# The State of New Hampshire
## Superior Court

Rockingham S.S.

DANIEL J. KALINSKI, ESQ.
AS GUARDIAN OF ALEXANDER J. TRABUCCO, A MINOR

V.

PHILLIP GAGNE *ET AL.*

NO. 218-2010-CV-0652

**ORDER ON MOTION TO STRIKE *DEBENEDETTO* DISCLOSURE**

Alexander J. Trabucco was a two-year old toddler who was injured when he walked across the hot coals in an outdoor fire pit, which the plaintiff claims was not properly extinguished. The named defendants include the property owners where the fire pit was located and David White, who is alleged to have been responsible for extinguishing the fire. The plaintiff has also named Corner Pocket Bar & Grill, Inc. ("Corner Pocket") on the theory that it was responsible for an event the evening before Alexander was injured during which the fire was lit in the outdoor pit and that David White was an agent of Corner Pocket. Pursuant to RSA 507:7-e and DeBenedetto v. CLD Consulting Engineers, Inc., 153 N.H. 793, 804 (2006), the defendants David White and Corner Pocket provided notice of their intent to prove that four unnamed third-parties were at fault in causing Alexander's injuries. In a nutshell, the defendants allege that Alexander's mother, her boyfriend, Alexander's grandmother and her husband were all at fault for failing to adequately supervise Alexander and/or negligently entrusting Alexander's care to the mother's boyfriend. The plaintiff has moved to strike the so-

called DeBenedetto disclosure, arguing that the disclosure was not sufficiently detailed to establish how the unnamed third parties are liable for Alexander's injuries.

The parties originally entered a stipulated structuring conference form which provides: "If defendant claims that unnamed parties are at fault . . . the defendant shall disclose the identity of every such party and the basis of the allegation of fault no later than 11/1/11. Plaintiff shall then have 60 days from the date of disclosure to amend the initiating pleading." (Docket Entry No. 28 (entered July 20, 2011)). Both David White and Corner Pocket provided written DeBenedetto disclosures within the stipulated timeframe. See Plaintiff's Motion to Strike DeBenedetto Disclosure Ex. 1 & 2 (filed Dec. 7, 2012). The plaintiff asserts that in order to prove negligence by a parent, caretaker, or guardian the defendants must establish more than the ordinary care standard and that the disclosures do not meet this heightened standard.

The Court generally agrees with the plaintiff that the DeBenedetto disclosure must be sufficiently specific to explain the theory of liability of the non-litigant parties and facts upon which that liability is based. Even though the defendant has the burden of proof to shift liability to the non-litigant party, that liability may not be shifted easily. See DeBenedetto, 153 N.H. at 804. If the defendant were allowed too easily to shift liability to a party who was not named in the litigation that may effective preclude recovery by a plaintiff who was legitimately injured by negligent conduct. The non-party may be legally immune from liability or unavailable to be brought into the litigation as an active defendant by the plaintiff. This, then, effectively would preclude the plaintiff from recovery if the jury were to find that the non-litigant was liable for the damages.

The defendants' significant burden to shift the liability of the non-litigant does not change the nature of the cause of action or basis for the non-litigant's liability. Rather, the defendant must prove that the non-litigant is liable using the same basis for a cause of action as if the non-litigant had been sued directly.

The defendants' argument in the present motion is that the liability for a parent or caretaker requires proof of something more than ordinary negligence. While the defendant has cited to substantial case law and other authority from other jurisdictions, this is simply not the law in this State. New Hampshire has long ago recognized that a child may sue a parent or caretaker applying the ordinary negligence principals as if a stranger had inflicted the injuries. See Bonte v. Bonte, 136 N.H. 286 (1992); Briere v. Briere, 107 N.H. 432 (1966). In fact, in Briere, the Court considered the public policy arguments in favor of a heightened standard of liability and rejected those considerations. Id. at 434-35. In Briere, the New Hampshire Supreme Court overruled its earlier precedent requiring willful or malicious misconduct or other special circumstances before a child could sue his or her parent. Id. at 436 (overruling Levesque v. Levesque, 99 N.H. 147, 148 (1954)). The Court reasoned that "a minor has the same right to redress for wrongs as any other individual." Briere, 107 N.H. at 434. This conclusion was reaffirmed in Bonte, where a minor was allowed to sue her mother based on a theory of ordinary negligence for crossing the road and getting struck by a car without paying adequate attention, resulting in serious injuries to the child while still in the mother's womb. Bonte, 136 N.H. at 287-90. As the defendants correctly recognize, the New Hampshire Supreme Court has also recognized that when a child is entrusted to the care of another, that caretaker stands on the same footing as the parent in terms of liability for injuries to the child. Niemi v. Boston & Maine R.R., 87 N.H. 1 (1934).

The plaintiff certainly has a right to have the theory of liability adequately explained in the DeBenedetto disclosure. If the disclosure is insufficiently detailed the Court may order supplemental disclosure. See N.H. R. Super. Ct. 29 ("The Court may in all cases order either party to plead and also to file a statement in sufficient detail to give the adverse party and to the Court reasonable knowledge of the nature and

grounds of the actions or defense. Upon failure to comply with such order, the Court may take such action as justice may require.").

While this Court does not find based on existing New Hampshire case law that a heightened standard of liability applies when a child sues a parent, guardian, or caretaker, the disclosure must still be adequate to understand the theory of liability. The disclosure in this case does not clearly articulate the theory of liability or the facts upon which that theory is based. Depending on the theory of liability, different elements must be proven. See, e.g., Roy ex rel. Roy v. Currier, 2001 WL 34013574 (N.H. Super. Ct. Oct. 15, 2001) (Conboy, J.) (discussing theories of negligent hosting, negligent entrustment, and negligent supervision in the context of a case where a minor was sexually molested by the babysitter's son).

Because the trial has now been continued to June 2013 and the plaintiff did not move to strike the disclosure for more than a year after the defendants made the original disclosure, the Court rules that the defendants should be given an opportunity to supplement the disclosure pursuant to N.H. Super. Ct. R. 29. Accordingly, within 30 days of the notice of this order, the defendants shall provide a supplemental disclosure articulating the cause of action upon which liability for each non-litigant is based with sufficient factual detail to support the cause of action. If the plaintiff believes that the supplemental DeBenedetto disclosures are still inadequate the plaintiff may file a renewed motion to strike, motion for summary judgment, or request for other appropriate relief.

SO ORDERED.

6/11/2013
DATE

N. William Delker
Presiding Justice