

Lex Loci: A Survey of New Hampshire Supreme Court Decisions
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The recent opinions of the New Hampshire Supreme Court include the first authored by the newest member of the Court, Justice Broderick. The early indications appear to show that the new Justice brings to the Court an added acuity in the litigation area, based upon his many years of practice as a successful trial attorney.

An example is *Bronson v. The Hitchcock Clinic*, decided May 8, 1996. This medical malpractice case on behalf of a deceased patient against the defendant clinic was on appeal to the Supreme Court after a trial court verdict in favor of the plaintiff. On appeal, the Supreme Court originally had decided in favor of the defendant clinic on the basis that the plaintiff had failed to prove causation. However, the plaintiff moved for a re-hearing and the Court subsequently withdrew its first opinion and issued the instant opinion. In the new opinion, the Court reversed itself, and found for the plaintiff. The latest opinion, written by Justice Broderick, clearly shows his litigation background. Calling it "a close case," Justice Broderick found that the plaintiff had met his burden in proving causation even though the plaintiff's expert was less than clear in establishing the cause-in-fact of the injury to the decedent. Justice Broderick's opinion places great weight on the jury's ability to "fairly and reasonably conclude that but for a defendant's negligence an injury probably would not have occurred." Conceding that a reasonable jury could have concluded otherwise, the Court put great weight upon the fact that the totality of the evidence showed that the decedent's death had been causally related to the failure of the defendant to promptly diagnose and treat the decedent's cancer. Justices Horton and Thayer dissented (they were in the majority in the first opinion) for the reason that they would find that the defendant's expert had not causally linked the plaintiff's death to the negligence of the defendant clinic physicians.

In a case that could be described as the Battle Of The Doe Interpretations, *Roberts v. General Motors Corporation*, decided March 12, 1996, presents a novel question of first impression in New Hampshire and a very important one: "whether a plaintiff may rely upon the statute of limitations saving statute, [RSA 508: 10] more than once, when a judgment is rendered against the plaintiff and the right of action is not barred by the prior judgment." The over-arching dynamic of the case was the tension between the protection of a plaintiff's right to be heard on the merits, as espoused by the majority on the one hand, and on the other, the promotion of an end to litigation as passionately enunciated by the minority. RSA 508: 10, the so-called savings statute, allows a plaintiff who begins an action within the usual statute of limitations period, to bring another action (within one year) if the original action is dismissed after the expiration of the statute of limitations if the dismissal was not on the merits, i.e., dismissed for lack of prosecution, a voluntary non-suit, etc. In a sparkling majority opinion by Chief Justice Brock, a two Court majority (only three judges sat) established the rule that a plaintiff may rely on RSA 508: 10 for a second time (or even three or four or more times) even though the subsequent suit was brought after the expiration of the original statute of

limitations and after the first one year invocation of RSA 508:10. Upholding the trial court's ruling that a "successive invocation of RSA 508:10 is permissible," the Supreme Court held that the "sale test" for the invocation of RSA 508: 10 "is whether the right of action is, or is not, barred by the first judgment." It does not matter that the lawyer for the plaintiff may have made "mistakes - - even 'inexcusable' mistakes in lawyering." Rather, the Court relied upon Chief Justice Charles Doe's philosophy which the majority felt makes New Hampshire unique: that in New Hampshire "we make every effort to reach a judgment on the merits, to achieve the ends of justice unobstructed by imaginary barriers of form."

To the dissenter, Justice Thayer, the issue was whether the purpose of the statute of limitations to promote an end to litigation and setting a time for the extinguishment of existing claims would be served by the rule established by the majority. "In this case, the plaintiff is trying to bring a third lawsuit more than two years after he accepted a voluntary nonsuit of his original action. The majority ignores this two-year delay." Pointing out that all other states with similar statutes, except one, had ruled against the plaintiff in similar situations, Justice Thayer would assume that even Chief Justice Doe would have objected to the possibility of a never-ending series of successive savings, ad infinitum. On this point, the majority rejected such a "slippery slope argument" and held that a trial court could easily prevent a plaintiff from abusing the litigation process by overly long, successive uses of the savings statute.

Three recent cases involve the Court in issues concerning the actions of the Court's own Judicial Conduct and Professional Conduct Committees. In the judicial conduct case, *In the Matter of Snow*, decided February 7, 1996, the Court rebuked a district court judge who was found to have initiated the fixing of a traffic ticket issued to his brother. Citing to the felicitous language of the New Hampshire Constitution providing to the citizens of New Hampshire the right "to be tried by judges as impartial as the lot of humanity will admit" (N.H. CONST, pt. I, art. 25), the Court held that even though the judge involved may have truly believed that his intervention did not affect his ability to decide legal matters impartially, "it is the public's perception of the ability that is important. In this area, '[p]erceptions may become reality.'" The Court approved a six months suspension of the judge, as well as public censure for misconduct.

Petition of Tray E. Brooks, decided May 8, 1996, is a curious case. The Court, interpreting its own rules, decided a case that it had concluded was moot. The Court decided to rule on the matter anyway because the case raised a significant constitutional issue whether the Supreme Court's own rules (prior to their recent amendment) relating to Professional Conduct Committee procedures which required parties, including the complainant, from publicly discussing a case before the Committee violated the first amendment to the federal Constitution. In its core holding, the Court held that its prior rules "prohibited more speech than was necessary by preventing disclosure of well-founded complaints. . . and accordingly were overbroad" and thus violated the petitioner's first amendment right of free speech. See the companion case in the federal system, *Brooks v. N.H. Supreme Court*, No. 9j-2129,

decided April 8, 1996, where the First Circuit declined to intervene in the New Hampshire proceeding.

In *Basbanes' Case*, decided May 11, 1996, the Court lowered the boom of disbarment upon an attorney who lied to a court, even though the referee appointed by the Supreme Court to hear the plaintiff attorney's appeal from the Professional Conduct Committee's finding of a violation of the Rules of Professional Conduct recommended a substantially lesser penalty, a two-year suspension. The Court instead imposed the more draconian penalty of complete disbarment. The Court found that the defendant had engaged in a "continuing course of dishonesty" by concealing from a marital master the fact that the attorney's client had settled an outstanding judgment against the client that, in effect, greatly increased the value of the client's business that was a prime subject of the divorce controversy then before the marital master. The Court repeatedly stressed "the importance we place on honesty and candor." The Court is supersensitive to the issue of an attorney lying, and would not be amused by Oscar Wilde's witticism that "the only form of lying that is absolutely beyond reproach is lying for its own sake."

Key Bank of Maine v. Latshaw, decided February 7, 1996, is a hornbook exposition of the New Hampshire law on trustee process. The Supreme Court, speaking through Justice Johnson in a unanimous and well written opinion, took the "opportunity to clarify the law with respect to charging a trustee pursuant to RSA 512:20" because "there has been little case law on this matter during this century." A truism indeed. In the instant case, the plaintiff, with notice, trustee the trustee defendant who was, in turn, the trustee of a realty trust. The plaintiff procured from the defendant trustee-trustee a trustee disclosure that indicated that she did not hold any property of the defendant-in-chief in the action in which the trustee process was made. After the disclosure was filed, the trustee received a \$14,000 property tax refund check that she in turn paid to the defendant-in-chief as trust beneficiary of the trust of which she acted as trustee. The Supreme Court held that the trustee defendant, even though a trustee of a realty trust, could be held **personally** liable as trustee and a personal judgment would issue against her personally if she were chargeable under the statute. Addressing the issue of whether the trustee was liable for after acquired funds, the Court made clear that, under the statute (RSA 512:20) a trustee can be so chargeable. The Court held that while unliquidated claims are not reachable by trustee process, a claim which exists but remains uncollected, can be reached by trustee process and a "trustee. . . has a duty to disclose [the uncollected claim's] existence. The trustee, however, is under no obligation to compel delivery if payment is not yet due." The proper procedure in such a case is for the plaintiff to stay proceedings until the claim is payable. The rule established by the Court is that "the trustee is chargeable if a claim, right, or credit existed and was not contingent at the time of disclosure." The principal lesson of the case for creditors appears to be two-pronged: (1) a trustee defendant cannot escape liability by failing to disclose a non-contingent claim in existence and not yet paid, and (2) a plaintiff creditor should not willy-nilly take and file trustee disclosures without inquiring into the possibility of after acquired property or staying proceedings until the claim is paid or until the actual deposition of the trustee can be taken.

Some cases can be noted in passing. In *Unit Owners Association of Summit Vista Lot 8 Condominium v. Miller*,¹ the Court made clear that a trustee of a realty trust who holds title to condominium property on behalf of a trust beneficiary can be found personally liable for violation of the New Hampshire Condominium Act, RSA 356-B:65, 1, III. In *Ellsworth v. Heath*, the Court held that the superior court has exclusive jurisdiction "over custody disputes between unwed parents when there are no guardianship issues." The Court distinguished its earlier case, *McLaughlin v. Mullin*, 139 NH 262 (1994), where the grandparents of a minor child sought custody **and guardianship** of a grandchild. In that case, the Court held that jurisdiction lay in the probate court and the superior court had no jurisdiction.

In *Nutbrown v. Mount Cranmore, Inc.*, decided February 15, 1996, the New Hampshire Supreme Court had before it for interpretation the precedent setting New Hampshire Ski Operators Immunity Act, RSA 225-A:25, 1. The Court upheld the immunity granted by this section and rejected the plaintiff skier's arguments under both the equal protection and the right to remedy clauses of the New Hampshire Constitution. The case came to the Supreme Court by way of certified questions of law from the United States District Court from the District of New Hampshire. The plaintiff alleged that he was injured when he left a ski trail, hitting an area off the side of the trail which was without snow cover, falling down a gully or ravine, and striking either rocks, stumps, logs or trees. The plaintiff suffered serious permanent injuries to his head and body. Except for that part of the plaintiff's claim that alleged that the ski operator had failed to properly mark the beginning of the trail, the Supreme Court dismissed the plaintiff's claims because they revealed that:

[T]he chief cause of his injuries to be an unenumerated, yet quintessential risk of skiing: that a skier might lose control and ski off the trail. By participating in the sport of skiing, a skier assumes this inherent risk and may not recover against a ski area operator for resulting injuries

Appeal of New Hampshire Department of Employment Security, dated March 7, 1996, illustrates that the DES continues its course of ill-considered appeals to the Supreme Court. In this case, the employee was successful in an appeal to the New Hampshire Department of Labor from a DES ruling. The New Hampshire DOL found the employee's complaint was valid that he had been discriminated against by the DES because he has filed a complaint against the DES under the Whistle Blowers' Protection Act, RSA 275-E. The plaintiff was a Vietnam era disabled veteran and while working as a part time employee of the DES, sought a full-time, advertised, DES position. Under federal law, a Vietnam war veteran was given preference for such a position, but the DES chose a veteran of another era to fill the job. The employee complained to the U.S. Department of Labor while at the same time applying for another DES full-time job for which he was again turned down. The U.S. Department of Labor found that the DES had erred in construing the federal statute and should have given the employee preference for the first job applied for. The New Hampshire DOL found for the employee in his appeal and ordered the DES to offer the employee a full time position in the office

of his choice. Making a bad situation worse, the DES appealed to the Supreme Court where a unanimous Court upheld the actions of the Department of Labor both on the preference issue as well as on the remedy issue. When will the DES ever learn?

Appeal of Public Service Company of New Hampshire, decided May 13, 1996, is the landmark case by which the Supreme Court upheld the Public Utilities Commission ruling that an electric utilities franchise is not exclusive as a matter of law. PSNH appealed the PUC's ruling to the Supreme Court, arguing that the PUC erred "by failing to adhere to a longstanding pattern of statutes and court decisions favoring exclusivity, by ignoring its own administrative gloss on its statutory authority, and by exceeding the limited scope of its authority to permit competition" under the public utilities statute. A "free wheeling" Supreme Court hit that slowball pitch out of the park. A unanimous three judge Supreme Court, in a compelling opinion by Justice Thayer, distinguished the cases and arguments offered by PSNH. The Court pointed out that its earlier statement concerning the monopoly status of utilities as being "derived from sound economic reasons" was a "justification of policy and not of law. What was sound regulatory policy in 1930 may be anachronistic today. . . . [T]his court [has] made clear the commission's authority to grant a competing franchise should the public good so require." The Court concluded by holding "that electric utility franchises in New Hampshire are not exclusive as a matter of law" but cautioned that its decision "should not be read as expressing a point of view either on the desirability of retail competition among electric utilities as a matter of policy or on the recoverability of 'stranded costs' in the event competition is introduced." As the Industrial Revolution was followed, beginning in 1880, by a century of regulation, will the pendulum now swing to a century of free enterprise and little regulation? .

In *State v. Hokanson*, decided March 12, 1996, the Court had before it the appeal of a defendant convicted of manufacturing a controlled drug, *i.e.*, growing several hundred marijuana plants. The defendant claimed he had a good reason for his horticultural interest in the cannabis species. He claimed that his cultivation of marijuana was for medicinal purposes and he sought to admit expert testimony regarding marijuana's "medicinal use. . . to support his attempt to obtain jury nullification." The Court upheld the trial court's refusal to admit the proffered expert testimony of a Harvard Medical School professor because the testimony "is irrelevant because it does not assist in the 'determination of the action.'" The Court's comments on jury nullification, a hot button issue with the militia movement across the country, are interesting. Pointing out that the New Hampshire courts have recognized "jury nullification as the undisputed power of the jury to acquit, even if its verdict is contrary to the law is given by the judge and contrary to the evidence," the Court pointed out that the nullification power is "the jury's prerogative and not the defendant's right." A defendant cannot compel a trial judge to issue a nullification charge although the trial court may exercise its discretion "to specifically instruct the jury as to its inherent power to return a verdict 'in the teeth of both law and fact.'"

Finally, in a case that can be categorized as "boys will be boys," *Appeal of Griffin*, decided February 12, 1996, the Supreme Court had before it a question of first

impression, "that of the so-called 'traveling employee' whose business requires that he be away from home." The plaintiff construction worker was injured while on a job out of state that was required by his employer, when an altercation occurred between the plaintiff and a fellow employee while returning to a motel after an evening dinner. The employee sought workers' compensation coverage and the Supreme Court reversed the finding of the trial court that coverage was not available. The Court established a travelling employee rule and held that a travelling employee "is generally considered to be within the scope of his employment throughout his sojourn." Where an employee is required by his employer to live away from home, the risk of injury to him during the travel necessary to take his meals is created by his employment. The employee must show that the injury occurred in the performance of an activity related to employment, but the Court found that the dinner, paid for by the employer, and the travel surrounding it, was sufficient to create workers' compensation liability. The Court determined that it did not matter that the injury to the employee occurred out of a quarrel between the plaintiff employee and a fellow employee. It appeared that at the dinner the plaintiff had "4 or 5" beers and was driving back to his motel when he got into an argument with his fellow employee who was sitting in the passenger seat of the pickup truck driven by the plaintiff. The fellow employee, in the heat of the argument, removed the keys from the vehicle because "the plaintiff's driving wasn't all that great." The removal of the keys resulted in the employee's injury which occurred when the two men fought at the side of the road and the plaintiff construction worker employee was injured when hit by his fellow employee "on the head with a two-by-four." Yes, indeed, boys will be boys.

Endnote

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