
Clara E. Lyons
Debbie L. Makris
Tracy L. McGraw
Edwinna Vanderzanden
Heather S. Ward
Brendan L. Wile

the grounds supervisor. The contract also stated that Casella "shall apply salt and/or sand only as directed" by the grounds supervisor.

The plaintiff, who was unable to file suit against DHMC due to the workers compensation bar, filed suit against Casella alleging that it negligently failed to maintain the premises in a reasonably safe condition. Casella moved for summary judgment, arguing that it did not owe a duty of care to the plaintiff. The trial court granted the motion and the plaintiff appealed.

The Supreme Court affirmed in part and reversed in part. The Court rejected the plaintiff's argument that despite the fact that she wasn't a party to the contract between Casella and DHMC, Casella owed her a duty based on the "mutuality of interest" that both she and DHMC had in avoiding workplace injuries. The Court found that there was nothing in the contract to indicate that DHMC's intent was to protect its employees from workplace injuries or to benefit third parties. Therefore, there was no third-party beneficiary relationship.

The Court also rejected the plaintiff's argument that Casella owed her a duty based on foreseeability. In *Hungerford v. Jones*, 143 N.H. 208 (1998), the Court had held that "parties owe a duty to those foreseeably endangered by their conduct with respect to those risks whose likelihood and magnitude make the conduct unreasonably dangerous." The Court ruled that there was no evidence to support a claim that the activity at issue involved a risk sufficient to give rise to such a duty.

Finally, the Court addressed the plaintiff's argument that liability was supported by Section 324A of the Second Restatement of Torts which provides that one who undertakes to provide services to another which are necessary for the protection of a third person is subject to liability to the third person for his failure to exercise reasonable care if: (1) the failure to exercise reasonable care increases the risk of harm; (b) he has undertaken to perform a duty owed by the other to the third person; or (c) the harm is suffered because of reliance on the undertaking.

The Court ruled that Section 324A was applicable to its analysis as to whether liability exists. It agreed with the trial court that subsection (a) did not apply because there was no evidence that Casella did anything to increase the harm. It also agreed that

**GETMAN,
SCHULTHESS,
STEERE & POULIN,
P.A.**

Laurence W. Getman
Getman, Schulthess,
Steere & Poulin, P.A.

1838 Elm Street
Manchester, NH 03104
(603) 634-4300
FAX (603) 626-3647

Website:
www.gssp-lawyers.com

New Hampshire
Superior Court
E-FILING
September 18, 2018

**Phone Number for
ALL New Hampshire
Courts**

New Hampshire
Courts
1-855-212-1234

subsection (c) did not apply because the plaintiff did not allege that she was injured because of reliance upon Casella's undertaking.

However, the Court disagreed with the trial court's ruling that in order for subsection (b) to apply the contractor must have completely subsumed or supplanted the property owner's responsibility to keep its property free from unreasonable risks of harm. Instead, the Court ruled that subsection (b) is applicable when any part of the duty to perform a service on which others depend has been delegated to the defendant. Applying subsection (b), the Court held that there was a genuine issue of material fact as to the scope of Casella's undertaking with regard to salting and sanding. As a result, the Court reversed the entry of summary judgment and remanded the case for further proceedings.

**STATUTE OF REPOSE APPLICABLE TO
CLAIMS FOR INDEMNITY AND CONTRIBUTION**

Rankin v. South Street Downtown Holdings, Inc. v.
Truexcullins and Partners Architects. et al

(August 6, 2019)

In March of 2015, the plaintiff was injured when he fell while using an allegedly "inadequate and dangerous ramp or partial stair" that "did not meet applicable building codes" located on business property owned by defendant South Street. The plaintiff and his wife filed suit against South Street in March of 2017.

South Street then filed a third-party complaint against the project architect and the landscape architect seeking indemnity and/or contribution. South Street had hired the third party defendants to serve as design professionals for renovations to the property that began in 2002 and were substantially completed by January of 2009.

The third party defendants moved to dismiss the claims against them on the grounds that the claims were barred by the statute of repose, RSA 508:4-b, because South Street's third-party action was brought more than 8 years after substantial completion of the improvements.

Join Our List

 [Forward to a Friend](#)

[Join Our Mailing List!](#)

The trial court transferred the question of the applicability of the statute of repose to claims for indemnity and contribution to the Supreme Court.

The Supreme Court examined the language of RSA 508:4-b and found that none of the limited exceptions set forth in the statute of repose applied to claims for indemnity and contribution. In addition, the Court noted that in a prior case it had broadly interpreted the statutory language which provides that it is applicable to "all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of improvement to real property" as "unambiguously encompass[ing] all types of claims" arising from a deficiency in the creation of an improvement to real property. The Court rejected South Street's argument that the term "economic loss" was limited to the cost of repairing a defective product, and ruled instead that "economic loss" means a loss that is financial, fiscal or monetary. The Court noted that indemnification is a claim for compensation for economic losses in the form of damages paid to a third person regardless of whether the underlying loss is economic or the result of physical injury or damage to property. Furthermore, the intent of the statute of repose is to protect those in the building trades from infinite liability perpetuated by the discovery rule.

The Court concluded that the third-party claims for indemnity and contribution were claims for economic loss arising out of an alleged deficiency in the creation of improvement to real property and, therefore, they were barred by the statute of repose.

**DeBENEDETTO APPORTIONMENT AMONG
ENTITIES IN
PRODUCT CHAIN OF SUPPLY NOT
APPLICABLE
TO BREACH OF WARRANTY CLAIMS**

Virgin v. Fireworks of Tilton, LLC, et al
(August 6, 2019)

The plaintiff was injured as the result an incident involving fireworks sold by defendant Fireworks of Tilton and distributed by defendant Foursquare Imports. The plaintiff's complaint against the defendants included claims for breach of the implied warranty of merchantability.

Pursuant to DeBenedetto, the defendants sought to apportion liability to a Chinese company that had manufactured the fireworks but was not a named defendant in the lawsuit. The plaintiff moved to strike the DeBenedetto disclosure on the grounds that apportionment of fault does not apply to breach of warranty claims. The trial court denied the motion but granted the plaintiff's request for an interlocutory appeal.

RSA 507:7-e, I provides that "in all actions, the court shall" instruct the jury to determine the amount of damages to be awarded based on the proportionate fault of the parties. Under the DeBenedetto case the term "parties" includes settling parties as well as those immune from liability or not otherwise before the court. The plaintiff argued that the apportionment statute only applies to tort actions. The defendants argued that the phrase "in all actions" means that the statute was intended to cover all actions, including those based in contract.

The Court noted that if it was to accept the defendant's position that apportionment applies to breach of warranty claims between entities in the supply chain of a product, the plaintiff would be forced to joint all potentially liable parties, including upstream manufacturers and suppliers. This would conflict with the purpose of imposing implied warranties on all sellers of product - that is, enabling injured consumers to obtain complete relief against any entity in the chain of distribution.

The Court concluded that DeBenedetto apportionment under RSA 507:7-e does not apply to breach of warranty actions between persons or entities in the supply chain for liability predicated on the same warranty. The Court recognized that its holding may result in responsibility being placed on defendants in the supply chain who played little or no role in creating the condition that constituted the breach of warranty. However, the Court noted that the entities held liable for breach of warranty have the ability to pursue indemnity actions against the manufacturer. In addition, the plaintiff injured by

a product can sue the manufacturer directly since there is no contractual privity requirement.

Because the only absent party was the manufacturer, the Court had no occasion to consider whether defendants in the supply chain of a product may seek to apportion liability to a third party outside of the supply chain or to a third party within the supply chain whose liability is predicated on a basis other than sale of an unmerchtable product.

**MASSACHUSETTS
SUPREME COURT**

**AUTOMOBILE LIABILITY INSURANCE -
POST-JUDGMENT INTEREST ON
UNREASONABLE SETTLEMENT
WHERE COVERAGE IS CONTESTED**

**Commerce Insurance Company v.
Szafarowicz/Szafarowicz v. Padovano**

(October 1, 2019)

Shortly after an altercation in a bar, David Szafarowicz was struck and killed by a motor vehicle operated by Matthew Padovano. Padovano pled guilty to voluntary manslaughter in connection with the incident. The vehicle operated by Padovano was owned by his father and insured under an automobile insurance policy issued by Commerce in the amount of \$20,000 per person compulsory insurance and \$480,000 per person optional insurance.

Szafarowicz's estate filed a wrongful death action against the Padovanos. Commerce acknowledged a duty to defend and its duty to pay the \$20,000 in compulsory insurance, but issued a reservation of rights as to the \$480,000 optional insurance based on its position that the death was caused by Padovano's intentional act and was not an "accident". Commerce filed a separate declaratory judgment action.

The wrongful death action and declaratory judgment action were consolidated for purposes of discovery only. However, less than three weeks prior to the trial of the wrongful death action, Commerce filed an emergency motion to intervene. Commerce claimed that based on the prosecutor's summary of evidence at Padovano's plea hearing, after Szafarowicz and Padovano had engaged in an altercation at the bar, Padovano drove his vehicle toward Szafarowicz, accelerated, ran him over and dragged him 40-50 feet, killing him. In the wrongful death action, the estate's attorneys claimed that when Padovano returned in his vehicle to the bar's parking lot he was frightened by unknown persons who came from the bar with knives and he did not see Szafarowicz when he ran over him. Commerce argued that it should be permitted to intervene in the wrongful death action because the parties would not have any incentive to offer evidence tending to show that the incident was not an accident since they wanted insurance coverage for the claims. Commerce wanted to ensure that if a judgment issued based on a finding of negligence rather than intentional conduct, it would not be foreclosed from litigating that issue in the declaratory judgment action.

The judge denied the motion to intervene. Although the judge acknowledged that Commerce had a legitimate concern about the risk of "underlitigation", it also recognized the need to balance the insurer's rights with those of the insured, including the prejudice resulting from the insurer's presentation of evidence that the insured acted intentionally and the fact that the jury would be alerted to the possible existence of insurance coverage. Seeking to balance these considerations, the trial judge ruled that the following litigation of the wrongful death action, Commerce could bring a post-tort trial declaratory judgment action in which the judge would determine whether the issue which determined insurance coverage was "fairly litigated" in the tort trial. Commerce then moved to stay the wrongful death trial until after the question of insurance coverage was decided, but that motion was also denied.

Shortly before the wrongful death trial the parties to the tort case reached a settlement agreement in which Padovano agreed that he was "grossly negligent" and his father admitted liability for negligent entrustment. The parties agreed that damages would be determined in a jury-waived proceeding. The estate agreed that it would not seek to enforce any judgment beyond the amount of insurance coverage and the Padovanos assigned their rights with respect to insurance

coverage to the estate and agreed to cooperate with the estate in litigation related to insurance coverage. Commerce objected to the terms of the settlement agreement.

The judge rejected Commerce's objections and entered judgment in the amount of approximately \$7.7 million, including interest. Commerce also paid the \$20,000 in compulsory coverage and, in an attempt to stop post-judgment interest from accruing (at a rate of over \$920,000 a year), filed a motion seeking permission to deposit its optional policy limit of \$480,000 with the court or in an interest-bearing account pursuant to Mass. R. Civ. P. 67. Commerce's policy provided that it would pay, in addition to the compulsory and optional limits, interest that accrues after judgment is entered in any suit it defends, but that it would not pay any interest accruing after Commerce offers to pay up to the policy limits. The court denied the motion because Commerce's offer to pay the optional limit was not unconditional since Commerce intended to seek the return of that sum in the event that it prevailed in the declaratory judgment action.

In the meantime, the declaratory judgment action proceeded to a jury-waived trial. The judge ruled that Commerce did not owe a duty to indemnify because Padovano accelerated knowing to a substantial certainty that his vehicle would strike the decedent. As a result, the court ruled that Commerce did not have to pay the \$7.7 million judgment beyond the \$20,000 compulsory coverage. However, the court ruled that under the terms of its policy Commerce was obligated to pay post-judgment interest.

Commerce appealed the unfavorable rulings to the Supreme Judicial Court.

The SJC first ruled that the trial court did not abuse its discretion in denying Commerce's motion to stay the wrongful death action pending resolution of the declaratory judgment proceeding. An insurer that contests coverage does not automatically have a right to stay the underlying proceedings. The court will consider many factors including: (1) whether a stay would delay or expedite final resolution of the underlying tort action; (2) whether trying the tort action first may render the declaratory judgment action moot; (3) whether the insured would be required to procure its own counsel to defend it in the tort action in the event that the insurer prevailed on the coverage issues; (4) whether all the parties are parties to both the tort action and declaratory action so that they can adequately protect

their interests; and (5) whether the insurer will be unfairly prejudiced in the trial of the declaratory judgment action if it was to be bound by a finding during the adjudication of the underlying tort case. The Court ruled that the trial court protected Commerce from prejudice by granting it the opportunity to seek review of the underlying trial to determine whether the trial was fairly litigated. Furthermore, the Court found that Commerce was not in fact prejudiced by the settlement agreement because the judge in the declaratory judgment action independently determined that the death was not an accident.

Next, the SJC ruled that the trial court did not abuse its discretion in denying Commerce's motion to pay the \$480,000 limits into court or a bank account under Rule 67. The Court held that because the offer was not unconditional, it would not have stopped the accrual of post-judgment interest. As a result, Commerce remained obligated to pay the post-judgment interest that accrued. [It should be noted that the accident in this case occurred in 2013. In 2016, the standard Massachusetts automobile insurance policy, which is prescribed by statute, was amended to reduce the scope of post-judgment interest that an insurer is required to pay and now provides that the interest will accrue only on that part of the judgment or award that is within the limits of liability.]

Finally, the SJC addressed Commerce's challenge to the validity of the settlement agreement. Commerce relied on a policy provision stating that it would not be bound by a settlement entered into without its consent. However, the Court explained that where an insurer defends under a reservation of rights and seeks a declaration that it owe no obligation to indemnify, it has no right to control the defense with respect to settlement. An insured is entitled to mitigate the risk that he or she will be personally responsible for a judgment by entering into a settlement that will protect him or her from liability or diminish the amount of judgment. Under these circumstances, the insured is not in breach of the policy provision by settling without the insurer's consent.

However, while the settlement amount is binding on the parties to the agreement, whether the insurer should be bound is a separate issue. The Court ruled that Commerce was not bound by the parties' stipulation of negligence and was not bound to pay the damages under its optional coverage since the judge in the declaratory judgment action ruled that the death was not an accident. Since Commerce recognized a duty to defend, it was obligated under the terms of its policy to pay post-judgment interest, but the question

remained as to whether Commerce was bound by the amount agreed upon by the parties. The Court recognized that the risk of collusion exists when the insured assigns his rights under the policy in exchange for a release from liability. However, the Court declined to rule that such agreements are automatically unenforceable. Instead, it ruled that when an insurer defends under a reservation of rights it is bound by the amount of the judgment resulting from a prejudgment settlement/assignment agreement where: (1) the insurer has notice of the settlement/assignment agreement and an opportunity to be heard before judgment is entered; (2) the insurer contests the judgment; and (3) the insured establishes during a hearing that the amount of the settlement is reasonable.

Here, Commerce preserved its right by objecting to the settlement/assignment agreement on the record. Because no reasonableness review was conducted, the SJC vacated the judgment and remanded the case for a hearing on reasonableness. The Court noted that since the settlement exceeded the \$500,000 policy limits it was per se unreasonable, but a hearing was required to determine what amount would be reasonable. Commerce would be obligated to pay interest on that amount going back to the date of the original judgment. The Court noted that typically a court rejecting a settlement during a reasonableness hearing will invite the parties to re-negotiate, however, since so much time had passed in this case the Court ruled that the judge would decide a reasonable amount.

MASSACHUSETTS APPEALS COURT

RULE 54(b) CERTIFICATION AND INDEMNIFICATION CLAIMS

Yanis v. Paquin
(September 26, 2019)

Yanis was a tenant in an apartment owned by Paquin. When Yanis moved into the apartment the natural gas stove did not work. Paquin was initially going to replace the stove, but due to cost decided to hire Sclamo's Appliance & Furniture, Inc. to repair it instead. After several attempts to repair the stove, a Sclamo's employee told Yanis that it was fixed and operational. Shortly after that the pilot light

went out. When Yanis attempted to relight it, an explosion occurred resulting in severe burn injuries to his hand.

Yanis filed suit against Paquin based on negligence, vicarious liability for Sclamo's negligence, breach of the implied warranty of habitability and breach of the covenant of quiet enjoyment. He also sued Sclamo's based on negligence, breach of contract as a third-party beneficiary, violation of G.L. c. 93A and strict liability. Paquin and Sclamo's asserted cross-claims against each other for contribution and indemnification.

Yanis and Sclamo's reached a settlement agreement for \$15,000 in exchange for a release of all claims Yanis had against Sclamo's. With Yanis's assent, Sclamo's filed a motion for entry of a separate and final judgment pursuant to Mass. R. Civ. P. 54(b) which provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

This is commonly referred to as Rule 54(b) certification. Paquin opposed the motion arguing that his cross claim for indemnification substantially overlapped the settled claims and was not extinguished by the settlement under G.L. c. 231B, §4(b), which provides that when a release is given to one of two or more tortfeasors it discharges the tortfeasor from all liability for contribution to any other tortfeasor.

The judge ordered the entry of separate and final judgment dismissing Yanis's complaint against Sclamo's. The judge agreed that G.L. c. 231B, §4(b) only discharged Sclamo's from liability for contribution and did not affect indemnity claims. However, the judge found that Paquin was not entitled to indemnification because he was not without fault.

The Appeals Court vacated the Rule 54(b) certification and entry of separate and final judgment because Paquin's cross claim overlapped factually and legally with Yanis's dismissed claims against Sclamo's,

thereby constituting a single claim rather than multiple claims for purposes of Rule 54(b). The Court also noted that the judge failed to make express factual findings that there was no just reason for delay as required under Rule 54(b). The Court remanded the case for further proceedings because whether Paquin had a contractual right to indemnification or whether he was free from fault so as to be entitled to common law indemnification were dependent on facts that were not yet determined.