

LEX LOCI: A Survey of Recent New Hampshire Supreme Court Decisions
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One of the most momentous (should the author venture "titanic"?) constitutional confrontations of our century continues to be waged on all fronts over the educational funding issue. It's a classic conflict, involving the executive, legislative and judicial branches, each with a separate agenda and each trying to maintain their prerogatives. In the latest skirmish, *Claremont IV*, decided June 23, 1998 (see the case discussed below as *Claremont III*), was an advisory opinion of the Supreme Court issued in response to the Senate's request for advice upon the Governor's ABC program, her answer to the educational funding issues created by *Claremont II*.

The five justices of the New Hampshire Supreme Court returned a unanimous advisory opinion to the Senate, holding that the Governor's educational funding proposal did not meet the constitutional test of Part II, Article 5 of the State Constitution that requires all taxes to be "proportional and reasonable" because of the "special abatement" provision of the proposed legislation. The proposed special abatement provision, in a nutshell, reduced "the effective tax rate [under the Governor's proposal] below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined 'adequate education' for its children." During oral argument, it appeared that the justices had a lot of questions about the abatement provision and some of their comments raised concern about the constitutionality of all abatements. However, the advisory opinion skirted that issue by finding that the special abatement provided in the proposed legislation could be distinguished from other abatements because it was not "supported by good cause or just reasons consistent with the constitution."

The Court went on to note that "public policy cannot undermine the constitutional requirement of proportionality. That is, the purpose of an abatement or an exemption can never be to achieve disproportionality for disproportionality's sake." The Court noted the Governor's attempt to meet the requirements set forth in *Claremont II*, but, in colorful language, pointed out that it

"should not be forgotten that New Hampshire is not a random collection of isolated cities and towns. Indeed, all of us live in a single State. The benefits of adequately educated children are shared statewide and are not limited to a particular town or district"

The Court was well aware of the stormy constitutional seas upon which it and the Ship of State were sailing and reminded the Senate, and the public at large, that it was mindful of its responsibilities as a co-equal branch of government, pointing out that Part

I, Article 37 of our Constitution provides that the legislative, executive and judicial powers of our State should be kept "as separate from and independent of, each other, as the nature of a free government will admit...consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity and amity."

In passing, the justices also unanimously found that Senator Ruben's bill to address the school educational funding crisis was also inadequate because it continued to rely upon the current unreasonable and disproportionate real estate property tax basis for funding education that the Court had found to be unconstitutional in *Claremont II*.

A recent case involves a growing body of New Hampshire law, the law relating to attorneys. In *Kalled v. Albee*, decided May 11, 1998, an attorney who had been suspended from the practice of law sought to enforce a 50% fee sharing agreement with another attorney in a contingency fee tort case. The agreement was entered into with a former associate of the plaintiff attorney when the associate left the attorney's practice and took with her certain cases she had been working on while employed by the attorney. After the fee sharing agreement was entered into, the attorney was suspended from the practice of law but he sought the enforcement of the agreement when the case was settled. The Court held that the suspended attorney's fee sharing agreement was "contrary to public policy and, thus, void" and would not allow the attorney to enforce the agreement. Because the associate took the position that the attorney deserved compensation in the form of quantum meruit, the Court remanded the case to the superior court to determine what amount the attorney was entitled to be compensated for "based on his actual work done prior to suspension."

Buckingham v. R. J. Reynolds Tobacco Co., decided May 29, 1998 is a little gem of a case involving a big issue, the liability of tobacco companies for damage to third parties caused by second hand smoke. The administrator of a decedent who died of lung cancer brought an action against several tobacco companies and a retailer alleging that the decedent's terminal cancer resulted from her exposure to "environmental tobacco smoke (ETS)" from cigarettes manufactured or sold by the defendants. The decedent was a non-smoker and her administrator's writ sounded in two counts, a strict liability claim based on Section 402A of the Restatement (Second) of Torts and a negligence claim brought under Section 389 of the Restatement. With regard to the strict liability claim under Section 402A, the language of the writ alleged that the "cigarettes sold by the defendants were defective or unsuitable at the time of sale in that they were in an unreasonably dangerous condition for innocent bystanders." The Supreme Court, in a unanimous opinion by Justice Horton, upheld the trial court's dismissal of that claim because the plaintiff had failed to allege separately that cigarettes are both "defective" and "unreasonably dangerous". The Court stated that "when the plaintiff cannot allege

that something is 'wrong' with the product, strict liability should not be used as a tool of social engineering to mandate that manufacturers bear the entire risk and costs of injuries caused by their products."

Turning to the negligence count under Section 389, the Supreme Court reversed the trial court that had held that New Hampshire did not recognize a claim under this Restatement Section 389, dealing with supplier liability. This section provides that a supplier of products to a third person is liable to that person if the person is injured by the product where the supplier knows, or has reason to know, that the product is unlikely to be reasonably safe before being put to a use which the supplier should expect it to be put to use. The Supreme Court unanimously found that Section 389 is a statement of basic negligence principles of foreseeability and fault in the supplier context and adopted Section 389 "as a proper statement of the law of supplier negligence" and held that in the context of the second hand smoke, a bystander "assuming he is within the scope of foreseeability of risk is owed a duty under law and may recover on a showing of breach, damage and causation." This important decision may be a costly victory for the plaintiff since the road to a successful recovery against the tobacco company alliance has proved to be a very arduous one for most plaintiffs, particularly in a second hand smoke case.

In a far-reaching labor law case, *Nashua Teachers Union v. Nashua School District*, decided March 23, 1998, a split Supreme Court held that insofar as public employees are concerned, New Hampshire is no longer a right to work State. The facts showed that the plaintiff teachers union and the school district had negotiated a contract which required that all employees, regardless of membership in the union or not, were required to pay agency fees. These fees were described by the Court as "assessments that non-union employees pay their collective bargaining representative to defray the costs associated with exclusive representation and collective bargaining." An employee of the school district who was not a member of the union contested the payment of the fee and the present case resulted. The majority of a split Supreme Court, Justice Broderick writing for the majority, held that, although not explicitly provided for in the Public Employee Labor Relations Act, as a consequence of statutory changes to the Act "agency fees are now statutorily authorized as a proper subject of negotiation under" the Act:

Not only are such fees consistent with the legislative purpose of promoting harmonious labor relations through mandatory collective bargaining but they also play a valuable role in ensuring labor peace...The public interest served by the assessment of agency fees outweighs any infringement they may impose on a public employee's first amendment rights...Therefore, negotiated, compulsory agency fees in the public sector

are constitutional and may be assessed to finance collective bargaining, contract administration, and grievance adjustment.

Justices Brock and Thayer in the minority would hold that since the Public Employee Labor Relations Act did not explicitly authorize agency fees and in the absence of such explicit legislative authorization, such fees should not be found to be constitutionally permissible. The author will quote Gertrude Stein: A rose is a rose, is a rose, is a rose, etc. Agency fees, although less than regular union dues, are union dues nevertheless.

Demauro v. Demauro, decided June 16, 1998, is a divorce war that, like World War II, had several theaters of operation, including the Rockingham County superior court, the United States District Court for the District of Massachusetts, the First Circuit Court of Appeals, and finally, twice, the New Hampshire Supreme Court. The plaintiff wife opened the hostilities in a 1994 divorce petition that alleged that the defendant husband had engaged in the systematic effort to conceal assets throughout their marriage by fraudulently "using trusts, foundations, sham corporations, offshore accounts, straws and other entities" to hide his assets. The defendant contested the divorce and filed a counter-libel but never filed a completed Rule 158 affidavit that requires a defendant in a divorce action to disclose, under oath, his assets. The defendant continually refused to answer interrogatories and other requests for admissions concerning his financial situation. A year and a half after the case began, the defendant first asserted his privilege against self-incrimination, long after a sympathetic trial court found that he had made his decision "not to meaningfully comply with any past Court order regarding divulging of his financial status and asset picture."

Finding discovery in the New Hampshire superior court action to be a Guadalupe-like quagmire, the plaintiff wife began a proceeding in a second theater of operations, the federal district court for the District of Massachusetts, accusing the defendant of all sorts of unlawful activities. Upping her firepower, the plaintiff brought a nuclear weapon to bear by alleging that her defendant husband had engaged in racketeering in violation of the draconian RICO federal anti-racketeering criminal statute. That case eventually wound up in the First Circuit Court of Appeals that remanded the case to the district court that then stayed proceedings until the New Hampshire divorce action was completed. In the New Hampshire theater of war, the defendant remained dug in and steadfastly refused to answer "even the most elementary questions about his assets and finances" and a frustrated trial court found the defendant in contempt and ordered him to file a completed Rule 158 financial affidavit. The defendant appealed to the Supreme Court and that Court in 1996 ordered the trial court to conduct a further hearing at which the plaintiff's counsel bombarded the defendant with over one hundred questions, but the defendant husband refused to answer the large majority of the queries. He claimed his self-incrimination privilege and pointed to the pending federal civil

RICO complaint by the plaintiff in the Massachusetts Federal District Court. The superior court ruled that he had improperly asserted his state and federal privilege against self-incrimination, but the Supreme Court unanimously reversed, holding that "[a]lthough the defendant's assertion [of his privilege against self-incrimination] frustrated the plaintiff and the trial court, we conclude that the defendant effectively asserted and did not waive his right against self-incrimination."

The Court remanded the matter to the trial court for a renewed battle, but the Court set guidelines for the lower court's permissible action in light of its opinion. The Supreme Court held that the defendant may refuse to answer questions concerning the size and scope of his estate, but the trial court may order the defendant to execute consent waivers consistent with those permitted in federal cases for discovery of assets. Furthermore, the trial court "may also order any entities the defendant has allegedly used to hide his assets to produce appropriate records." Upon completion of the plaintiff's discovery efforts, the trial court "may fashion an equitable distribution based on all information then available and all reasonable inferences to be drawn therefrom. The court may also enter a decree for division of property subject to modification if additional assets are disclosed or discovered." The defendant seems to have won the battle but it may be a victory like Prussia's over France in 1871 (where the victor eventually lost over the long run) because the Supreme Court pointed out that the defendant, "having asserted his privilege, cannot be heard to argue that the disposition ordered by the trial court was unequal when the defendant has effectively prevented the trial court...from being able to determine whether the disposition was in fact equal or not. The only one who knows is [the defendant], and he is not talking"! A third trip to the New Hampshire Supreme Court and a second trip to the First Circuit should not be ruled out. Remember that the Franco-Prussian War of 1870-71 was followed by World War I and World War II, involving essentially the same protagonists. Consider the plight of the poor wife after all of this long, drawn out and expensive litigation, verily a refugee left destitute in the war's aftermath.

The doctrine of absolute witness immunity, a doctrine with which the author was not previously familiar, was before the Court in *Provencher v. Buzzell-Plourde Associate2*, decided June 11, 1998. It was undisputed that the plaintiff's land was considered for eminent domain proceedings for highway purposes by the State of New Hampshire, but prior to the beginning of the proceedings, the parties agreed to negotiate to see if an agreed-upon price could be obtained. The State hired the defendants to make a pre-litigation appraisal and they placed the fair market value at about \$1,000,000. The plaintiff refused the offer and at the subsequent condemnation proceedings, the defendants testified as expert witnesses for the State, consistent with their original appraisal of \$1,000,000. The plaintiff presented expert testimony alleging that the value of the property exceeded \$7,000,000 and a jury eventually found the property to be

worth \$4,000,000. Subsequently, the plaintiff brought an action against the defendants alleging that they had breached various duties owed to him as an intended third party beneficiary to the contracts they had entered into with the State. The plaintiff's writ included allegations of negligence, negligent misrepresentation, fraud, breach of contract and negligent infliction of emotional distress. The trial court dismissed the plaintiff's action ruling that the doctrine of absolute witness immunity extended to the defendant's pre-litigation appraisal of the plaintiff's property and the Supreme Court affirmed. The Supreme Court pointed out that it is well settled in New Hampshire that certain communications are absolutely privileged and immune from civil suit and "[s]tatements made in the course of judicial proceedings constitute one class of communications that is privileged from liability in civil actions if the statements are pertinent or relevant to the proceedings." The issue before the Court was whether this doctrine extends to communications that occur prior to the initiation of judicial proceedings. This was a case of first impression for the Court. The Court pointed out that other jurisdictions were divided on the issue. However, the Court adopted Section 588 of the Restatement (Second) of Torts, and joined "those courts which have concluded that pertinent pre-litigation communications between a witness and a litigant or attorney are absolutely privileged from civil liability if litigation was contemplated in good faith and under serious consideration by the witness, counsel, or possible party to the proceedings at the time of the communication."

A couple of cases may be noted more briefly. *Bartlett v. Town of Kingston*, decided March 26, 1998, establishes the rule that when describing a zoning district, the text of the zoning ordinance controls over a map description where there is a conflict between the two. In *Touma v. St. Mary's Bank*, decided May 11, 1998, the plaintiffs claimed that the defendant Bank had issued a defamatory foreclosure advertisement that caused the decline and ultimate failure of their restaurant business. The allegedly defective advertisement was a foreclosure notice of a building which the plaintiffs leased from the defaulting mortgagor and in which they operated their business. The foreclosure sale notice announced the sale of "two well known N.H. restaurants" and included a photograph of the property that the plaintiffs were leasing, with a description that identified the property to be foreclosed as the plaintiffs' property. The trial court found that the foreclosure notice was defamatory and the Supreme Court affirmed stating that the notice would cause a reasonable person to believe incorrectly that the restaurant lessee itself was in default and that a "financial problem serious enough to warrant foreclosure would injure the plaintiff's reputation in the community is plain." Bankers and bank attorneys take notice!

The high hurdle presented by New Hampshire's medical malpractice statute was not hurdable by the plaintiff administrator in *Bissett v. Renna*, decided May 19, 1998. The plaintiff claimed that his decedent died after surgery and treatment by the defendant, a

board-certified ophthalmologist. After surgery, the defendant prescribed a non-FDA approved anti-inflammatory drug to treat the plaintiff's eye inflammation. The plaintiff's lawsuit alleged that the defendant negligently prescribed the drug that the plaintiff contended resulted in his decedent's death. At a preliminary hearing in the trial court, the plaintiff offered to meet his burden under RSA 507 -E:2 which requires in a medical case the testimony of a competent expert witness as to the standard of reasonable professional practice in the medical care provider's professional specialty by the testimony of a pharmacologist and by proposing to give to the jury an article from every med mal attorney's old reliable Physicians' Desk Reference. A pharmacologist is not a medical doctor, but is an expert (called "Dr.") on the science of drugs and their effect on the body. The Supreme Court upheld the trial court's dismissal of the plaintiff's case and stated that the statute required testimony by a medical physician, presumably in this case an ophthalmologist, who otherwise met the requirements of the statute. As for the *Physicians' Desk Reference*, the Court held that it was not sufficient alone to support under the med mal law the plaintiff's offer of proof that the use of the particular drug here was not recommended or approved by the Food and Drug Administration for the use prescribed by the defendant doctor. The Court held that the use of the *Physicians' Desk Reference*, "by itself, is insufficient to establish the standard of care required of the defendant."

It's good to know that judges, particularly Supreme Court justices, having passed the age of 70 are still good for something. In *Claremont School District v. Governor*. (*Claremont III?*) decided May 8, 1998, the Supreme Court held that the fact that Justice Batchelder, mandatorily retired from full time service on the Supreme Court by virtue of turning age 70 (under our New Hampshire Constitution, judges can't serve beyond the age of 70, Part I, Article 35) sat on the appeal by special appointment by the Supreme Court pursuant to RSA 490:3 did not taint the Court's decision in *Claremont II*. In that appeal, since one Supreme Court judge had recused himself from the hearing, the Supreme Court had, because of the constitutional import of the matter, appointed newly retired justice William Batchelder to sit as a fifth justice on the Supreme Court to hear the appeal. Subsequently, this appointment was challenged by a citizen who claimed that the Supreme Court decision should be vacated because a constitutionally retired justice impermissibly participated in the case (even though the case was decided four to one?). The Supreme Court determined that a Supreme Court justice sitting after reaching the age of retirement is still qualified to sit by special appointment on a case-to-case basis under the provisions of RSA 490:3. The Court found RSA 400:3 constitutional, holding that

[w]hile it is clear that the legislature has no prerogative to invest retired justices over age seventy with the panoply of powers associated with judicial office, it does have the

constitutional authority to authorize limited temporary assignment of retired justices over age seventy to ensure the adequate and orderly administration of justice.

Justice Batchelder's appointment looks more and more like the fable of the horse put out to pasture which, called upon to fill in for a hybrid starter at Churchill Downs, runs the race of his life and wins the roses.

These weighty cases serve to remind the author of a simpler time. Have you ever represented the buyer of property and accepted title knowing that it was subject to a multi-million dollar lien? The author once did so in the 1960's when he represented the buyer of property from the Public Service Company of New Hampshire. The purchase price was several hundred thousands of dollars and at the closing, it unexpectedly appeared that encumbering the property was a trustee lien *for* bond holders of the seller from which the seller, PSCO, announced that it only requested lien releases once a year. It wanted its purchase money now, but it assured the author they it would give him a written promise to include a discharge of the property from the bond in its next requested annual discharge from the bond trustee!! That was as far as the seller would go. In a dither, the author consulted his senior partner who was close to the buyer who then authorized taking title subject to the multi-million dollar bond indenture lien. What would Harrison Smith or Al Lipchik have thought? What a simpler time it was.

ENDNOTES

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