



NEWS and VIEWS

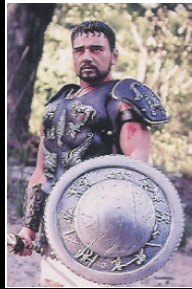
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Strafford County Superior Court - Setting Back the Clock on the Duty to Defend

The presumption among insurance carriers is likely that they have no duty to defend or reimburse an insured for costs incurred in the defense of a case before the date notice is provided to the carrier or its agent. However, in 2008, the Strafford County Superior Court ruled that a carrier may be required to pay its insured's cost of defense even for the period preceding notice of the claim. The Court had before it a case in which notice of the claim had not been given for a number of months. During this time, the insured company was incurring attorneys fees and costs at its own expense in defending the action brought against it. The insured subsequently put the carrier on notice, asking for the carrier to pick up the defense and to indemnify the insured for any judgment against it. The carrier denied coverage, but later agreed to defend the action under a reservation of rights.

The carrier made only one or two payments towards defense costs, and only beginning with the period after notice of the claim was made. The insured, in turn, brought a motion to recover all of its attorneys fees incurred in the defense of the case. The carrier argued that its obligation to pay attorneys fees could not arise before it was given notice of the claim. However, the Strafford County Superior Court disagreed.

In making its decision, the Court relying on case law within New Hampshire and in other jurisdictions. The Court noted that "[in] New Hampshire, the duty to defend begins when the covered act occurs," not when notice is given. The Court was not persuaded by language in the policy that provided that the insured is responsible for voluntary payments made without the carrier's consent. The Court dismissed this language as non-pertinent because it held that 'the duty to defend pre-exists any

obligation on the part of the insured as to compliance with the voluntary payment provision." Thus, the Court held that pre-notice defense costs were not per se precluded, finding instead that a carrier would have to make a showing of prejudice to avoid paying pre-notice attorney fees once it had agreed to defend the matter and/or a duty to defend is found by a court to exist.

The order then set the matter up for a factual hearing on the issue of prejudice. As expected, the carrier could not show clear prejudice, and the insured was reimbursed.



Shenanne Tucker

Limiting Vicarious Liability

We were able to successfully limit vicarious liability for the acts of insureds' employees. In one case, the insured employer was facing allegations of vicarious liability arising out of an alleged sexual assault by an employee, later followed by the suicide of the allegedly abused individual. The employee's alleged conduct was intentional, but the plaintiff argued that it was nevertheless committed

within the scope of employment.

In another case, the plaintiff sued the insured employer for allegations of negligent and statutory liability for a bite from an employee's dog on the employer's property. The employer did not know the employee had brought the dog to work, and it was not there as a guard dog or otherwise in connection with the employer's operations. Nevertheless, the plaintiff argued that the employee was acting within the scope of his employment at the time of the bite and that the employer should be held vicariously liable.

In the first case, we argued that New Hampshire follows the Restatement (Second) of Agency §228 to determine whether an act is within the scope of employment. See *Pierson v. Hubbard*, 147 N.H. 760, 766 (2002). This requires the plaintiff to establish that the alleged conduct is: (1) the kind of conduct that the employee is hired to perform; (2) was committed substantially within the authorized time and space limits associated with the employee's employment; and (3) that such alleged conduct is in furtherance of the master's purposes.

Here, the alleged sexual misconduct of the employee was not within the scope of his employment because it was neither the "kind of conduct" the employee was hired to perform nor the type of conduct that could or would serve the employer's purposes. Thus, the alleged sexual assault(s) has no connection with the employee's employment activities for which he was hired. Instead, the alleged acts, if true, were done for purely personal motives of the employee. In particular, though it



was alleged that the employee committed sexual misconduct during counseling sessions, there was nothing therapeutic or remedial about the alleged threats and conduct and they were in no way connected with the employer's interests. Moreover, it was not a situation in which some degree of alleged conduct would be necessary to carry out the employee's employment responsibilities. Instead, the alleged sexual acts were purely personal in nature and constituted a substantial departure from the employee's scope of employment.

The plaintiff countered that the alleged acts were within the scope of employment because they were allegedly committed while the employee was on duty as a counselor and that the employee gained access and opportunity to commit the alleged acts by virtue of his employment. The plaintiff further argued that earlier New Hampshire



case law established that vicarious liability can be found when the employee's conduct was motivated at least in part by some purpose to serve the employer. Here, the plaintiff argued that the purpose of the employer was counseling, and because the alleged acts took place in the counseling sessions, they were in part motivated by accomplishing the purposes of the employer. Further, the plaintiff argued that the employee was granted authority over the plaintiff as part of his job responsibilities and therefore the employer should be vicariously liable when an employee abuses such employer-granted authority.

The Court agreed with us that the plaintiff did not and could not allege that the employee was hired for the purpose of committing the alleged sexual acts.

In the second of these cases, the Court agreed with us again that the presence of the dog at the site was not related to the employee's work for the employer. Therefore, the bringing of the dog to work was not within the scope of employment and the employer could not be held vicariously liable. Further, the Court held that RSA 446:19, the dog bite statute, did not permit recovery against the insured as an employer of the dog's owner or keeper. In particular, the Court reiterated that "[s]trict liability is disfavored." The Court agreed with us that because "[n]o one is strictly liable under RSA 466:19 except the persons listed," except that parents or guardians can be liable when the owner or keeper is a minor. Thus, because neither the statute nor the common law has rendered landowners or employers

liable when they are not the owner or keeper of the dog, the employer could not be vicariously liable for the statutory liability of the employee either.

Both these orders are victorious limitations of the doctrine of vicarious liability. Vicarious liability has often been available to plaintiff's in employee committed torts. However, it is clear that the New Hampshire Courts are aware of the limitations of the doctrine, are willing to scrutinize whether the alleged acts are within the scope of employment, and are willing to enforce the doctrine's limitations in appropriate cases.



Shenanne Tucker

*The following changes affect litigation in New Hampshire courts generally and have been compiled by **Elsabeth Foster** of our Manchester office.*

N.H. Courts' Budget Woes

In an unprecedented move that received nationwide news coverage, the New Hampshire courts cancelled an entire month of jury trials this year to reduce operating costs. While not technically a change in the



law, the inadequate budget for the New Hampshire Courts affects cases and clients across all areas of litigation. For example, anyone who had a case with a jury trial scheduled for February, 2009 in Cheshire or Carroll County courts will have to wait months for access to justice.

The inadequate budget is making itself known in other ways as well, civil cases are frequently postponed so that criminal matters can go forward, and recently Hillsborough Superior Court Northern District experienced a massive plumbing leak that disabled motions and other routine matters for close to a week.

Hillsborough Northern District Superior Court: Renovations

This coming fall, lawmakers and the court are anticipating a massive rearrangement of Hillsborough county juries. While typical Northern District juries are pulled from Manchester and surrounding areas and Southern District juries are pulled from Nashua and surrounding areas, the two districts will be combined, with all trials taking place in the Nashua courthouse throughout the winter. This will also affect travel costs for attorneys and clients who are local to the Manchester area. The proposed move is due to asbestos throughout the Hillsborough Superior Court Northern District courthouse and necessary to prevent further plumbing, heating or other system failures because they cannot be accessed without remediating the asbestos.

Splitting Issues for Trial

The New Hampshire Supreme Court recently clarified that when a court splits (bifurcates) the issues for trial and makes a decision on one of the issues, the thirty day appeals clock under New Hampshire Supreme Court Rule 7 starts running. In In re Guardianship of Phuong Phi Thi Luong, 157 N.H. 429 (2008), the court refused to consider any issue that arose from a "decision on the merits" that was not appealed within thirty days. Without elaborating too much on the facts of the Luong case, in essence the Court declined to review the trial court's decision early in the case to reject a proposed estate plan, even though the court invited alternative estate plans and later rejected a different estate plan. As a practical matter, this means that if the consideration of one issue in the case is concluded before other issues, the appeal of any decision on that issue must be appealed within thirty days, even if issues remain to be tried.

Expert Opinions Without Live Expert Testimony

Some clever Plaintiff's lawyers are trying to convince the judges that Rule 902(11) of the Rules of Evidence can allow a Plaintiff to submit an expert opinion without bringing the expert to trial.

The rule states "Certified Domestic Records of Regularly Conducted Activity. The original or



a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6)[the rule describing the types of documents], and which the custodian thereof or another qualified person certifies under oath as its' authenticity..can be admitted." Note that the rule requires that opposing counsel be notified of the intent to use the document and is given a copy sufficiently in advance of its use at trial.

I don't see this being actually and successfully used at trial because I am of the opinion that an expert should be able to be cross-examined live in front of the jury or by video. I do not believe the rule was intended otherwise, and I am looking forward to see how the judges interpret it. The problem is that the defendant may be forced to bring and pay for the doctor live because he or she cannot cross-exam a piece of paper. The rule requires that opposing counsel must be given a fair opportunity to challenge it. Again, you can't challenge a medical record. We will keep you posted.

Under the new rule 902(11), a plaintiff can supply a certified copy of a treating physician's record, including that expert's opinion as to causation, and the whole record can be admitted without any live

testimony. The defendant can call the plaintiff's expert to Court, but now the defendant will have to pay the cost to call the doctor to court.

In addition to the more general matters discussed above, our insurance clients will be interested in the following reported decisions:

Lassonde v. Stanton, 157 N.H. 582 (2008): in this breach of a construction contract case, defended by Nicholas D. Wright of our office, the court overwhelmingly affirmed a verdict in favor of the builder and remanded so that the court below could award attorney's fees to the builder.



Barbuto v. Peerless Insurance Company, 156 N.H. 565 (2007): in this insurance coverage case, the New Hampshire Supreme Court again held that the amount of damages available under an Uninsured/Underinsured Motorists policy is the difference between the insured's coverage and the amount of coverage that the underinsured motorist had. Nicholas D. Wright of our office has already used this case for yet another victory at the trial

court level in a coverage case.

In Poland v. Twomey, 156 N.H. 412 (2007), the New Hampshire Supreme Court overwhelmingly emphasized that its jurisprudence favored enforcement of settlement agreements, a handy decision to cite when plaintiffs back away from settlements reached at mediation or otherwise.

In addition to the more general matters discussed above, our Landlord/Tenant clients will be interested in the following reported decisions:

Acceptance of Rent After Notice to Quit: Thankfully, the New Hampshire Supreme Court's decision in Colonial Village, Inc. v. Pelkey, confirmed that landlords do not create a new tenancy when they accept rent after a notice to quit and send a letter stating that it should not be construed as a waiver of the eviction proceeding. 157 N.H. 91 (2008). In this case, the court clarified that acceptance of the rent alone could create a new tenancy if the landlord did not notify the tenant it intended to proceed, but sending the letter of its intent to proceed prevented the rent from creating a new tenancy.

Other Good Cause: In a more disappointing decision, the New Hampshire Supreme Court required that landlords notify a tenant at least 30 days in advance of an eviction notice if their behavior constitutes good cause to evict. Great Traditions Home Bldrs., Inc. v. O'Connor, 157 N.H. 387 (2008).



Elsabeth D. Foster



TALES OF WOE AND HOW A PROPER ESTATE PLAN COULD HAVE AVOIDED IT

Many people are beginning to appreciate the significance of having an estate plan, but ensuring that it is properly funded and created is what is important, not merely having the documents. At least two tales of woe come to mind, both of which, unfortunately, appear repeatedly. First, too many estates that come to me for administration have scenarios in which the will and trust are trying to do the same thing. While this may seem as though they would work together, they in fact work against one another and needlessly complicate any probate of assets inadvertently or intentionally left out of the trust. In probate, all named beneficiaries must be given notice

and copies of all actions in the probate, and are often required to assent. Only the trustee needs to assent and receive notice if the trust is the only beneficiary of the will. The trustee is often the same individual as the estate's administrator, therefore further streamlining the proceedings. Worse yet, sometimes I see that an amendment has been made to the distribution terms of the trust, but no new will or codicil has also been prepared. In that case, the will and the trust have different terms, and usually this is not what the client intended. A trust is flexible enough to take care of intended different treatment of assets and their

distribution. There is no need to have such an arrangement. Anyone with this type of arrangement should seek review of the documents and counseling as to whether they are properly drafted and amended to achieve the goals of the plan. A second frequently occurring tale of woe is the single asset that has been inadvertently left out of a trust. This asset then often requires probate if it is a titled asset, a deeded asset, an account, or investment portfolio. Many times, the assets are not of great value, but it is desirable to liquidate them quickly to cover expenses, such as real estate tax or association fees, to preserve the more valuable assets of the trust, or get them in the hands of a needing beneficiary (i.e. a car). Everyone with a trust should ensure that they have sought advice as to how it needs to be funded.



Shenanne Tucker



ESTATE PLANNING

Perhaps frightening and while it isn't the most pleasant subject to talk about, it is something that everyone needs to do.

- Do you have a will?
- Do you have provisions for your spouse, partner, children, grandchildren, pets?
- What about a living will, power of attorney or a trust?

These are things that we all need to seriously think about. Shenanne R. Tucker at Bouchard, Kleinman & Wright, P.A. will guide you through all of your estate planning needs, inform you of recent changes in the law and help you in making the right decisions for yourself, your spouse and your family. We offer corporate discounts for our various document packages. Please call or email Attorney Tucker and schedule an appointment to take care of your estate planning needs TODAY.

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TYCO LITIGATION - ERISA

Although our practice typically involves insurance defense, this case involves our representation of one of the two major parties in a federal class action suit. The individuals we represented are those who participated in Tyco's ERISA plan. We contended that the Tyco Retirement Committee had inside information which showed that the Tyco stock was not a good investment because of the looting done by the executive officers.

We were pleased to have been designated to be lead local counsel, whose major job was to examine and take care of the filings generated by out of state counsel from New York and Connecticut with the Court, and advising the other attorneys as to local court procedures and case strategy.

I really enjoyed the Court conferences on various motions and the settlement discussions that followed.

The financial settlement we just received is confidential, but I can at least say that we made a significant recovery for those Tyco employees who had seen their investments drop in value.

Ken Bouchard

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