

LEX LOCI: A Survey of Recent New Hampshire Supreme Court Decisions
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Since New Hampshire has no intermediate appellate court, the New Hampshire Supreme Court is presented with a wide-ranging array of appeals involving sometime prosaic areas of practice. The recent decisions of the New Hampshire Supreme Court indeed reflect the broad nature of the cases brought to it. This column will focus attention on some of the areas of the practice of law that often receive less attention in this column, such as workers' compensation, proximate cause, insurance coverage, comparative negligence, legal malpractice, criminal law, property rights, and lawyer misconduct.

Appeal of Murray, decided July 21, 1998, is a workers' compensation appeal where the Supreme Court overturned the Compensation Appeals Board decision to deny the injured worker the reasonable costs of her travel to and from her doctor for treatment for her injured back. After her back injury, the plaintiff moved to Puerto Rico on the advice of her Manchester physician. She continued to consult with her physician in New Hampshire and sought recovery under the Workers' Compensation Act for her travel costs and expenses. In the Supreme Court, the Compensation Appeals Board argued that the determination of whether travel expenses are reasonable required the testimony of a medical expert but the Supreme Court held otherwise, stating that

[t]he determination of whether the travel expenses are reasonable in some instances may not require expert medical testimony. Unlike a determination of medical causation, for example, that by its nature lies solely in the province of medical experts... a claimant may be able to establish through lay testimony that travel outside the local area was warranted. Moreover, in order to give substantial effect to a claimant's statutory right to choose the doctor best suited to the claimant's needs...we will require only that claimants provide some competent evidence of reasonableness.

Acadia Insurance Company v. McNeil, decided May 22, 1998,] was the Supreme Court answer to a question certified to it by the First Circuit that concerned an ocean marine insurance policy issued in New Hampshire by the plaintiff insurance company to cover a yacht. The policy contained an exclusion for liability for suits between or among members of the insured's family. However, RSA 412:2,II provides that no **liability** policy issued or delivered in the state shall contain any exclusion that would preclude coverage for intra-family or inter-spousal claims. The plaintiff insurance company argued that RSA 412:2,II applied only to general liability policies and not marine insurance policies. The Supreme Court thought otherwise, pointing out that its many prior interpretations broadly defining liability policies as well as the legislative history of

the statute led it to conclude that ocean marine policies are subject to the provisions of RSA 412:2,II, and, therefore, the exclusion was not a valid one.

One of the few discussions of legal malpractice in New Hampshire arose recently in an insurance coverage context in the case of *Shaheen, Cappiello, Stein & Gordon v. The Home Insurance Company*, decided September 30,1998. The case came up to the Supreme Court on an appeal by the defendant insurance company of the plaintiff insured's successful petition for declaratory judgment which had been granted in the superior court which had decreed coverage. The insurance company defended in the Supreme Court on the basis that the insured law firm had failed, upon renewal of the policy, to give notice to the company of the fact that a claim had been made earlier against it. The issue thus became whether or not the insured under the facts of the case had knowledge or had become aware of any act or omission "which could reasonably be expected" to give rise to a claim under the policy. Before its renewal, the plaintiff law firm had learned that a malpractice claim could possibly be made against it in a divorce action and discussed it with the potential claimant but at that point the potential claimant elected to have the plaintiff law firm proceed with correcting the action, if possible, so that she would not be damaged in the underlying divorce action. The plaintiff law firm did not at that time give notice to the insurance company but proceeded to argue the potential malpractice claimant's position in the divorce action. The marital master rejected the argument and ruled against the claimant. At this point, the plaintiff law firm gave notice to the malpractice carrier (but after the renewal of its policy under which it had earlier reported no claims against it).

The Supreme Court defined for the first time (at least in the author's often faulty memory) legal malpractice in New Hampshire as occurring "when an attorney breaches a professional duty **and damages occur as a result...** [A] cause of action...arises once all the necessary elements are present." (Emphasis in original).

Turning to the insurance policy containing the above quoted language requiring reporting of any act or omission "which could reasonably be expected" to give rise to a claim, the Supreme Court held that the plaintiff law firm had met its burden of proof:

By using the phrase 'reasonably be expected,' Home Insurance apparently requires that its insureds exercise professional judgment at several critical junctures. First, Home Insurance requires insureds to exercise their judgment before triggering the reporting requirement for potential claims. A similar ambiguity arises upon renewal, when Home Insurance requires its insureds to disclose 'any incident, act or omission **which might reasonably be expected** to be the basis of a claim or suit arising out of the performance of professional services for others.' (Emphasis added). The ambiguity in determining whether potential claims must be reported when renewing the policy is

identical to the ambiguity in determining when to report a potential claim during the policy period. Accordingly, we agree with the trial court's determination that the plaintiffs acted reasonably in concluding that reporting was not required in May 1991 since a claim was not 'reasonably...expected to be the basis of a claim or suit' until September 1992. If Home Insurance wishes to require reporting in every instance of an actual or a potential claim in order to guarantee coverage, it must use clear policy language to do so (Emphasis in original).

Score one for the lawyers! This decision will be quite helpful to law firm administrators and lawyers who frequently wrestle with the issue of when a potential malpractice claim must be reported to the firm's malpractice carrier.

Burse v. Hudson, decided September 30, 1998, establishes that a marital party in a divorce proceeding has standing to protect her inchoate interest to property owned by a corporation that the libelee marital party owned at the time of the divorce before a tax deed to a town may be issued. The facts showed that in 1991 the wife filed a libel for divorce against her husband after which the superior court issued the usual order prohibiting any transfer, encumbrance, hypothecation, etc., of any marital property by either party. A major marital asset was the libelee husband's stock of a corporation that owned property in the town of Hudson. In violation of the court's order, the libelee husband and his wholly owned corporation failed to pay the 1993 real estate taxes due on the property and the town placed a tax lien on the property in 1994. In 1996, the town sent the corporation a notice of the pending tax deed. The libellant wife learned of the town's actions and advised the town of the divorce proceedings and her claim to the real estate as marital property. She offered to pay the taxes and asked for a delay in the deeding of the property. The wife brought a temporary restraining order against the town, but that was denied by the superior court and the town's tax collector then issued a tax deed to the town. The libellant wife appealed to the Supreme Court which gave her relief, finding that

Even though the plaintiff lacked title to both the real estate and [the libelee's corporation] stock, her interest in the corporation and its assets was protected by the 1991 temporary decree, which granted the plaintiff, *inter alia*, an equitable interest in the corporation. Because a final divorce decree had not issued, the plaintiff could still have been awarded stock in [the libelee's corporation] and thus she had an equitable claim to the property. See RSA 458: 16a. A party with an equitable interest in a marital asset... has standing to protect legal title to that interest While it is true that the plaintiff may not ultimately be awarded any stock or interest in the real estate in the final decree, by denying the plaintiff standing to seek equitable relief, the trial court effectively terminated any possible claim of the plaintiff to the real estate. This was error.

The town's position is baffling since it ultimately spent mucho legal dollars to collect taxes for which the libellant wife had offered to be responsible.

Goss v. State, decided July 24, 1998, is an old-fashioned Palsgraf Case conundrum, the proximate cause between negligence and injury. The case addresses the unique question whether the surviving husband of a rape and murder victim may recover for negligence and loss of consortium against the State of New Hampshire because the State, prior to the attack on the plaintiff's wife, had mistakenly released the murderer (a Montana parolee) after his apprehension for other reasons because the apprehending officer had no knowledge of his prior sexual assault convictions in other jurisdictions. Moreover, the murderer's New Hampshire parole officer while the murderer was under arrest failed to notify the New Hampshire Parole Board of the parolee's arrest as he was required to do. The State brought a motion for summary judgment claiming "discretionary function immunity-" which was denied by the trial court and the State appealed to the Supreme Court, which reversed the lower court. The Court upheld the State's contention that its actions did not proximately cause the death of the plaintiff's wife, concluding that "as a matter of law, legal causation cannot be established in this case. The nexus between the State's omission [the failure to contact the New Hampshire Parole Board] and the plaintiff's harm is 'simply too attenuated to impose legal liability on the part of the defendant.' Consequently, no reasonable jury could find that proximate cause exists, and we therefore reverse the trial court's denial of summary judgment."

In a double jeopardy case, *State v. Anderson*, decided July 24, 1998, the Court had before it the question "whether a substituted criminal complaint charging the same offense at the trial *de novo* filed before *not* *prossing* the original complaint constitutes an impermissible second prosecution for double jeopardy purposes, so as to preclude prosecution of the new charges." The issue turned upon the unique aspect of a trial *de novo*. The Supreme Court found that a *de novo* trial is a continuation of the original proceeding whose effect is to vacate, for most purposes, the judgment below. The defendant, having elected to choose a retrial, cannot complain that there is a second prosecution for the same offense after conviction in the lower court. "A trial *de novo* does not constitute an impermissible second trial for double jeopardy purposes, however, when the defendant merely asserts, without judicial determination, that there was insufficient evidence to support the conviction at the first trial. In the *de novo* system, the defendant can avoid an adverse decision from the initial bench trial by appealing for a trial *de novo*, even without allegations of error. 'Once the right to a *de novo* trial is exercised, the judgment at the bench trial is 'wiped out.'"

State v. Davis, decided September 24, 1998, creates the rule that while it is the duty of the trial judge in a criminal case to *voir dire* prospective jurors about their beliefs con-

cerning the presumption of innocence even without a request from the defendant, the trial court's failure to do so is not ground for the reversal of a defendant's conviction where the defendant did not contemporaneously object to the trial judge's failure to do so. The black letter rule established by this case is that an objection to the trial judge failure to *voir dire* concerning the presumption of innocence is "required to provide the trial court with the opportunity to correct its error."

In *Cole v. Hobson*, decided September 24, 1998, the Supreme Court was confronted by a party who apparently fails to learn from his mistakes (not an uncommon happening as the author has learned from three decades of practice). In this decision, the Supreme Court upheld the imposition of a final default judgment against the defendant for failure to appear at a pretrial conference. Final default followed three prior default judgments in the same case: (1) a prior default judgment against the defendant for failing to file an appearance which was later stricken; (2) a conditional default against the defendant for failure to complete answers to interrogatories; and (3) default and sanctions against the defendant for failure to file a neutral evaluation summary. Upon entering the final default, the trial court entered judgment for the plaintiff's damages based on the plaintiff's affidavit. The defendant applied to the superior court for reconsideration and at that hearing, attempted to raise issues concerning liability but the trial court refused to hear such evidence. On appeal to the Supreme Court, the Court upheld the trial court's decision, stating that the entry of a final default "precluded the defendant from asserting any affirmative defenses at the damages' hearing". Furthermore, the Supreme Court rejected the defendant's contention that the trial court's reliance on the affidavit of the plaintiff to base the award of damages was not hearsay because the hearsay rule in this case was overridden by New Hampshire Superior Court Administrative Rule 6-7 which provides that "a proper affidavit is acceptable as evidence in the assessment of damages" in default cases.

Pike Industries, Inc. v. Hiltz Construction, Inc., decided September 24, 1998, is an example of a trial court's careful assignment of liability in its computation of the amount of contribution between joint tortfeasors. As background to the present action, a personal injury action had been brought against one of two joint tortfeasors [Pike], which Pike subsequently settled for \$175,000, obtaining a release from all liability from the plaintiff of itself **and** its joint tortfeasor, Hiltz. Pike then brought the present action for contribution from Hiltz for Hiltz's comparative share of fault in causing the accident. On appeal, Hiltz claimed that it was only liable for the percentage of its negligence as found by the judge (30%), of the \$175,000 settlement amount (or \$52,500). However, the trial judge had found that the plaintiff driver in the underlying action had been 30% liable, Pike 40% liable and Hiltz 30% liable so the court calculated the value of the case as \$250,000 based upon the 40% and 30% liability of the two tortfeasors, Pike and Hiltz, respectively, and the 30% liability of the driver. A settlement of \$250,000 would

represent a fair estimate of the total value of the case, so the trial court found, and then awarded the plaintiff Pike 30% of \$250,000 or \$75,000, not the figure argued by Hiltz of 30% of \$175,000, or \$52,500. The Supreme Court affirmed the trial court's skillful work.

A fractious case from which have spun off Professional Conduct Committee allegations of misconduct including perjury and other attorney misconduct resulting in the PPC's recommendations for the disbarment and/or suspension of some of the attorneys involved reached its final conclusion on July 21, 1998 in the case of *Bussiere v.*

Roberge. This was an all-out, no holds barred, barroom brawl between a prominent and well-respected (and very tenacious) Manchester attorney, as plaintiff on one hand, and on the other, the state banking commissioner, his daughter Carolyn (an attorney), and the companies which his wife (state senator Sheila Roberge) and daughter controlled as defendants. The battle was pyrotechnic: the plaintiff attorney testified that in the course of the litigation he had had to resort to "fighting fire with fire." The case involved a simple issue: whether or not the plaintiff "had the right to exclusive possession and control, as against [the defendant corporation] of an apartment in Manchester." The case began quietly fourteen years ago in April 1984 when the plaintiff's trust sold a 76 unit apartment building in Manchester to a purchaser. The purchase and sale agreement specifically provided that the plaintiff Bussiere would retain a penthouse apartment unit in the building and, as a consequence, the P&S provided for a substantially reduced purchase price taking this into account. The agreement went on to provide that the plaintiff's apartment would be considered a "paid-up" lease until the building was converted to a condominium at which time it was provided that the unit would be conveyed to the plaintiff at no additional charge.

The purchaser financed the purchase with a first mortgage to a bank, the mortgage clearly describing the mortgaged property as "subject to" the lease of the plaintiff. Furthermore, the trial court specifically found from the testimony of a bank official that the mortgagee bank understood that as part of consideration for the purchase, the penthouse unit would ultimately be conveyed to the plaintiff. However, the purchaser defaulted on the bank loan and the defendant corporation eventually purchased the bank's mortgage and note in 1994. The defendant's corporation, as mortgagee-in-possession, then twice attempted to evict the plaintiff as a result of which the plaintiff began the present action to assert his title to the premises. The trial court determined, based upon the clear language of the document and the testimony of the bank official, that the bank's right (and that of its transferee, the defendant corporation) were subject to the plaintiff's lease right and ruled that the plaintiff's property right to his unit was superior to those the defendant obtained through its purchase of the bank's note and mortgage.

The present appeal followed at which the defendants' main argument in the Supreme Court was that the lower court's ruling in effect created "a perpetual lease" since it

appeared that the property would never be condominiumized. The defendants contended that since perpetual leases are not favored in the law, explicit language was required to create a perpetual lease. This reasoning was rejected by the Supreme Court which found that a perpetual lease may be created based upon the "parties' intent to create a perpetual leasehold where, despite the absence of formal language in the grant, the agreement of the parties clearly showed such an intent." The defendant next argued that the trial court had erred because the trial court's ruling in effect provided that the plaintiff was not subject to any landlord action, claiming that the plaintiff "has no landlord." The Supreme Court rejected this argument also, ruling that the trial court had simply ruled that the defendants had no right to evict the plaintiff because his right was superior to the defendants' rights. The Supreme Court stated that as the plaintiff was not a tenant at will or a year-to-year tenant, he was not subject to eviction by the defendants unless he breached the lease, such as failing to pay utilities, etc., as he had agreed to do. Since no such breaches were claimed by the defendants, the Court rejected this argument also.

Charges of attorney misconduct, illegal taping of telephone conversations and perjury arising from the case have resulted in the Professional Conduct Committee taking action to suspend the attorney defendant and to disbar her counsel. The Committee recommended the suspension of the defendant attorney Roberge for six months and the disbarment of her counsel, but an appeal followed and is pending. A referee appointed by the Supreme Court (respected retired superior court judge Robert Temple) has recommended that the defendant attorney not be suspended and recommends only a public reprimand of her counsel. N.H. Supreme Court, LD 97-008 (Carolyn Roberge) and LD 97-009 (Steven E: Feld). A hearing in the Supreme Court upon the referee's recommendations is pending as of this writing.

ENDNOTES

1. The author's firm represented a party to the action and therefore, the author's views may be colored.