# IN THE SUPREME COURT OF THE STATE OF VERMONT

THOMAS QUESNEL and ELIZABETH QUESNEL,
and THOMAS QUESNEL as Co-Administrator of
the Estate of MATTHEW J. QUESNEL,
Appellants-Plaintiffs,

VT. SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 2 2 1996

v.

THE TOWN OF MIDDLEBURY, ET AL.,
and CHRISTOPHER DUNDON,
Appellees-Defendants.

CHRISTOPHER DUNDON and DUNDON
HEATING & PLUMBING, INC.
Third-Party Plaintiffs

v.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE COMPANY,
Third-Party Defendants.

Supreme Court Docket No. 96-553

Appeal from the

Addison County Superior Court
Docket No. S151-94Ac

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## APPELLANTS' PRINTED CASE

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James A. Dumont, Esq.
Sandra M. Lee, Esq.
Keiner & Dumont, P.C.
72 Court Street
Middlebury, VT 05753

Attorney for Appellants
November 1996

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S151-94Ac(6)
James Dumont

JURY

ADDISON SUPERIOR COURT

S151-94Ac(6)
William O'Rourke/Dundon
Michael Gannon/Midd.
James Spink/Hanover &
Massachusetts

THOMAS QUESNEL and ELIZABETH QUESNEL

VS.

TOWN OF MIDDLEBURY,
THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS,
THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS,
THE MIDDLEBURY BOARD OF SELECTMEN,
and CHRISTOPHER DUNDON vs. Hanover Ins. Co. & Mass. Bay I

CIVIL ACTION

| | |
|---|---|
| Complaint dated | June 30, 1994 |
| Service (Dundon) @ Middlebury | July 15, 1994 |
| (all Middlebury Dfts) @ Middlebury | July 15, 1994 |
| ENTERED | June 30, 1994 |

| | |
|---|---|
| June 30, 1994 | J.Dumont filed Jury Demand. |
| Sept. 28, 1994 | J. Dumont advises Court he will be amending the complaint and Dfts will answer thereafter. |
| Nov. 18, 1994 | J. Dumont filed Motion to Amend Complaint. |
| Dec. 14, 1994 | W. O'Rourke filed Answer to Amended Complaint, Defenses, Jury Demand, Discovery Certificate of First Interrogatories and Requests to Produce. |
| Dec. 16, 1994 | Order filed granting Motion to Amend Complaint; copies to Dumont, O'Rourke. Amended Complaint filed. |
| Dec. 19, 1994 | M. Gannon filed Notice of Appearance for Town of Middlebury. |
| Dec. 21, 1994 | A. Keyes filed Third-Party Complaint against Hanover Insurance Co. and Massachusetts Bay Inc. Co., Jury Demand. |
| | Served on MA Bay Ins.Co. @ Montpelier Dec. 22, 1994 |
| | Served on Hanover Ins.Co. @ Montpelier Dec. 22, 1994 |
| Dec. 27, 1994 | A. Keyes filed Affidavit of Mailing on Third-Party Defendants. |
| Jan. 27, 1995 | A. Keyes filed Request to Enter Default of 3rd Party Dfts. Hanover Ins. Co. and Massachusetts Bay Ins. Co., Affid. for Entry of Default, Cert. of Service. Default Noted. |
| | J. Spink filed faxed Appearance, Answer for Third Party Dfts. Hanover Ins. Co. and Mass. Ins. Co. |
| | A. Keyes Withdraws Request to Enter Default of 3rd Party Dfts. via telephone. |
| Jan. 30, 1995 | J. Spink filed Original Notice of Appearance, Answer and Affirmative Defenses for Hanover Insurance and Massachusetts Bay Insurance. |
| Jan. 31, 1995 | A. Keyes files withdrawl of Request for Default. |
| Feb. 23, 1995 | M.Gannon filed Answer of Middlebury to Amended Complaint, Discovery Certificate of Interrogs & Requests to Produce. |
| Mar. 2, 1995 | A. Keyes filed Discovery Certificate of Expert Interrogato |
| March 17, 1995 | Status conference, M.Gannon did not appear. Pre-trial Ord issued: discovery on coverage complete 8/15/95 & Motion for |

J.Kupersmith

S151-94Ac(6)
James Dumont

ADDISON SUPERIOR COURT

S151-94Ac(6)
Michael Gannon/Town of Midd.
Allan Keyes/Dundon
James Spink/Hanover Ins.,
Mass.Bay Ins.

THOMAS QUESNEL and ELIZABETH QUESNEL

VS.

TOWN OF MIDDLEBURY,
THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS,
THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS,
THE MIDDLEBURY BOARD OF SELECTMEN,
and CHRISTOPHER DUNDON VS.HANOVER INSURANCE (
CIVIL ACTION and MASSACHUSETTS BAY INSURANCE (

PAGE TWO:

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|---|---|
| March 21, 1995 | A.Keyes filed Discovery Certificate of First Interrogs & Requests to Produce. |
| May 4, 1995 | A. Keyes filed Motion for Partial Summary Judgment with Statement of Material Facts and Memorandum of Law, Affidavit of C. Dundon, Memorandum of Atty's Fees and Disbursements. |
| May 9, 1995 | D. LeBrun filed Motion to Dismiss Third-Party Complaint, Motion for Protective Order, Discovery Certificate of Responses to Expert Interrogatories and Partial Responses to First Set of Interrogatories and Requests to Produce. |
| May 12, 1995 | A. Keyes filed Dundon's Reply to Motion to Dismiss Third-Party Complaint. |
| May 15, 1995 | J. Dumont filed Discvoery Certificate of Answers to Dft's Interrogatories and Requests to Produce.<br>A. Keyes filed Motion for Judgment on the Pleadings. |
| May 16, 1995 | A.Keyes filed Dundon's Motion to Compel and Reply to Hanover' Motion for Protective Order. |
| May 24, 1995 | D.LeBrun filed Hanover's Opposition to Motion to Compel. |
| May 26, 1995 | A.Keyes filed Dundon's Further Reply to Motion to Dismiss Third-Party Complaint & Memo in Support of Motion to Compel. |
| May 31, 1995 | J.Dumont filed Motion for Extension of Time (to 6/2/95) to respond to Dundon's Motion for Judgment on the Pleadings. |
| June 5, 1995 | J.Dumont filed Memo in Opposition to Motion for Judgment on the Pleadings, Motion to Amend Complaint Paragraph 23.<br>D.LeBrun filed Opposition to Motion for Partial Summary Jdgmt Cross-Motion for Partial Summary Judgment. |
| June 7, 1995 | D. LeBrun filed Hanover's Further Reply to Dundon's Reply. |
| June 15, 1995 | J. Dumont filed Discovery Certificate of Answers to Interrogatories and Requests to Produce. |
| June 16, 1995 | A. Keyes filed Reply Memorandum in Support of Motion for Judgment on the Pleadings. Copy to J. Katz. |
| June 23, 1995 | D.LeBrun filed Hanover's Memorandum in Support of Dundon's Motion for Judgment on the Pleadings. Copy to J.Katz.<br>M.Gannon filed Motion for Summary Judgment of Dfts Middlebury Copy to J.Katz. |
| June 26, 1995 | J.Dumont filed Second Memorandum in Opposition to Motion for Judgment on the Pleadings. Copy to J.Katz. |

JURY

S151-94Ac(6)
James Dumont

ADDISON SUPERIOR COURT

S151-94Ac(6)
William O'Rourke/Dundon
Michael Gannon/Midd.
~~James Glapp~~/Hanover & Ma
James Spink

THOMAS QUESNEL AND ELIZABETH QUESNEL

VS.

TOWN OF MIDDLEBURY,
THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS,
THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS,
THE MIDDLEBURY BOARD OF SELECTMEN, AND CHRISTOPHER DUNDON

VS.

HANOVER INSURANCE CO. AND MASSACHUSETTS BAY INSURANCE CO.
CIVIL ACTION

PAGE #3:

| | |
|---|---|
| July 3, 1995 | M. Gannon filed Supplemental Memorandum of Dfts' Middlebury in Support of their Motion for Summary Judgment. |
| July 7, 1995 | A.Keyes filed Reply Memorandum in Opposition to Cross-Motion for Summary Judgment and in Support of Dundon's Motion for Partial Summary Judgment. Copy to J.Katz. |
| Aug. 15, 1995 | D. LeBrun filed Reply to Dundon's Reply Memorandum in Opposition. |
| Sept. 5, 1995 | M. Gannon filed Motion for Summary Judgment, Exhibits A,B,C; Statement of Uncontested Facts, Discovery certificate of Supplemental ~~Interrogatories and Requests to Produce.~~ |
| * SEE COMPUTER FOR FURTHER ENTRIES | |
| Sept. 12, 1995 | ORDER filed: Dft Dundon's Motion for Judgment on the Pleadings granted, Middlebury Dfts' Motion for Summary Judgment of 6/23/95 granted, Dundon's Motion for Partial Summary Judgment against 3rd Party Dfts denied, Hanover & Mass.Bay Insurances' Motion to Dismiss and Motion for Summary Judgment granted, all other pending motions moot. |
| | Order filed granting Pltff's Motion to Amend Complaint ¶23; copies to attys. |
| Sept. 13, 1995 | M.Gannon filed Affidavits in Support of Motion for Summary Judgment. |
| Oct. 6, 1995 | J. Dumont filed Notice of Appeal. Notice of Appeal, $100 filing fee, certified copy of docket entries mailed to Supreme Court, copy to attys. |
| Oct. 12, 1995 | A. Keyes filed Notice of Appeal, check in amount of $100. Original Notice of Appeal and check in the amount of $100 forwarded to Supreme Court. |
| Nov. 27, 1995 | D. LeBrun filed Motion to Stay Discovery and for Expedite Consideration; Motion to Dismiss Third-Party Complaint of Dundon Heating & Plumbing, Inc.; Motion for Summary Judgment; Statement of Undisputed Facts w/Exhibits. |
| Nov. 30, 1995 | A. Keyes filed Dundons' Memorandum in Opposition to Motion to Stay Discovery and for Expedited Consideration; Memorandum in Opposition to Motion to Dismiss Third-Part, |

Superior Court — County of Addison

Docket No. 151-6-94 Ancv — Quesnel et al vs. Middlebury, Town of et

Case Type:
Case Track: Not set
Case Status: Disposed
Court/Jury: Jury Trial
Next Hearing:

Last judge: Matthew I. Katz
Recused: None

## PARTIES

| No. | Role | Litigant Name | Attorney Name | Telephone |
|---|---|---|---|---|
| # 1 | plf | Quesnel, Thomas | Dumont, James A. | 388-4906 |
| # 2 | plf | Quesnel, Elizabeth | Dumont, James A. | 388-4906 |
| # 3 | def | Middlebury, Town of | Murnane, Janet C. | 863-4531 |
| # 4 | def | Middlebury Bd. of Sewage Syste | Murnane, Janet C. | 863-4531 |
| # 5 | def | Middlebury Bd.of Sewage Dispos | Murnane, Janet C. | 863-4531 |
| # 6 | def | Middlebury Bd. of Selectmen | Murnane, Janet C. | 863-4531 |
| # 7 | def | Dundon, Christopher | Keyes, Allan R. | 773-3344 |
| # 8 | def | Hanover Insurance Company | Lebrun, Douglas | 864-5751 |
| # 9 | def | Massachusetts Bay Insurance Co | Lebrun, Douglas | 864-5751 |
| # 10 | ccd | Murnane, Janet C. REMOVED | | W:863-4531 |

## DISPUTES

| Dispt | Case Name | Disputants | Dispo | Date |
|---|---|---|---|---|
| | cmpl Wrongful Death | p#1-2 v p#3 | jdsum | 10/25/96 |
| | cmpl Wrongful Death | p#1-2 v p#4 | jdsum | 10/25/96 |
| | cmpl Wrongful Death | p#1-2 v p#5 | jdsum | 10/25/96 |
| | cmpl Wrongful Death | p#1-2 v p#6 | jdsum | 10/25/96 |
| | cmpl Wrongful Death | p#1-2 v p#7 | jdsum | 10/25/96 |
| | thp Insurance/Defense & Indemnification | p#7 v p#8 | jdsum | 10/25/96 |
| | thp Insurance/Defense & Indemnification | p#7 v p#9 | jdsum | 10/25/96 |

## MOTIONS/PETITIONS/REQUESTS FOR RELIEF

| No. | Type | Status | Judge | Date |
|---|---|---|---|---|
| | M/for Partial Summary Judgment | denied | MIK | 09/12/95 |
| | M/to Dismiss Third-Party Complaint | granted | MIK | 09/12/95 |
| | M/for Judgment on the Pleadings | granted | MIK | 09/12/95 |
| | M/for Protective Order | moot | MIK | 09/12/95 |
| | M/to Compel | moot | MIK | 09/12/95 |
| | M/to Amend Complaint Paragraph 23 | granted | MIK | 09/12/95 |
| | M/for Partial Summary Judgment | granted | MIK | 09/12/95 |
| | M/for Summary Judgment | granted | MIK | 09/12/95 |
| | M/for Summary Judgment | moot | MIK | 09/12/95 |
| | M/to Stay Discovery/for Expedited Consider | granted | MIK | 12/05/95 |
| | M/to Dismiss 3rd Party Complaint | denied | MIK | 03/07/96 |
| | M/for Summary Judgment | granted | MIK | 04/03/96 |
| | M/for Reconsideration (of Motion to Compel. | order | MIK | 03/07/96 |
| | R/for Enlargement of Time | granted | MIK | 01/09/96 |
| | M/to Enlarge Time to Respond to Motion | moot | MIK | 03/07/96 |
| | M/for Partial Summary Judgment | disposed | MIK | 05/17/96 |
| | M/to Amend Complaint | granted | MIK | 04/03/96 |
| | M/for Summary Judgment | granted | MIK | 08/22/96 |
| | M/to Withdraw as Attorney | granted | MIK | 08/22/96 |

06/30/94 Wrongful Death case filed by Plaintiff Thomas Quesnel and Plaintiff Elizabeth Quesnel against Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd.Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen and Defendant Christopher Dundon. Jury trial requested.

07/15/94 Service complete on party(s) 3-6: personal service. Documents served: Summons & Complaint. Service complete on party(s) 7: personal

service. Documents served: Summons & Complaint.

12/21/94 Third Party Claim filed by Defendant Christopher Dundon against Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. (Dispute 6-7).

05/04/95 MPR 1) Motion for Partial Summary Judgment filed by Defendant Christopher Dundon. Motion for Partial Summary Judgment given to judge.

05/09/95 MPR 2) Motion to Dismiss Third-Party Complaint filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion to Dismiss Third-Party Complaint given to judge.
MPR 4) Motion for Protective Order filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion for Protective Order given to judge.

05/15/95 MPR 3) Motion for Judgment on the Pleadings filed by Defendant Christopher Dundon. Motion for Judgment on the Pleadings given to judge.

05/16/95 MPR 5) Motion to Compel filed by Defendant Christopher Dundon. Motion to Compel given to judge.

06/05/95 MPR 6) Motion to Amend Complaint Paragraph 23 filed by Plaintiff Thomas Quesnel and Plaintiff Elizabeth Quesnel. Motion to Amend Complaint Paragraph 23 given to judge.
MPR 7) Motion for Partial Summary Judgment filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion for Partial Summary Judgment given to judge.

06/23/95 MPR 8) Motion for Summary Judgment filed by Defendant Christopher Dundon. Motion for Summary Judgment given to judge.

09/05/95 MPR 9) Motion for Summary Judgment filed by Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd.Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen. Motion for Summary Judgment given to judge.

09/12/95 SEE FILE/DOCKET BOOK FOR PREVIOUS/OTHER ENTRIES. Finding Filed on MPR 1 by MIK. Finding Filed on MPR 2 by MIK. Finding Filed on MPR 3 by MIK. Finding Filed on MPR 7 by MIK. Finding Filed on MPR 8 by MIK.
Entry Order by Judge Matthew I. Katz: ORDER filed GRANTING Dundon's Motion for Judgment on the Pleadings, GRANTING Middlebury's Motion for Summary Judgment of 6/23/95, DENYING Dundon's Motion for Partial Summary Judgment on 3rd Party Complaint, GRANTING 3rd Party Dfts' Motion to Dismiss & Motion for Summary Judgment. All other pending motions MOOT. Copies to attys. Finding Filed on MPR 4 by MIK. Finding Filed on MPR 5 by MIK. Finding Filed on MPR 9 by MIK.
Entry order re MPR 6) Motion to Amend Complaint Paragraph 23. M/Reaction Form. Granted by MIK. Dispute 1-5 Summary Judgment for Defendant. Dispute 6-7 Summary Judgment for Defendant. MPR status changed to denied, MPR 1. MPR status changed to granted, MPR 2. MPR status changed to granted, MPR 3. MPR status changed to moot, MPR 4. MPR status changed to moot, MPR 5. MPR status changed to granted, MPR 7. MPR status changed to granted, MPR 8. MPR status changed to moot, MPR 9. Case Closed.

09/13/95 M.Gannon filed Affidavits in Support of 9/5/95 Motion for Summary Judgment.

10/06/95 Notice of Appeal from Party 1-2.

10/09/95 Complete file mailed to Supreme Court.

10/12/95 Notice of Appeal from Party 7.
Original Notice of Appeal and check #24977 in amt of $100.00 forwarded to Supreme Court.

11/13/95 A. Keyes filed Discovery Certificate of Notice of Deposition of Dft. Hanover.

11/27/95 MPR 10) Motion to Stay Discovery/for Expedited Consider filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion to Stay Discovery/for Expedited Consider given to judge.
MPR 11) Motion to Dismiss 3rd Party Complaint filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion to Dismiss 3rd Party Complaint given to judge.
MPR 12) Motion for Summary Judgment filed by Defendant Hanover

Insurance Company and Defendant Massachusetts Bay Insurance Co.
Motion for Summary Judgment waiting for Memo in Opposition.
D.Lebrun filed Statement of Undisputed Facts.
10/95 Party 7 filed response to MPR 10. Party 7 filed response to MPR 11.
MPR 13) Motion for Reconsideration (of Motion to Compel filed by Defendant Christopher Dundon. Motion for Reconsideration (of Motion to Compel waiting for Memo in Opposition.
05/95 Entry order re MPR 10) Motion to Stay Discovery/for Expedited Consider. M/Reaction Form. Granted by MIK. Until further order. Court will review pleadings on 3rd party claims. Copies to Dumont, Gannon, Keyes, LeBrun.
12/95 D.LeBrun filed Affidavit of C.Poulin in support of Motion for Summary Jdgmt.
MPR 14) Request for Enlargement of Time filed by Defendant Christopher Dundon. Request for Enlargement of Time given to judge.
08/96 Party 7 filed response to MPR 12.
MPR 16) Motion for Partial Summary Judgment filed by Defendant Christopher Dundon. Motion for Partial Summary Judgment waiting for Memo in Opposition.
09/96 Entry order re MPR 14) Request for Enlargement of Time. M/Reaction Form. Granted by MIK.
10/96 Re-open: to reverse closing entries made in error.
16/96 MPR 15) Motion to Enlarge Time to Respond to Motion filed by Defendant Hanover Insurance Company. Motion to Enlarge Time to Respond to Motion given to judge.
10/96 Party 8-9 filed response to MPR 16.
D. LeBrun filed Response to Dundon's Statement of Material Facts.
MPR status changed to judge, MPR 16.
07/96 Entry order re MPR 13) Motion for Reconsideration (of Motion to Compel. M/Reaction Form. Order issued by by MIK. Counsel ought to be able to resolve. Court unlikely to bar summary judgment - if appropriate - solely for lack of opportunity to fish.
Entry order re MPR 11) Motion to Dismiss 3rd Party Complaint. M/Reaction Form. Denied by MIK. Corporate policyholder joined as 3rd party plaintiff.
Entry order re MPR 12) Motion for Summary Judgment. M/Reaction Form. Set for hearing per by MIK.
Motion Hearing set for 04/03/96 at 09:00 AM. MPR status changed to moot, MPR 15.
03/96 MPR 17) Motion to Amend Complaint filed by Plaintiff Thomas Quesnel and Plaintiff Elizabeth Quesnel. Motion to Amend Complaint given to judge.
Motion Hearing held. MIK/TAPE.
Entry Order by Judge Matthew I. Katz: Motion GRANTED IN PART; Coverage Declared; Not Bad Faith to Deny Coverage; A. Keyes to prepare Order. Motion to Amend Complaint GRANTED, Amended Complaint DISMISSED for grounds previously stated.
Entry order re MPR 12) Motion for Summary Judgment. Contested Hearing. Granted by MIK. Notice was given on record.
Entry order re MPR 17) Motion to Amend Complaint. Contested Hearing. Granted by MIK. Notice was given on record.
Entry order re MPR 16) Motion for Partial Summary Judgment. Contested Hearing. Granted in part, denied in part by MIK.
17/96 ORDER filed disposing of Third-party Pltffs' & Dfts' cross-motions for summary judgment. Copies to LeBrun, Keyes, Dumont, Gannon. Dispute 1-7 Summary Judgment for Defendant. MPR status changed to disposed, MPR 16. Case Closed.
13/96 J.Dumont filed Notice of Appeal. Notice, certified copy of docket entries, filing fee forwarded to Supreme Court.
18/96 File hand-delivered to Supreme Court by Linda Richards.
17/96 Notice of Appeal from Party 8-9.
Notice of Appeal, filing fee forwarded to Supreme Court. Copies to attys.
18/96 MPR 18) Motion for Summary Judgment filed by Defendant Christopher Dundon. Motion for Summary Judgment waiting for Memo in Opposition.
[illegible] Notice of Appeal from Party 7

07/23/96 Party 8-9 filed resp[illegible]e to MPR 18. MPR status chang[illegible] to judge, MPR 18.

07/26/96 A. Keys filed Dundon's Reply Memorandum in support of Motion for Summary Jdgt.

08/06/96 Supreme Court entry: cross-appellant Dundon's Motion to Dismiss is granted.

08/19/96 Appearance by Janet C. Murnane as Co-counsel for Defendant.
J.Murnane filed Notice of Appearance & Subsitution of Counsel (for Dfts).
MPR 19) Motion to Withdraw as Attorney filed ! Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd.Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen. Motion to Withdraw as Attorney given to judge.

08/22/96 Entry order re MPR 19) Motion to Withdraw as Attorney. M/Reaction Form. Granted by MIK.
Attorney Michael J. Gannon withdraws.
Attorney Michael J. Gannon withdraws.
Attorney Michael J. Gannon withdraws.
Attorney Michael J. Gannon withdraws.
Appearance entered by Janet C. Murnane on behalf of Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd.Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen. Party 10 Co-counsel for Defendant removed: Substitution of Party.
Entry Order by Judge Matthew I. Katz: Entry Order regarding Motion for Summary Judgment filed: no factual dispute, fees reasonable, application for fees approved in amount of $5732.61, judgment to be filed. Copies to Dumont, Keyes, LeBrun, Murnane. MPR status changed to granted, MPR 18.

10/25/96 Entry Order by Judge Matthew I. Katz: JUDGMENT ORDER filed; copies to attys. Dispute 1-7 Summary Judgment for Defendant. Case Closed.

11/05/96 Notice of Appeal from Party 1-2.
Notice of Appeal, certified copy of docket sheet to Supreme Ct; copy of Notice, docket sheet, transcript order form, docketing statements to attys. S.Lee to Request Waive[illegible]f Filing Fee of Supreme Ct.

STATE OF VERMONT
ADDISON COUNTY, SS

THOMAS QUESNEL and ELIZABETH QUESNEL, AND THOMAS QUESNEL AS CO-ADMINISTRATOR OF THE ESTATE OF MATTHEW J. QUESNEL

Plaintiffs

Addison Superior Ct.
Docket No.

v.

THE TOWN OF MIDDLEBURY, THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS, THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS, THE MIDDLEBURY BOARD OF SELECTMEN, and CHRISTOPHER DUNDON,
Defendants

(AMENDED) COMPLAINT

Now come Thomas Quesnel and Elizabeth Quesnel by and through the law firm of Sessions Keiner Dumont & Barnes, P.C., and they complain as follows:

1. Thomas and Elizabeth Quesnel are husband and wife and reside in Corwnall, Vermont.

2. Matthew Quesnel, their adult son, resided in Middlebury, Vermont at the time of his loss of consciousness and death on May 8, 1993.

3. The Town of Middlebury is a municipal corporation. Its Selectmen also function as the Board of Sewage System Commissioners and the Board of Sewage Disposal Commissioners.

4. The Town and the three Boards own, control, and operate one or more sewer lines in Middlebury, with associated manholes. In owning, controlling and operating sewer lines and manholes, the

Town and the three Boards act in a nongovernmental or proprietary fashion.

5. Christopher Dunden resides in Orwell, Vermont.

6. In 1992 and 1993 Christopher Dunden and Matthew Quesnel both were employed by Dunden Heating and Plumbing, Inc.. Christopher Dunden's duties as a fellow employee of Matthew Quesnel included training and supervision of Matthew Quesnel.

7. The Town of Middlebury and the three Boards had established a pattern or practice of permitting, consenting to and inviting plumbers and plumbing contractors and others to enter into its manholes in connection with their activities as plumbers.

8. On May 8, 1993, Matthew Quesnel and Dunden Plumbing and Heating, Inc. were invitees of the Town of Middlebury and the three Boards in a manhole located adjacent to Mr. Ups restaurant in Middlebury.

9. In the alternative, they were licensees of the Town of Middlebury and the three Boards.

10. The Town and the three Boards had a duty of reasonable care to persons such as Matthew Quesnel. The duty included a duty to discover hazards, a duty to warn of known hazards, and a duty to take other reasonable precautions when it was apparent that warnings alone would not suffice.

11. Christopher Dunden had a duty of reasonable care in the training, supervision, equipping and assignment of Matthew Quesnel.

12. On May 8, 1993, Matthew Quesnel entered the manhole.

13. Matthew Quesnel entered the manhole alone, without

reasonable warning, assistance, supervision, equipment or training.

14. He fell unconscious and then died of asphyxiation within the manhole.

15. Matthew Quesnel's loss of consciousness and death were a proximate result of each Defendants's failure to exercise reasonable care or a result of each Defendant's recklessness.

16. Matthew Quesnel's loss of consciousiness and death have caused Thomas and Elizabeth Quesnel to suffer the loss of their son's consortium and companionship.

17. Defendants' conduct was in wanton disregard of their duties. Plaintiffs are entitled to punitive damages.

18. [NEW] On October 24, 1994, Thomas Quesnel was appointed by the Addison County Probate Court to serve as a co-administrator of the Estate of Matthew J. Quesnel.

19. [NEW] Thomas Quesnel brings this action as personal representative of the decedent, seeking damages for the Thomas and Elizabeth's lost love, companionship, consortium, future support and care, and other pecuniary and non-pecuniary injuries.

20. [NEW] Thomas Quesnel and Elizabeth also bring this action independently of those claims being brought by the personal representative. This claim too seeks damages for the Thomas and Elizabeth's lost love, companionship, consortium, future support and care, and other pecuniary and non-pecuniary injuries.

21. [NEW] The decedent left a spouse and child.

22. [NEW] The spouse and child, through counsel, have informed the probate court that they wish to take or inherit no monies

obtained by jury verdict or settlement or other resolution of the present action.

23. [NEW] The spouse and child, for purposes of this action, have waived any claim they have to be "next of kin" within the meaning of Vermont's wrongful death statute and common law.

24. [NEW] A ruling by the court that Thomas and Elizabeth Quesnel are not entitled to recovery because they are not next of kin or otherwise are not proper Plaintiffs under Vermont's wrongful death statutes and common law would deprive the Estate and Plaintiffs of their rights to equal protection of law under the Fourteenth Amendment and Article 9 of Chapter I of the Vermont Constitution, and would deprive the Estate and the Plaintiffs of their remedy guaranteed by Article 4 of Chapter I of the Vermont Constitution.

WHEREFORE Plaintiffs seek trial by jury, compensatory damages, punitive damages, costs, and such other and further relief as the Court deems proper.

Date: 11/17/94

James A. Dumont, Esq.
Sessions Keiner Dumont & Barnes PC
72 Court St.
Middlebury, VT 05753

12

STATE OF VERMONT
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL
Plaintiffs,

vs.

THE TOWN OF MIDDLEBURY, ET AL
Defendants

CHRISTOPHER DUNDON and
DUNDON HEATING & PLUMBING, INC.,
Third-Party Plaintiffs,

vs.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE COMPANY,
Third-Party Defendants.

## MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Christopher Dundon and Dundon Heating & Plumbing, Inc. move under V.R.C.P. 12 (c) for judgment on the pleadings dismissing plaintiffs' action on the merits. The complaint states no valid claim on behalf of the decedent's parents, because the parents are not "next of kin" within the meaning of the wrongful death act.

Mr. Quesnel was survived by a wife and children, who claim no damages. (Amended Complaint ¶ ¶ 21-23.) This action is brought exclusively on behalf of the parents. (Amended Complaint ¶ ¶ 2, 16, 19-23.)

The wrongful death act allows the decedent's personal representative to recover such damages as are just with reference to the pecuniary injuries resulting from the death to the decedent's spouse and "next of kin." 14 V.S.A. § 1492(b). The term "next

of kin" in the wrongful death act denotes only those "persons most nearly related to the decedent *by blood*." *Whitchurch v. Perry*, 137 Vt. 464, 408 A.2d 627 (1979). "Next of kin" in the wrongful death statute carries the same meaning as it does in the laws of descent. *Mobbs v. Central Vermont Ry.*, 155 Vt. 210, 311, 583 A.2d 566 (1990). It means those blood relatives in existence at decedent's death who would take decedent's property if decedent had died intestate. *Ouellette v. State Farm Mutual Automobile Insurance Co.*, 1994 Okla. LEXIS 88, 65 O.B.A.J. 2222 (1994); *In Re Estate of Finley*, 151 Ill. 2d 95; 601 N.E.2d 699 (1992); *Holmgren v. National Big-4 Asbestos Removal Specialty*, 228 Ill. App. 3d 433; 592 N.E.2d 1197 (1992); *Rodgers v. Consolidated R.R.*, 136 Ill. App. 3d 191; 482 N.E.2d 1080 (1985); *Wilcox v. Bierd* 330 Ill. 571, 582, 162 N.E. 170 (1928),[1] overruled on other grounds, *McDaniel v. Bullard*, 34 Ill. 2d 487, 216 N.E.2d 140 (1966).

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[1] The Illinois court explains:

> The term 'next of kin,' in its technical, legal meaning, means persons nearest in degree of blood surviving. In its practical use the term has come to mean, ordinarily, those persons who take the personal estate of the deceased under the statute of distribution. The English courts hold that the primary and proper meaning of 'next of kin' is the nearest in proximity of blood living at the death of the person whose next of kin are spoken of. (2 Pope's Legal Definitions, p. 1025.) Under our statute on descent (Smith's Stat. 1925, chap. 39, sec. I, p. 979,) personal property descends first to the deceased's children and their descendants in equal parts, the descendants of the deceased's child or grandchild taking the share of its deceased parents in equal parts. When there is no child of the intestate or descendants of such child, and no widow or surviving husband, then the property descends to the parents, brothers and sisters of the deceased and their descendants, etc. * * * The civil law rule that parents and children stood in the same degree of kindred was changed in

Under Vermont laws of descent, parents do not inherit when the decedent is survived by children. 14 V.S.A. § 551(1) & (3).[2] The children, not the parents, are next

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> this State by the adoption of the Descent act in 1829, and such civil law rule, which was the common law doctrine, has been wholly superseded by statute in this State and parents have been reduced to the second degree of kindred. * * * The next of kin of any deceased person are definite blood relatives or a definite class of blocd relatives or kinsmen in existence at the time of the death of the deceased who would take his personal property in case he died intestate.

*Wilcox v. Bierd* 330 Ill. 571, 581-82, 162 N.E. 170, 175 (1928), overruled on other grounds, *McDaniel v. Bullard*, 34 Ill. 2d 487, 216 N.E.2d 140 (1966).

[2] 15 V.S.A. § 551. General rules of descent

The real and personal estate of a decedent, not devised nor bequeathed and not otherwise appropriated and distributed in pursuance of law, shall descend in the following manner:

(1) in equal shares to the children of such decedent or the legal representatives of deceased children;

(2) If the decedent is married and leaves no issue and the surviving spouse does not elect to take a third in value of the real estate of which the decedent dies seised in his or her own right, or waives the provisions of the will of such decedent, such spouse shall be entitled to the whole of the decedent's estate forever, if it does not exceed $25,000.00. but if it exceeds that sum, then such spouse shall be entitled to $25,000.00 and half the remainder. The remainder of such estate shall descend as the whole would if such spouse did not survive. If the decedent has no kindred who may inherit the estate, such spouse shall be entitled to the whole of such estate;

(3) If the decedent does not leave issue nor surviving spouse, the estate shall descend in equal shares to the father and mother of such decedent. If the mother is not living and the father survives, the estate shall descend to the father. If the father is not living and the mother survives, the estate shall descend to the mother;

(4) If the decedent does not leave issue, nor surviving spouse, nor father, nor mother, the estate shall descend in equal shares to the brothers and sisters of such decedent, and to the legal representatives of deceased brothers and sisters;

of kin. They are most closely related by blood and would inherit under the laws of descent.

Because the parents are not next of kin, the complaint fails to state a claim upon which relief can be granted. *Whitchurch v. Perry*, 137 Vt. 464, 408 A.2d 627 (1979)("next of kin" within the meaning of 14 V.S.A. § 1492 must exist if damages for wrongful death are to be recovered); see *Mobbs v. Vermont Central Ry.*, 150 Vt. 311, 553 A.2d 1092 (1989) (directed verdict affirmed because there was no proof that next of kin suffered pecuniary injury).

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(5) If none of the kindred above-named survives the decedent, the estate shall descend in equal shares to the next of kin in equal degree; but a person shall not be entitled, by right of representation, to the share of such next of kin who has died.

(6) Notwithstanding the foregoing rules or provisions otherwise made in any case where a person is entitled to inherit, including a devisee or legatee under the last will of a decedent, such person's share in the decedent's estate shall be forfeited and shall pass to the remaining heirs of the decedent if such person stands convicted in any court of the United States or of any of the individual states of the United States of intentionally and unlawfully killing the decedent. In an y proceedings to contest the right of a person to inherit, the record of such person's conviction of intentionally and unlawfully killing the decedent shall be admissible evidence and may be taken as sufficient proof that such person did intentionally kill the decedent.-

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## CONCLUSION

Where children survive, parents are not "next of kin" within the meaning of the wrongful death act. No lawful beneficiary claims damages under the act; therefore the complaint fails to state a claim upon which relief can be granted. The court should grant the motion for judgment on the pleadings.

Dated: May 12, 1995

CHRISTOPHER DUNDON and
DUNDON HEATING & PLUMBING, INC.

By _____
Allan R. Keyes, Esquire
Ryan Smith & Carbine, Ltd.
PO Box 310
Rutland, VT 05702-0310

cc: Douglas D. Le Brun, Esq.
James A. Dumont, Esq.
Michael J. Gannon, Esq.

50831-#37348v2

STATE OF VERMONT
ADDISON COUNTY, SS.

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| THOMAS QUESNEL and ELIZABETH QUESNEL, and THOMAS QUESNEL AS CO-ADMINISTRATOR OF THE ESTATE OF MATTHEW J. QUESNEL<br><br>v<br><br>THE TOWN OF MIDDLEBURY, THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS, THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS, THE MIDDLEBURY BOARD OF SELECTMEN and CHRISTOPHER DUNDON | ADDISON SUPERIOR COURT<br>DOCKET NO. S151-94Ac |

INITIAL MEMORANDUM
IN OPPOSITION TO
MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Dundon has sought judgment on the pleadings. Dundon argues that the wrongful death statute restricts plaintiffs to "next of kin", and that Thomas and Elizabeth Quesnel do not qualify as next of kin.

Defendant's motion should be denied for the following reasons.

1. Matthew Quesnel's parents <u>are</u> "next of kin" within the meaning of the wrongful death act, because, as alleged in the complaint, the interests of the widow and child are being disclaimed.

2. The complaint also alleges a common law cause of action independent of any limitations of the wrongful death statute.

3. Interpretation of the wrongful death statute as precluding statutory recovery by parents unless their adult child is single, and as precluding common law recovery, denies Plaintiffs equal protection and access to the courts under the Fourteenth Amendment and the Vermont Constitution.

<u>1. Matthew Quesnel's parents are "next of kin".</u>

Vermont case law discusses but does not precisely define "next

of kin". Two cases exist. One, a 1979 case, addressed an unrelated issue. The second, a 1988 case, controls this case.

Whitchurch v. Perry, 137 Vt. 464,472 (1979) relied on Black's Law Dictionary (1968) for a definition. In Whitchurch the issue was whether a proposed adoptive parent -- not a blood relative and not yet an adoptive parent -- fell within the definition. The Black's definition is as follows:

> In the law of descent and distribution, this term properly denotes the persons nearest of kindred to the decedent, that is, those who are most nearly related to him by blood; but it is sometimes construed to mean only those who entitled to take under the statute of distributions, and sometimes to include other persons.

Black's (1968) p.1194. Relying on the reference to "blood" relation, the Court held for the defendants.

In Mobbs v. Central Vt. Railway, 150 Vt. 311, 315 (1988) the Court addressed a tragic situation in which a two-year old and her parents were killed at a train crossing. The estate of the two-year old brought suit, seeking damages on behalf of the two-year old's two siblings. The trial court dismissed the action. The Supreme Court reversed this aspect of the trial courts ruling, expressly holding that "'next of kin' should carry the same meaning as it does in the laws of descent."

In Vermont the "laws of descent" include 14 V.S.A §§ 1951 et seq.. These provisions must be read in pari materia with §§ 1492 and 551. Briefly, these statutes state "[a]ny person ... to whom any property or interest therein devolves, by whatever means, may

disclaim it in whole or in part." 14 V.S.A. § 1951. If the interest or property is disclaimed under the statute, the law treats the disclaimant, in terms of the disclaimed property, as having "predeceased the decedent." 14 V.S.A. § 1954(a). Therefore, the disclaimed interest, which in the current case is the right of the "next of kin" to bring an action for damages for wrongful death, 14 V.S.A. § 1492(b), would pass to the respective family "tier" not having disclaimed the interest. Where the decedent dies intestate, which is the case here, and "the decedent does not leave issue nor surviving spouse, the estate shall descend in equal shares to the father and mother of such decedent." 14 V.S.A. § 551(3).

In the present case, both the decedent's surviving spouse and child disclaimed their right to either bring a wrongful death action and to any recovery therefrom. The father and mother, Thomas and Elizabeth Quesnel, therefore are "next of kin".

This is motion for judgment on the pleadings. All allegations of the complaint must be taken as true. Paragraphs 21-23 of the complaint state:

> 21. The decedent left a spouse and child.
>
> 22. The spouse and child, through counsel, have informed the probate court that they wish to take or inherit no monies obtained by jury verdict or settlement or other resolution of the present action.
>
> 23. The spouse and child, for purposes of this action, have waived any claim they have to be "next of kin" within the meaning of Vermont's wrongful death statute and common law.

These paragraphs of complaint are based upon and track the

precise purpose of the disclaimer statute. The motion for judgment on the pleadings should be denied[1].

2. The Complaint Also Alleges a Common Law Cause of Action Independent of Any Limitations in the Wrongful Death Statute.

Paragraph 19 of the Complaint alleges that Thomas Quesnel brings the Complaint as personal representative of the decedent, seeking damages for Thomas' and Elizabeth's damages from the loss of their son. This is the statutory wrongful death action for damages to next of kin.

Paragraph 20 alleges that Thomas and Elizabeth "also bring this action independently of those claims brought by the personal representative." This claim as well seeks damages for the loss of their son. The claim in Paragraph 20 is a claim under the common law, outside the statute and independent of the authority given by statute to personal representatives to seek damages for next of kin.

The question before the Court (assuming that the Plaintiffs are not "next of kin") is whether to recognize a common law, nonstatutory, cause of action to provide a remedy to parents who

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[1]To remove any ambiguity about this point, Plaintiffs submit along with this Memorandum a Motion to Amend the Complaint, and an Affidavit in support of the Motion. The Amendment adds to Paragraph 23 the underlined wording as follows:

> 23. The spouse and child, for purposes of this action, have waived any claim they have to be "next of kin" within the meaning of Vermont's wrongful death statute and common law. The spouse and child have disclaimed any present interest and will disclaim their future interest once it has been finally ascertained and indefeasibly vested.

are not "next of kin".

In 1970 the United States Supreme Court summarized the absurdity and unfairness of the common law rule that, upon the death of the victim, the liability of tortfeasors vanishes. In Moragne v. States Marine Lines, 398 US 375, 26 L.Ed.2d 339, 90 S.Ct.1772, the Court adopted, as a matter of federal common law[2], a new common law rule recognizing the right of a decedent's estate to pursue remedies for wrongful death.

This was done in the face of Congressional enactments which provided wrongful death remedies in other areas of federal jurisdiction, but not in the particular jurisdiction of the victim in the Moragne case. The Court rejected the argument that the Congress intended to "freeze" wrongful death remedies into the precise molds it had created by statute. 398 US 396, 26 L.Ed.2d 354.

The parallel to the present situation is striking. The Vermont legislature created a remedy for parents who are "next of kin". The legislature has not created a remedy for parents who are not "next of kin". Nor has it forbade such a remedy.

This is exactly the area in which interstitial development of common law is most appropriate. See Moragne at 398 US 391-394, 26 L.Ed.2d 351-352.("It has always been the duty of the common-law court to perceive the impact of major legislative innovations and

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[2]The particular field of federal common law was maritime jurisdiction.

to interweave the new legislative policies with the inherited body of comon-law principles -- many of them derived from earlier legislative exertions.")

As the Supreme Court notes, commentators virtually without exception describe the common law rule against recovery for wrongful death as "barbarous", "anomalous" and without logical basis. 398 US 381-391; 26 L.Ed.2d 346-351. Its sole justification is the historical doctrine of felony-merger, by which civil recovery was barred for acts which constituted both a tort and a felony. Punishment for felons was death and the forfeiture of his property to the Crown. "[A]fter the punishment nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death." 398 US 382; 26 L.Ed.2d 346.

In England, where the doctrine arose, it has been "emasculated" by judicial decision. 398 US 388; 26 L.Ed.2d 350.

In the United States, every single state has adopted legislation to temper this absurd and unfair common law doctrine. 398 US 390; 26 L.Ed.2d 351. To varying degrees, the state courts have adopted the U.S. Supreme Court's approach by interweaving remedies where the statutes provide no remedy. The Supreme Judicial Court of Massachusetts followed Moragne and expressly adopted a common law wrongful action, to provide a remedy to a plaintiff left without recourse by that state's wrongful death statutes. Gaudette v. Webb, 284 N.E. 222 (Mass. 1972). See S.

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Speiser and S. Malawer, An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions, 51 Tulane L.Rev. 1, 23 (Dec. 1976)(approving of Gaudette); Summerfield v. Superior Court of Maricopa County, 698 P.2d 712 (Arizona 1985)(existence of common law and statute together compel recognition of right of recovery for wrongful death of fetus, citing Moragne and, among many other cases, Vermont's Vaillancourt v. MCHV, 139 Vt. 138 (1980).)

The Vermont Supreme Court clearly and unmistakeably has adopted the Dean Roscoe Pound's view of its duty as a common law court to create interstitial common law precedent -- and it has done so in the wrongful death area. See, e.g., Lazelle v. Town of Newfane, 70 Vt. 440 (1898)(defining "pecuniary" loss as "lost intellectual, moral, and physical training, or the loss of care, nurture and protection."); Vaillancourt, supra (recognizing unborn fetus as "person" within meaning of statute); Hay v. Medical Center of Vermont, 145 Vt. 533 (1985)(minor children granted a common law cause of action for the recovery of lost parental consortium, because "in the best interests of justice and the citizens of the state of Vermont."); Hartnett v. Union Mutual Fire Ins. Co., 153 Vt. 152 (1989)(mental anguish and grief recognized as within the statute); Clymer v. Webster, 156 Vt. 614 (1991)(recognizing parent-child loss even of adult child, despite statutory reference to "minor child").

The Vermont Supreme Court has not yet had to decide whether a

common law remedy should be provided to parents who are not "next of kin", or whether for any reason a nonstatutory cause of action for wrongful death should be recognized. In Vaillancourt, supra, the Court noted a "conflict of authority" on the issue but did not reach it. 139 Vt. 141. In Thayer v. Herdt, 155 Vt. 448, 454 (1990), the Court rejected a request that it recognize a common law action for wrongful death of a minor child (to a next-of-kin parent who had missed the statutory limitations period). But it did so with the following comments:

> This Court will not recognize a new cause of action or enlarge an existing one without first determining whether there is a compelling public policy reason for the change. [Citing Langle v.Kurkul, the social host decision, 146 Vt. 513 (1986)] Plaintiff does not suggest, and we do not perceive, such a reason here.... [R]ecovery may be had for the pecuniary injuries sustained by the decedent's spouse and next of kin. 14 V.S.A. §§ 1491, 1492. Plaintiff does not argue that the remedy is inadequate.

(Emphasis added.) In the present case, the remedy is sorely inadequate. If they are not "next of kin", the mother and father of the deceased young man have no remedy at all.

A crabbed view of the common law, denying these parents their remedy, would be more than unfair. Of course such a ruling will rob these parents of any pecuniary replacement or compensation for the financial, household and emotional support they expected from the boy they raised since birth. Such a ruling would do more than that. Such a view would contradict the statutory policy of this State that adult children, such as this child, support their parents when their parents need support. 15 V.S.A. § 202 mandates

support by adult children of their destitute parents. By statutory law the duty exists. By common law the courts must not rely on the felony-merger fiction to deny the existence of the universally recognized moral, legal and emotional relationship between adult children and their parents.

3. Interpretation of the wrongful death statute as precluding statutory recovery by parents unless their adult child is single, and as precluding common law recovery, denies Plaintiffs equal protection and access to the courts under the Fourteenth Amendment and the Vermont Constitution.

The wrongful death statute exists to provide recovery to persons who have lost a family member with whom there is a relationship of dependency, very broadly defined. See Clymer and Vaillancourt, supra, and cases cited therein. Parents of adult children, children of adult parents, siblings of infants, parents of minor children, minor children of parents -- these and many more are encompassed within the statutory right of recovery. See, generally, Speiser, Recovery for Wrongful Death, 2d edition, cited in Mobbs and Vaillancourt.

Given this statutory purpose, given the statutory duty of adult children to support their parents (15 V.S.A. § 202), and given that a parents' qualification as "next of kin" hinges on criteria wholly unrelated to the purpose of the two statutes[3], the

[3]These criteria are those set out in 14 V.S.A. § 551. If the child has children of his or her own, then by operation of law the grandparents are deemed not to be emotionally or financially dependent on their child. There is no rational basis for this fiction.

statutory classification between parents who are next of kin and those who are not fails the "rational basis" test. Venman v. Patrissi, 156 Vt. 257 (1991). The dead weight of history replaces reason. Were this court to rule that these Plaintiffs are not "next of kin" who can bring a statutory action, and that these Plaintiffs enjoy no common law remedy, their rights to equal protection of the law under the Fourteenth Amendment and Article 7 will be violated. Id.

Such a ruling also would violate Article 4, as it would deprive Plaintiffs of a remedy for their wrongs. Lillicrap v. Martin, 156 Vt. 165 (1989). Their loss is just as painful, just as financially costly, and just as sure to deprive them of a child who can support them under 15 V.S.A. § 202, as deaths that occur to adult children who have no children of their own.

Dated: June 2, 1995

THOMAS and ELIZABETH QUESNEL

By _____
James A. Dumont, Esquire
Sessions, Keiner, Dumont & Barnes P.C.
72 Court Street
Middlebury, VT 05753

cc: Allan R. Keyes, Esq.
Douglas D. Le Brun, Esq.
Michael J. Gannon, Esq.

STATE OF VERMONT
ADDISON COUNTY, SS.

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| THOMAS QUESNEL and ELIZABETH QUESNEL, and THOMAS QUESNEL AS CO-ADMINISTRATOR OF THE ESTATE OF MATTHEW J. QUESNEL | ) | ADDISON SUPERIOR COURT DOCKET NO. S151-94Ac |
| v | ) | |
| THE TOWN OF MIDDLEBURY, THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS, THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS, THE MIDDLEBURY BOARD OF SELECTMEN and CHRISTOPHER DUNDON | ) | |

MOTION TO AMEND COMPLAINT PARAGRAPH 23

The Plaintiffs move pursuant to VRCP 15 for permission to amend Paragraph 23 of the Complaint to add the underlined sentence:

> 23. The spouse and child, for purposes of this action, have waived any claim they have to be "next of kin" within the meaning of Vermont's wrongful death statute and common law. <u>The spouse and child have disclaimed any present interest and will disclaim their future interest once it has been finally ascertained and indefeasibly vested.</u>

The motion is intended to clarify the intent of the parties who appeared in the Probate Court in this matter, leading to the appointment of Thomas Quesnel as co-administrator of the estate. See attached Affidavit of Thomas Quesnel.

No harm arises to any defendant. Initial discovery is being completed. No depositions have been taken.

Dated: June 2, 1995

THOMAS and ELIZABETH QUESNEL

By James A. Dumont
James A. Dumont, Esquire

Sessions Keiner Dumont & Barnes PC
72 Court St.
Middlebury VT 05753

STATE OF VERMONT
ADDISON COUNTY, SS.

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| THOMAS QUESNEL and ELIZABETH QUESNEL, and THOMAS QUESNEL AS CO-ADMINISTRATOR OF THE ESTATE OF MATTHEW J. QUESNEL | ) | ADDISON SUPERIOR COURT DOCKET NO. S151-94Ac |
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AFFIDAVIT OF THOMAS QUESNEL

I, THOMAS QUESNEL, upon being duly sworn, do depose and say:

1. I am the father of Matthew Quesnel, the decedent in this case.

2. My wife Elizabeth and I were extremely close to our son. Elizabeth and I saw him almost every single day, even after he married and lived apart from us. We believe we had a closer relationship to Matthew than anyone else did. His loss has been devastating to us in the areas set forth in the complaint.

3. We filed pleadings in the Addison Probate Court to remove Matthew's widow as Administratrix of the Estate. We agreed to withdraw that motion in exchange for certain commitments made by her. Among these commitments was her representation that, for various reasons, she was not seeking any damages under the wrongful death statute for herself or our granddaughter. We understood that she had "disclaimed" her claim and that of our granddaughter as surviving spouse and child. We understood that this would make us Matthew's "next of kin".

Date: 6/2/95 Thomas J. Quesnel
Thomas Quesnel

Subscribed and sworn to before me: [signature]
Notary Public

2/10/95
Notary Expires

STATE OF VERMONT
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL
Plaintiffs,
vs.

THE TOWN OF MIDDLEBURY, ET AL
Defendants

CHRISTOPHER DUNDON and
DUNDON HEATING & PLUMBING, INC.,
Third-Party Plaintiffs,
vs.
HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE COMPANY,
Third-Party Defendants.

## REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Dundon responds to Plaintiffs' Memorandum dated June 2, 1995, with the following points and authorities.

### 1. As A Matter Of Law, The Decedent's Spouse And Next Of Kin Have No Authority To Disclaim Their Status As Such.

The parents rest their case upon the Uniform Disclaimer of Property Interest Act, 14 V.S.A. Ch. 83, §§ 1951-59. But a wrongful death recovery is not part of the estate of the deceased and is not subject to the terms of this statute.

14 V.S.A. §1951 provides:

**Right to Disclaim Interest in Property.**

A person, or the representative of a deceased, incapacitated or protected person, to whom any property or interest therein devolves, by whatever means, may disclaim it in whole or in part by delivering a written disclaimer under this chapter. The right to disclaim exists notwithstanding

> any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

By its terms and its context, this statute applies only to property of the decedent which otherwise would pass under a will or under the laws of intestacy.

In Vermont the right of action for wrongful death is not the property of the decedent or his estate. The proceeds thereof are not awarded by a will or the laws of intestacy, nor are they distributed by the probate court. Damages are not measured by the loss to the decedent's estate. Instead, the wrongful death act "awards damages to surviving beneficiaries based on their loss." *Calhoun v. Blakely*, 152 Vt. 113, 116 (1989). The recovery is distributed to the statutory beneficiaries by the superior court in accordance with 14 V.S.A. § 1492(c). *See Calhoun v. Blakely*, 152 Vt. 113, 564 A.2d 590 (1989); *Bassett v. Vermont Tax Dept.*, 135 Vt. 257, 376 A.2d 731 (1977); *In re Brown Estate*, 129 Vt. 230, 275 A.2d 1 (1971); *Abbott v. Abbott*, 112 Vt. 449, 28 A.2d 375 (1942). As noted in *Clymer v. Webster*, 156 Vt. 614, 596 A.2d 905 (1991), "under wrongful death statutes, survivors of the decedent may recover for injury to themselves resulting from the death; under the survival statutes, the representatives of the victim may recover for injury to the victim." 156 Vt. at 630, n. 9.

Thus, under the wrongful death act--as distinct from the survival statute--no property of the deceased "devolves" in any manner to the beneficiaries. The recovery is personal-- "for injury to themselves." This wrongful death recovery cannot be the subject of a disclaimer under 14 V.S.A. §1951.

To hold otherwise would be contrary to the long-standing rule in Vermont against assignment of causes of action for personal injury. *Garfield v. Williams*, 2 Vt. 327

(1828); *see generally* Annot., Assignability of Claims for Personal Injury or Death, 40 ALR 2d 500 (1955). Here plaintiffs extracted the alleged disclaimer from the widow and child in exchange for a covenant not to challenge the widow's status as representative of the estate and other unstated "commitments." (Affidavit of Thomas Quesnel ¶ 3, sworn to June 2, 1995.) Public policy should not countenance such trafficking in wrongful death claims: the law and the facts decide who is next of kin--not the agreements of quarreling survivors.

## 2. As A Matter Of Fact, The Decedent's Next Of Kin Is His Child And She Has Not Disclaimed Her Status As Such.

Decedent was survived by his spouse and a minor daughter. We have been provided no writing on behalf of the spouse or the minor daughter, but are told the spouse has decided not to seek damages under the wrongful death act for herself or the daughter. (Affidavit of Thomas Quesnel ¶ 3, sworn to June 2, 1995.) This decision not to proceed with a wrongful death claim is "understood"--unilaterally, as far as it appears from the record--to be a disclaimer of their *status* as spouse and next of kin which "would make us Matthew's 'next of kin'." (*Id.*) This is extraordinary.

The widow and child are in fact and in law the spouse and next of kin. This status cannot be disclaimed or changed by agreement. In fact, the spouse and child have never denied their status as such, but have merely decided not to sue.

Assuming for purposes of argument that agreements of the survivors, and not the law and facts, decide who is next of kin, the court should require something more than the parents' unilateral understanding of something the spouse did, allegedly on

behalf of an unrepresented minor child, before the court decides whether some kind of transfer by the child of the right to sue has in fact occurred. *Cf.* 14 V.S.A. § 2643.

### 3. There Is No Common Law Cause Of Action For Wrongful Death.

The Vermont Supreme Court has never recognized a common law action for wrongful death. *Clymer v. Webster*, 156 Vt. 614, 622, 596 A2d 905 (1991); *Thayer v. Herdt*, 155 Vt. 448, 453-54, 586 A.2d 1122, 1125 (1990); *State v. Oliver*, 151 Vt. 626, 629, 563 A.2d 1002, 1004 (1989); *Trow v. Thomas*, 70 Vt. 580, 587, 41 A. 652, 654 (1898); *Sherman v. Johnson*, 58 Vt. 40, 2 A. 707 (1886). *Sherman* holds a parent has no claim for damage allegedly caused by the wrongful death of a child.

### 4. Denying Recovery To The Parents Where The Spouse And Next Of Kin Survive Is Constitutional.

Plaintiffs assert that their constitutional right to a remedy at law is violated by the statute which limits recovery to the "spouse and next of kin." Article 4 of chapter 1 of the Vermont Constitution provides:

> Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably to the laws.

This article does not establish substantive rights, but rather protects recourse to judicial process.[1] *Levinsky v. Diamond*, 151 Vt. 178, 559 A.2d 1073 (1989), overruled on other

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[1] This article was not part of the Constitution of 1777. The language is substantially similar to Article IX of the Massachusestts Declaration of Rights of 1780. The article was proposed by the first Council of Censors and incorporated into the Constitution of 1786. W. Hill, *The Vermont State Constitution*, 37 (1992). There are no

grounds, *Muzzy v. State*, 155 Vt. 279, 583 A.2d 82 (1990). The power to abolish substantive common law rights is not restricted by this Article. *See Sienkiewycz v. Dressell*, 151 Vt. 421, 561 A.2d 415 (1989) (21 V.S.A. § 621 is constitutional).

The Legislature certainly has the power to create new rights. It has the power, without restriction by Article 4, to specify and limit those persons for whose benefit a wrongful death action can be brought. At common law there was no cause of action for wrongful death. The Wrongful Death Act, 14 V.S.A. §§ 1491-1492, creates a "new right

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records of the constitutional convention of 1786. The records of the Council of Censors do not specifically mention this proposal. P. Gillies, *Records of the Council of Censors*, 58-73, 80-83 (1991).

The anti-court riots of 1786 and the general instability of the era may explain the phrase "comformably to the laws." See *id.* at 81 (discussing other similar phrases added to the Constitution of 1786). It is possible this section, like the provision for separation of powers, was a response by the Council of Censors to the several instances of the legislative suspension of and interference with the judicial power, such as "an act making the laws of this state temporary" which prohibited judicial courts from trying land titles. See *Records of the Council of Censors*, 63-65.

In 1813 the Council of Censors opined that "an act suspending civil process against the persons and property of the officers and soldiers of this State, while in service," violated several sections of the Constitution of the United States and of the State of Vermont, including Article 4 "in that it is an unnecessary delay, and even denial of recourse to the laws and of justice." *Records of Council of Censors*, 202-03. In *Granai v. Witters*, 123 Vt. 468, 194 A.2d 391 (1963), the court cited Article 4 among several other provisions of the Vermont Constitution in support of its ruling invalidating an act which prohibited, while the legislature was in session, the courts from hearing any cause in which a member or official of the General Assembly was a party or attorney of record. Cases squarely holding that the right guaranteed by this Article has been violated are scarce, if not nonexistent. *See Lillicrap v. Martin*, 156 Vt. 165, 591 A.2d 41 (1989) (discussing seven year medical malpractice statute of repose.)

of recovery" or "new element of damages" engrafted upon the decedent's cause of action which survives to the estate under 14 V.S.A. § 1453. *Clymer v. Webster*, 156 Vt. 614, 596 A.2d 905 (1991); *see Whitchurch v. Perry*, 137 Vt. 464, 469, 408 A.2d 627, 630 (1979) citing *Desautels' Admr. v. Mercure's Estate*, 104 Vt. 211, 214, 158 A. 682, 683 (1932); *Legg v. Britton*, 64 Vt. 652, 659-60, 24 A. 1016, 1017-18 (1890) overruling *Needham v. Grand Trunk Ry.*, 38 Vt. 294 (1865). The legislature took away no remedy by granting a new right of recovery to the spouse and next of kin.

In *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958), plaintiffs contended the monetary limit of the Illinois Wrongful Death Act violated that section of the Illinois constitution which provided that "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; * * *." The court, after observing that at the common law there was no cause of action for wrongful death, said:

> In our opinion the constitutional question is not formidable when it is considered in the context of the situation that existed when the statute was originally enacted. At that time no action whatsoever was permitted for a wrongful death. The legislature took away no right when it enacted the statute. It created both the right and the remedy, and we think that its power to limit the maximum recovery in the action that it created cannot be questioned.

13 Ill.2d at 29; *see also Seifert v. Standard Paving Co.*, 64 Ill. 2d 109; 355 N.E.2d 537 (1976). The *Hall* court went on to explain the reasonableness and necessity of common law and statutory limitations on liability:

> Considering first the difference in the parties who are entitled to sue, it is apparent that in a closely knit society the death of any one person will usually disrupt the pattern of many lives. Certainly the radiations of such an event are not confined to the immediate family circle. It is possible, of course, to contemplate a system of law that would, in the case of a death

> caused by the wrongful conduct of another, impose liability upon the wrongdoer in favor of all persons whose rights were affected in any degree. But the common law has characteristically imposed close limits upon the parties entitled to sue. If the deceased in this case had survived, for example, his injuries might have been such as to inflict upon these plaintiffs deprivations of the same kind and of equal severity. Yet the only person entitled to recover would be the injured man himself.
>
> In common-law fashion, the legislative remedy limits recovery to a small class of persons who are immediately affected by the death.

There is a rational basis for limiting the wrongful death remedy to the spouse and next of kin. Here the parents have no common law rights and have suffered no legal injury or wrong to their person, property or character. Because the parents have no substantive rights, they have not been denied recourse to judicial process. Denying recovery to parents where the spouse and next of kin survive is constitutional.

## 5. The Amended Complaint Does Not Cure The Legal Defect In The Original Pleading: That The Action Is Not Brought On Behalf Of The Spouse And Next Of Kin.

The original complaint alleges the spouse and child have "waived" their claim to be "next of kin." The amended complaint says they have "disclaimed any present interest and will disclaim any future interest once it has been finally ascertained and indefeasibly vested." Whatever this means, it does not cure the legal defect in the original pleading. The law and the facts decide who is next of kin--not any "waivers" or "disclaimers" by the survivors. As a matter of law, the amended complaint is not brought on behalf of the spouse and next of kin, and the court should dismiss the action.

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## CONCLUSION

As a matter of law, the decedent's spouse and next of kin have no authority to disclaim their status as such. As a matter of fact they have not done so. This action, even as amended, is not brought on behalf of the spouse and next of kin. There is no common law cause of action for wrongful death. Denying a recovery to the parents where the spouse and next of kin survive is constitutional. The Court should grant the Motion for Judgment on the Pleadings.

Dated this 15 day of June, 1995.

CHRISTOPHER DUNDON and
DUNDON HEATING & PLUMBING, INC.

By _____
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#39952

STATE OF VERMONT
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT
DOCKET NO: S151-94Ac

THOMAS QUESNEL, et al.
Plaintiffs

v.

THE TOWN OF MIDDLEBURY and
CHRISTOPHER DUNDON
Defendants

CHRISTOPHER DUNDON and DUNDON
HEATING & PLUMBING, INC.
Third-party Plaintiffs

v.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE
COMPANY
Third-party Defendants

**HANOVER'S MEMORANDUM IN SUPPORT OF DUNDON'S "MOTION FOR JUDGMENT ON THE PLEADINGS"**

NOW COME the third-party defendants, Hanover Insurance Company and Massachusetts Bay Insurance Company (hereinafter collectively "Hanover"), by and through their counsel, Dinse, Erdmann & Clapp, and submit the following memorandum in support of Dundon's "Motion for Judgment on the Pleadings." Hanover clearly has an interest in the dismissal of plaintiffs' complaint, because when that complaint is dismissed Dundon's third-party indemnity claim against Hanover will become moot. Hanover emphasizes that in filing the present memorandum it is not providing Dundon with a defense, nor does it hereby intend to waive any right whatsoever; rather, it is bringing the arguments and authorities contained herein to the

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Court's attention because it has an interest, albeit indirect, in the resolution of Dundon's "Motion for Judgment on the Pleadings," and because it believes Dundon's motion is meritorious.

A. The Disclaimer Statute Is Inapplicable

Plaintiff first argues that the Uniform Disclaimer of Property Interests Act, 14 V.S.A. section 1951 et seq. ("UDPIA") applies to the present case and makes the decedent's pa ~ts his "next of kin" albeit the decedent left a wife and child. Properly viewed, however, the UDPIA is simply inapplicable to this action.

1. The property did not "devolve" as required by the UDPIA

The UDPIA, by its terms, only applies when property "devolves" to a disclaimant. 12 V.S.A. § 1951. The term "devolution" means that the property in question must be transmitted from one person to another, the latter person being the disclaimant. See, e.g., Hermann v. Crossen, 160 N.E.2d 404, 408 (Ohio App. 1959) ("devolution" refers to transmittal from one person to another); Fitzpatrick v. McAlister, 248 P. 569, 573 (Okla. 1926) and authorities cited therein ("devolve" requires transmission "from one person to another"). Implicit in the requirement of "devolution" is that the property in question must be possessed by another person prior to its devolution to the disclaimant.

Harmoniously with this, the Prefatory Note to the model Uniform Disclaimer of Property Interests Act, which model act was adopted virtually verbatim in Vermont, indicates that its purpose

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is to provide a disclaimer remedy when "transfers at death or gifts impose unexpected expense or hardship upon the recipients." See Exhibit "A" hereto at 6 (emphasis added).[1]

In the present case, the Wrongful death Act ("WDA") claim arose in the first instance for the benefit of the decedent's wife and child; it did not "devolve" upon them from another person.[2] Further, the present situation is not one that could possibly impose hardship or expense on the decedent's wife and child; there is no obligation on their part to pursue the claim; the potential claim can simply be ignored--as in fact has happened--whereupon it imposes no burden or expense whatever. Thus, the UDPIA by its terms is inapplicable to the present case because the WDA claim did not "devolve" upon decedent's wife and child,[3] and fundamentally the present situation is not one contemplated as being remedied by the UDPIA.

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1 The Prefatory Note to the model Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act" is also the Prefatory Note to the model UDPIA. See Exhibit "A" at 2.

2 Under the WDA, the statutorily designated beneficiaries have a remedy "for injury to themselves." Clymer v. Webster, 156 Vt. 614, 630 n. 9, 596 A.2d 905, 915 n. 9 (1991).

3 Additionally, the property did not flow to the wife and child from a "deceased owner or deceased donee" or "under a nontestamentary instrument or contract." This further supports the inapplicability of the UDPIA.

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2. The WDA claim is not a kind of "property" subject to the UDPIA

Another reason why the UDPIA is inapplicable is that a WDA claim is strictly personal to the statutorily defined beneficiaries, and is not assignable or hereditable. Thus, in its nature, it is not a kind of property susceptible to transmission under the UDPIA.

An individual may not assign his or her wrongful death statute claim. E.g., Liberty Mut. Ins. Co. v. Lockwood Greene Engineers, Inc., 140 So.2d 821, 824 (Ala. 1962) and cases cited therein; Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 218-19 (Mo. App. 1967) and authorities cited therein.

A wrongful death statute claim is not hereditable. E.g., Fountain v. Chicago R.I. & P. Ry., 422 S.W.2d 878, 879 (Ark. 1968); Davis v. New York Cent. R. Co., 117 N.E.2d 39, 41 (Ohio 1954) and authorities cited therein; Carter v. Van Meter, 495 S.W.2d 583, 586 (Tex. Civ. App. 1973) and cases cited therein.

The Vermont Survival Statute does not provide that a claim for "pecuniary injuries"--which is the nature of the damages the beneficiaries themselves have sustained for purposes of the WDA--survives the death of a beneficiary. 14 V.S.A. §1453.

The UDPIA effects a transfer of the property that is subject to it by creating a fictitious death of the disclaimant. 14 V.S.A. section 1954. It's transfer of property is in the nature of an assignment. Because WDA claims are strictly personal, however, and may not be assigned or inherited, this indicates that such claims

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are not a kind of property contemplated as being subject to the UDPIA. In other words, the UDPIA cannot transfer strictly personal claims.

3. The "Lawrence" line of cases is analogous

Finally, we draw the Court's attention to Lawrence v. Whittle, 247 S.E.2d 212, 214 (Ga. App. 1978), which is in many ways the case most nearly analogous to the present action that we have found. In Lawrence, a more remote relative of a decedent attempted to bring a WDA suit when the decedent's next of kin declined to do so. The court dismissed the WDA suit because the next of kin's refusal to bring a WDA suit did not give more remote relatives the right to bring such a suit. Lawrence, and the line of cases on which it was based, supports Dundon's position. A copy of the Lawrence decision is enclosed for the Court's review.

B. No Common-Law Wrongful Death Action Exists

Plaintiff next argues that this Court should, in the face of overwhelming precedent to the contrary, create a common-law wrongful death action. With respect to this argument, we point out to the Court that the cases relied on by plaintiff, properly considered, do not support its position.

First, plaintiff's reading of Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1976), proves too much. Moragne arose in the sui generis context of admiralty law, where the existence of a specialized body of federal common

law has long been recognized.[4] Under the peculiar facts involved in Moragne, there was no applicable wrongful death statute in place.[5] Thus, there was absolutely no remedy--for anyone--with respect to the death. It was this lack of any statutory remedy that drove the court's decision.

Fundamentally, Moragne merely overruled The Harrisburg, and in so doing the court's own understanding was that

> our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law.

Moragne, 398 U.S. at 405, 26 L. Ed. 2d at 360 (emphasis added). In the absence of a wrongful death statute, the court's overruling of The Harrisburg merely permitted "access to the existing general maritime law."

The key difference between the Moragne situation and the present is that there is an applicable wrongful death statute in Vermont, but there was none in Moragne. It is a far cry from the Moragne situation to plaintiff's present invitation to this Court, with the WDA in place, to nonetheless create a separate common-law cause of action that overwhelming Vermont precedent has squarely refused to recognize.[6]

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[4] The Moragne court itself stated that "Maritime law had always . . . been a thing apart from the common law." Moragne, 398 U.S. at 386, 26 L. Ed. 2d at 349. See M. Redish, Federal Jurisdiction & Tensions in the Allocation of Judicial Power at 97 (1980); DeLorio v. Boit, 7 F.Cas. 418 (C.C.D. Mass. 1815).

[5] Since the death occurred in state territorial waters, not on the high seas, the court could not borrow a state statute to supply a basis for the death action.

[6] See "Reply Memorandum in Support of Judgment on the Pleadings" § 3 and cases cited therein.

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Similarly, plaintiff misreads Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1972) and Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985) (en banc).

Gaudette did not create an independent common-law cause of action for wrongful death. Rather, in concluding that the statute of limitations under the Massachusetts wrongful death statute was tolled during a beneficiary's minority, the court merely accepted the ancillary proposition that, as a historical matter, "the right to recover for wrongful death is of common law origin." Gaudette, 284 N.E.2d at 229 (emphasis added). Despite the supposed origin of the statute, the case in fact was unambiguously decided under the statute, and no common-law cause of action was created.

Additionally, Gaudette explicitly stated that among the effects of the statute that remained unchanged by the decision was the requirement that any action had to be brought "on behalf of the designated categories of beneficiaries." Id. (emphasis added). In this respect, it is settled under Vermont law that a statute pre-empts any common-law remedies that come within its scope. Estate of Kelley v. Moguls, Inc., 160 Vt. 531, 532, 632 A.2d 360, 361 (1993). Thus, not only did Gaudette emphatically not create an independent common-law wrongful death cause of action, it actually supports the proposition that the "next of kin" requirement in the WDA would be pre-emptive with respect to any common-law action in Vermont, if one were recognized.

Summerfield, too, does not recognize an independent common-law wrongful death action, but merely says that "common law may participate in the growth . . . of a statutorily created action, especially where its pronouncements do not constitute 'drastic or

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radical incursion[s] upon existing law,' or directly contradict either legislative words or expressed legislative intention." Summerfield, 698 P.2d at 718. Thus, at most, Summerfield might support developing a body of common-law with respect to a statutory term like "next of kin," except that in the present case this would be a "drastic incursion upon existing law," which existing law is reflected in Mobbs v. Central Vt. Ry., 130 Vt. 311, 553 A.2d 1092 (1988) and Whitchurch v. Perry, 137 Vt. 464, 408 A.2d 627 (1979).

Thus, properly viewed, Gaudette actually supports Dundon's position, Summerfield is by its own reasoning inapplicable, and Moragne is sui generis and distinguishable on the basis that there was no wrongful death statute available--to anyone--in the particular fact situation involved there.

C. The WDA Is Constitutional

Plaintiff finally argues that the WDA is unconstitutional under the Equal Protection Clause. State laws are entitled to a presumption of validity under the Equal Protection Clause. Lockport v. Citizens for Community Action, 430 U.S. 259, 272, 97 S. Ct. 1047, 51 L. Ed. 2d 313, 325 (1977).

Such laws are upheld under the Equal Protection Clause "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171, 176 (1979). The purpose of the WDA is to abrogate the common-law rule that personal action die with the

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plaintiff, and to provide a new element of damages for such actions. Whitchurch, 137 Vt. at 468, 408 A.2d at 630.

Plaintiff's argument therefore, put in the proper conceptual framework, must be: it is irrational for the WDA to provide a remedy only to the surviving spouse and next of kin, not to more remote relatives of a decedent.[7] To state the argument is to refute it.

D. Plaintiff's Claim Is Neither Timely Nor Ripe

We wish to make two final procedural points. First, even if one assumes that the UDPIA applies to this case, any "disclaimer" has not been delivered within nine months of obtaining the property, as specifically required by section 1952 (a) and (b). Thus, the "disclaimer" has not been made timely. Second, even if plaintiff's amendment of the complaint is allowed, it is clear that the "disclaimer" has not yet been consummated. As the proposed amended complaint states, "The spouse and child . . . will disclaim their future interest once it has become finally ascertained and indefeasibly vested."[8] Thus, plaintiff's action is not yet ripe, and should be dismissed, or else Dundon could be subject to multiple and conflicting suits should the "disclaimer" in fact not ultimately occur as represented.

For all of the above reasons, Dundon's "Motion for Judgment on the Pleadings" should be granted, and plaintiff's lawsuit should be dismissed.

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[7] Whether a person is factually the "next of kin" as defined by state law is not an issue of constitutional dimensions.

[8] See "Initial Memorandum in Opposition to Motion for Judgment on the Pleadings" at 4 n. 1.

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Dated at Burlington, Vermont, this 22nd day of June, 1995.

DINSE, ERDMANN & CLAPP

BY: _____
Douglas D. Le Brun, Esquire

cc: James Dumont, Esq.
Alan Keyes, Esq.
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STATE OF VERMONT
ADDISON COUNTY, SS.

| | |
|---|---|
| THOMAS QUESNEL and ELIZABETH QUESNEL, and THOMAS QUESNEL AS CO-ADMINISTRATOR OF THE ESTATE OF MATTHEW J. QUESNEL<br><br>v<br><br>THE TOWN OF MIDDLEBURY, THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS, THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS, THE MIDDLEBURY BOARD OF SELECTMEN and CHRISTOPHER DUNDON | ADDISON SUPERIOR COURT<br>DOCKET NO. S151-94Ac |

SECOND MEMORANDUM
IN OPPOSITION TO
MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Dundon has filed a second memorandum in support of his motion for judgment on the pleadings.

In his first memorandum Dundon argued that the wrongful death statute restricts plaintiffs to "next of kin", and that Thomas and Elizabeth Quesnel do not qualify as next of kin. Plaintiffs replied that the term "next of kin" was a statutory term, that the Vermont Supreme Court in Mobbs v. Central Vt. Railway, 150 Vt. 311, 315 (1988) held that Vermont law on descent and distribution should be looked to to provide definition of that term, and that under the Vermont statutes on descent and distribution (the disclaimer and intestacy chapters) the Plaintiffs indeed are the "next of kin". Plaintiffs also argued that a common law cause of action for wrongful death should be recognized, for the reasons set forth by the U.S. Supreme Court in Moragne v. States Marine Lines, 398 US 375, 26 L.Ed.2d 339, 90 S.Ct.1772 (1970)(rejecting the "barbarous"

common law precedent). Plaintiffs concluded by arguing that if neither statute nor common law provides them compensation for the loss of their son, the existing state of statute and common law deprives them of equal protection and of their remedies under law under the Fourteenth Amendment, Article 7 and Article 4.

In his second memorandum Dundon argues that only selected parts of the Vermont laws on descent and distribution, but not other parts, should be used to define "next of kin"; that "there is no common law cause of action for wrongful death"; and that the resulting rule of law does not offend Article 4. The present memorandum responds to these arguments.

1. Next of Kin.

Defendant Dundon argues that a wrongful death action does not exist before death and does not pass by will. Therefore the meaning of "next of kin" in the wrongful death statute cannot be determined by resort to the statutes governing the law of intestacy, such as the disclaimer statutes.

Whatever the superficial logic of this argument, it misses the point. Under Mobbs, supra, the statutory term "next of kin" must be interpreted by resort to the law of intestacy. The Court did not say that wrongful death benefits exist before death, or that they can or cannot be passed by will. The Court simply said that "'next of kin' should carry the same meaning as it does in the laws of descent." Mobbs, at 315. In effect, the legislature used the term "next of kin" to mean those person who would be next of kin

under the law of intestacy even though wrongful death rights per se would not trigger application of such principles. And in Vermont the "laws of descent" include 14 V.S.A §§ 1951 et seq. which state that "[a]ny person ... to whom <u>any</u> property or interest therein devolves, <u>by whatever means</u>, may disclaim it in whole or in part." 14 V.S.A. § 1951. (Emphasis added.)

The operative verb in the statute is "devolves". Defendant's argument boils down to his baldfaced assertion on page 2 that no property "devolves" in wrongful death actions, because wrongful death benefits do not exist prior to death. But "devolves" is a legal term with broad meaning:

> DEVOLVE. To pass or be transferred from one person to another; to fall on, or accrue to, one person as the successor of another; as a title, right, office, liability. The term is said to be particularly appropriate to the passing of an estate from a person dying to a person living.

Black's Law Dictionary (Revised 4th Ed.). The statute is <u>not</u> restricted to transfer of rights that can be transferred by will or by law of intestacy. It applies to "any" property interest, and all transfers "by whatever means". Thus wrongful death rights held by a widow or child "devolve" or pass to them upon ruling of the courts under the statute. These rights be disclaimed, so that they devolve upon others.

The title of the statute is the "Uniform Disclaimer of Property Interests Act". Wrongful death recovery is a property interest. The statute is not the "Uniform Disclaimer of Inherited Rights Act", as Defendant would prefer.

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2. Common Law.

Upon consolidation of the gains of the War of Independence, the nation experienced its second great "revolution" -- the remarkably peaceful transfer of power from the party of the Federalists to the partisans of Jefferson's Republicans[1]. The anti-Federalist Jefferson then embarked upon a series of actions which, ironically, strengthened the pro-business, pro-Central Government, anti-agrarian "Federalist" principles of the nation: Jefferson accepted the first National Bank and the Federalist Supreme Court and purchased the Louisiana Territory. The nation embarked upon a period of phenomenal economic expansion.

In this period the role of the courts grew and matured as well. The Federalists had argued that an independent judiciary was "the least dangerous branch", in a now-famous quote from Alexander Hamilton. (Federalist Paper No. 78.) The Republicans feared that judges in general, and in particular judges who applied the common law, would restrain both the economy and natural justice:

> Judges... are sworn to administer Common Law as it came down from the dark ages... With them, wrong is right, if wrong has existed from time immemorial: precedents are everything: the spirit of the age is nothing.

Robert Rantoul, Jr., Oration at Scituate, Delivered on the Fourth of July, 1836 (quoted in Presser & Zainaldin, supra, at 266-69, cited as an example of anti-Common Law sentiment held by reformers).

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[1]Jefferson himself used this term. See S.B. Presser & J.S. Zainaldin, Law and American History (West Pub. Co. 1980) at p.260.

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Defendant Dundon argues that the tort of wrongful death has not been recognized at common law. This argument glosses over the history of wrongful death law. Through the twelfth century, the courts did indeed recognize a family's right of compensation for wrongful death. Mr. and Mrs. Quesnel would have had a right of recovery for the wrongful death of their adult son in twelfth century England. When criminal law and tort law were still intermingled, a victim's family could obtain "emendations" from the criminal/tortfeasor who had caused the death. F. Pollock & F.W. Maitland The History of English Law (2d Ed., S.F.C. Milsom editor, Cambridge Univ. Press, 1968) Vol. II Chap. VIII. But that common law was changed -- by common law judges. In the thirteenth century wrongful death became exclusively a crime. Lord Campbell's Act re-created some tort liability. The History of English Law, id.

If the Defendant were to adopt the approach to the common law ridiculed by 19th century reformers such as Bantoul -- that the law is simply there to be "found", no matter how ancient or unjust -- then by all rights we should still be following the more ancient law, the law of emendments, and Plaintiffs have a right of recovery. Defendant does not argue that the twelfth century state of the law should be adopted in almost-21st century Vermont. Rather, Defendant argues for adoption of the thirteenth century state of the law. Under this version, Plaintiffs have no right of recovery.

Plaintiffs ask the Addison County Superior Court to adopt the

modern approach to statutes and the common law. This is the view adopted by Moragne, supra, and by the leading authorities on extension of statutes by analogy and implication, those summarized in Professor Sutherland's treatise on statutory construction and adopted by the American Law Institute in its discussion of wrongful death torts. See Sutherland Stat. Const. (5th Ed. Clark Boardman 1992) § 55.01 (attached, summarizing Dean Pound's views), and Restatement of Torts, Second § 925, Comment k (attached) (applying Pound's approach and concluding there is now a common law action for wrongful death).

3. Constitution.

Defendant Dundon does not dispute Plaintiff's argument that the wrongful death statute exists to provide recovery to persons who have lost a family member with whom there is a relationship of dependency. Defendant submits no other statutory purpose.

Defendant Dundon does not dispute Plaintiff's reliance on the statutory duty of adult children to support their parents. 15 V.S.A. § 202. If Matthew Quesnel had lived, he would have had a moral and legal duty to support his parents as they grew old and infirm and without adequate income.

Defendant does not dispute that a parents' qualification as "next of kin" hinges on criteria wholly unrelated to the purpose of these two statutes[2].

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[2]As argued in Plaintiffs' Initial Memorandum, if the child has children of his or her own, then by operation of law the grandparents are deemed not to be emotionally or financially

Defendant relies upon Hall v. Gillins to support his constitutional argument. 147 N.E.2d 352 (1958) Hall notes that historically only close family members receive damages, and that it makes sense to avoid opening too wide the doors of litigation.

But Vermont case law has rejected exactly this argument already. In Greenwood v. Richard, 131 Vt. 98 (1973), the Court rejected the "pandora's box" argument against allowing wives to sue husbands. The Rights of Married Women Act was a remedial statute, like the wrongful death act. But it had been interpreted as not allowing wives to sue husbands. Overruling centuries of precedent, including precedent interpreting this very statute that remained in force and had not been changed by the legislature, the Court held that failure to recognize a wife's cause of action would violate Article 4 by depriving her of a remedy. The same would be true here.

Hall suggests the proper resolution of this matter. In Hall the Court noted that it would uphold the statutory cap on wrongful death damages in that case, and reject a common law remedy, on the particular circumstances of the cases before it. These were that the plaintiffs in the case before it were indeed entitled to recovery but the legislature had capped damages, in 1957, at $30,000. This was the result of a series of legislative changes, raising the cap six times since 1903. 147 N.E.2d 355. "Under these

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dependent on their child. There is no rational basis for this fiction.

Sessions Keiner Dumont & Barnes PC
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Middlebury VT 05753

circumstances", wrote the court, "the differences between the action sought to be maintained and the action that is available under the statute are not sufficiently significant to warrant us in recognizing a new remedy." A greater gap would have led to a common law remedy. Here, if Defendant prevails, there will be no recovery at all. The answer is to follow the American Law Institute, the U.S. Supreme Court, and Professor Speiser, and recognize the common law remedy.

Dated: June 26, 1995

THOMAS and ELIZABETH QUESNEL

By _____
James A. Dumont, Esquire
Sessions, Keiner, Dumont & Barnes P.C.
72 Court Street
Middlebury, VT 05753

cc: Allan R. Keyes, Esq.
Douglas D. Le Brun, Esq.
Michael J. Gannon, Esq.
Harold Eaton, Esq.

received
9/13/95

STATE OF VERMONT
Addison County, ss.:

SUPERIOR COURT
Docket No. S 151-94 Ac

THOMAS QUESNEL, et al. ]
]
v. ]
]
TOWN OF MIDDLEBURY, et al. ]
]
v. ]
]
CHRISTOPHER DUNDON, et al. ]
]
v. ]
]
HANOVER INS. CO., et al. ]

ENTRY

Matthew Quesnel died in a Middlebury sewer while working for Dundon. His parents bring this action under Vermont's Wrongful Death Act and under common law "seeking damages for [their] lost love, companionship, consortium, future support and care and other pecuniary and non-pecuniary injuries." At his death, Matthew Quesnel left a wife and child. These latter survivors, however, have waived any claim to be next of kin for the purposes of this action or the Wrongful Death Act, "disclaimed" their rights as "next of kin," and thereby purport to permit decedent's parents to maintain this action.

Defendants seek to dismiss the complaint, on the ground that it is insufficient on its face. They assert that Vermont's Wrongful Death Act limits the class of persons who may recover under it to the decedent's "wife and next

ADDISON SUPERIOR COURT
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of kin," 14 V.S.A. sec. 1492(b), and that surviving parents are not within that class when there are a surviving wife and child.

We agree with defendants that surviving parents are not entitled to damages under the Act when there is a wife and child surviving. The statutory language is plain; as such it must be followed. Were there not such survivors, the parents would be able to pursue this claim, but that is not the case here. There is no provision in the Act for the surviving wife and child to step aside or disclaim their status. The Act does not state that the wife and child must commence an action, that act must be done by the personal representative. Rather, the award specified by the Act is "such damages as are just, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin...." Hence, the parents' loss of consortium or support is not the relevent measure of statutory damages, as they are not the next of kin. "Next of kin" carries the same meaning in the Wrongful Death Act as it does in the law of descent. Mobbs v. Central Vt. Rlwy., 150 Vt. 311, 315 (1988). Although the law of descent is thereby adopted for the purpose of determining who is the next of kin, it is not adopted for any other purpose to which it may conceivably be put, such as disclaimer. Plaintiff has pointed us to no caselaw suggesting that disclaimer has somehow been permitted by next of kin in wrongful death claims, thereby permitting the next thereafter of kin to recover. By contrast, defendants cite Lawrence v. Whittle, 146 Ga.App. 686, 247 S.E.2d 212 (1978), which refused to permit a wrongful death claim by a former wife, when a second wife survived. Although not directly on point, Lawrence v. Whittle does support the proposition that relatives in general, even close relatives, may not initiate wrongful death actions unless directly within the permitted class. Hence, it is the loss suffered by wife and child which must govern this case. For having stated a claim based on the loss of other persons, plaintiff's complaint must fail; it states a claim for which relief may not be granted.

Plaintiff asserts that he has a common law right, with his wife, to recover their damages. Although he cites Moragne v. States Marine Lines, 398 U.S. 375 (1970), for the proposition that the common law may fashion a remedy in the absence of any governing wrongful death statute, that is not the case we face here. In this case, there is a statute, it provides a remedy and thereby an obligation. But the remedy is for the benefit of other persons than

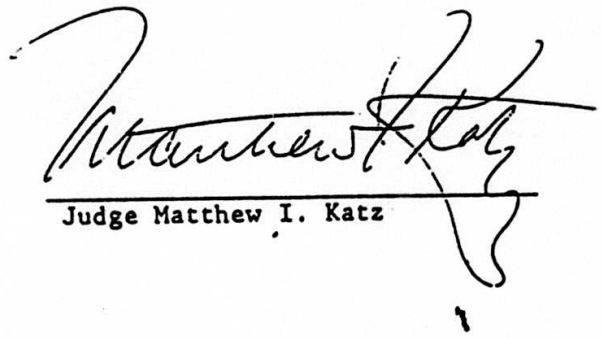
plaintiff and his wife. The Legislature has spoken on the question of compensation for wrongful death. Hence, Moragne, which is written against the backdrop of legislative silence, is not germaine.

Plaintiff next argues that denial of a remedy to surviving parents is unconstitutional as a denial of remedy. But we are not dealing with access to courtrs or court procedure. instead, we are dealing with substantive rights or recovery and the measure of damage. This area of rights and remedies in civil litigation is normally to be measured by the "rational state interest" test in the face of constitiutional challenge. We conclude that a rational purpose exists and is served by the present statutory scheme, and it is therefore a permissible policy decision on the part of the Legislature. By limiting the class of persons permitted to recover, the Legislature has left those within the class better situated. The tortfeasor's assets are available to those within the class, and need not be divided among some larger class, thereby diminishing those remaining for the beneficiary class. Without limitation, it would be reasonable to permit recovery by surviving parents, but it might also be permissible to permit recovery by "significant others," old friends, employers. All such potential persons may well have suffered pecuniary loss in a wrongful death. May they all recover? If so, the available recovery is diluted, or at least may be. A tortfeasor may be more reluctant to settle with the closest of surviving kin, while waiting to see what other claims may be asserted. That would deny benefits to the next of kin in the period soon after death, when they might be most needed. For all these reasons, we deny the constitutional challenge to statutory scheme.

Regarding the cross motions of Dundon and Hanover Insurance Company, the court denied the motion of Dundon regarding duty to defend and and indemnify and for damages. The court grants Hanover's motion for partial summary judgment, and declares that any claim of Dundon against his insurers is presently premature, as Dundon's retained limit has not yet been reached.

All other motions appear moot in light of the ruling dismissing the complaint.

Dated at Middlebury, Vermont, September 12th, 1995.



Judge Matthew I. Katz

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9/13/95

Form Number 368
Motion Reaction Form

Hold for memo until: _____

STATE OF VERMONT

| ☐ DISTRICT COURT OF VERMONT<br>☐ SUPERIOR COURT OF VERMONT | Unit No. | Circuit/County | Docket Number |
|---|---|---|---|
| | ---- | Addison | S151-94Ac |

Quesnel v. Town of Middlebury

## ENTRY REGARDING MOTION

Title of Motion: Motion to Amend Complaint ¶23

Date Motion Filed: 6/5/95

Party Filing Motion: ☒ Plaintiff/State _____
☐ Defendant _____
☐ Other _____

Date Response Filed: _____
("NONE" If None Filed)

✓ Granted — Compliance by _____

___ Denied

___ Scheduled for hearing on: _____ (Date) at _____ (Time); Time Allotted _____

___ Other

Presiding Judge Matthew I. Katz. | Assistant Judge | Assistant Judge | Date

Date copies sent to: 9/12/95

Plaintiff/State J. Duncan, Esq.

Defense N. Duncan, Esq.

Other T. Grant, Esq.
W. Rourke, Esq.

ADDISON SUPERIOR COURT
FILED
SEP 12 1995
KATHLEEN B. KEELER
Clerk

Clerk's Initials _____

**STATE OF VERMONT**
ADDISON COUNTY, SS.

| | | |
|---|---|---|
| THOMAS QUESNEL and ELIZABETH QUESNEL, and THOMAS QUESNEL AS CO-ADMINISTRATOR OF THE ESTATE OF MATTHEW J. QUESNEL | ) | ADDISON SUPERIOR COURT DOCKET NO. S151-94Ac |
| v | ) | |
| THE TOWN OF MIDDLEBURY, THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS, THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS, THE MIDDLEBURY BOARD OF SELECTMEN and CHRISTOPHER DUNDON | ) | |

MOTION TO AMEND COMPLAINT PARAGRAPH 11--
PERSONAL DUTY OWED BY DUNDON

The Plaintiffs move pursuant to VRCP 15 for permission to amend their complaint, so that the action, as dismissed, my accurately reflect Plaintiffs' position on appeal. Plaintiffs' position is that Mr. Dundon owed a personal duty to Matthew Quesnel, not just a duty to the corporate employer. This amendment does not affect the Court's ruling that the Plaintiffs are not "next of kin". Specifically, Plaintiffs ask for permission to amend paragraph 11 (new matter underlined, deleted matter overstruck):

> 11. Christopher Dundon had a personal duty of reasonable care, in addition to the duty of the employer, in the ~~training,~~ supervision, equipping, ~~and~~ assignment assisting and accompanying of Matthew Quesnel.

The motion arises in somewhat unusual circumstances, but is justified by the liberal pleading policies of Rule 15.

The complaint was dismissed on the basis of Defendants' Motion for Judgment on the Pleadings. No deposition was taken of Mr.

Dundon. A year and a half after Defendants filed their Motion to Dismiss, and many months after the motion was granted, the matter remains in the trial court because of litigation over the third-party claim. In the meantime, just a few months ago, the Supreme Court of Vermont narrowed the grounds on which tort suits may be brought by injured employees against corporate officers who are acting as fellow employees. The law of Vermont now requires that the duty that was breached be a personal duty, owed by the fellow employee/officer directly to the injured employee. Mere breach of a duty owed to the employer (who in turn may owe the duty to the injured employee) no longer suffices. Gerrity v. Manning, #94-222 -- Vt. -- (1/5/96).

Plaintiffs believe that Mr. Dundon owed a personal duty to Matthew Quesnel, separate and apart from the employer's duty. The complaint, when filed, did not need to be this specific[1]. Assuming that the Supreme Court disagrees with the trial court on the "next of kin" issue, this amendment will allow the Court to remand the case back to the trial court for discovery. If, after reasonable discovery, Plaintiffs' belief that the duty was personal proves

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[1] By analogy, Mr. Dundon's duty was personally owed, not owed by the corporation, just as an (employed) Lifeguard would be personally liable for directing novice swimmers to a dangerous section of beach and then abandoning them, or just as an (employed) adult would be personally liable for asking a minor with a Learner's Permit to drive an work errand and then refusing to accompany the young driver. These duties arise from the individual's knowledge of or contribution to the dangerous situation and from the individual's ability to avoid the danger. See, e.g.., Restatement of Torts, 2d § 324.

incorrect, the matter will be dismissed (or be the subject of a summary judgment motion). Plaintiffs in effect are asking for the opportunity for discovery on this issue if they prevail on the "next of kin" issue.

Dated: April 3, 1996

THOMAS and ELIZABETH QUESNEL

By /S/
James A. Dumont, Esquire
Keiner & Dumont P.C.
72 Court Street
Middlebury, VT 05753

cc: Allan R. Keyes, Esq.
Douglas D. Le Brun, Esq.
Michael J. Gannon, Esq.

STATE OF VERMONT
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT
DOCKET NO: S151-94Ac

THOMAS QUESNEL, et al.
Plaintiffs

v.

THE TOWN OF MIDDLEBURY and
CHRISTOPHER DUNDON
Defendants

CHRISTOPHER DUNDON and DUNDON
HEATING & PLUMBING, INC.
Third-party Plaintiffs

v.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE
COMPANY
Third-party Defendants

ADDISON SUPERIOR COURT
FILED
MAY 17
KATHLEEN B. KEELER
CLERK

**ORDER**

Hearing was held on April 3, 1996 on the cross motions for summary judgment filed by Third-party Plaintiffs and Third-party Defendants. On consideration thereof and the written and oral arguments of counsel, it is hereby DECLARED and ORDERED:

1. The Third-Party Defendants' Motion for Summary Judgment is Granted in part: In view of the dismissal of Quesnel's claim against Christopher Dundon in this Court's Entry dated September 12, 1995, the Third-party Plaintiffs' claims for indemnity with respect to Quesnel's claim are also dismissed; the dismissal of these indemnification claims is without prejudice to their renewal if the dismissal of Quesnel's claim is reversed on appeal.

2. The Third-Party Plaintiffs' Motion for Partial Summary Judgment is granted in part: Under commercial general liability

policy no. EDV 3989031 issued to Dunden Heating and Plumbing, Inc., Third-party Defendant Massachusetts Bay Insurance Company has a duty to defend Christopher Dunden against the Quesnel claim. Pursuant to the terms and conditions of policy no. EDV 3989031, Massachusetts Bay Insurance Company is obligated to reimburse Third-party Plaintiffs for those expenses and costs, including attorneys fees, that have been reasonably incurred in investigating and defending the Quesnel claim. Massachusetts Bay Insurance Company's defense of Christopher Dunden hereunder shall be without waiver or loss of any contractual or legal rights, including without limitation (i) its right to avail itself of any and all coverage defenses, and to appeal this Court's rulings with respect to such coverage defenses, and (ii) any right of recoupment of defense costs, in the event that this declaration that Massachusetts Bay Insurance Company must defend Christopher Dunden is reversed upon appeal.

3. With respect to umbrella policy UMV 3989032, issued to Dunden Heating and Plumbing, Inc., there is no reason at this time to change the Court's Entry dated September 13, 1995; whether there is a duty to defend under that policy remains premature because the retained limit has not been reached. The cross motions of Third-party plaintiff and Third-party defendant are therefore denied in pertinent part without prejudice.

4. The question of whether there is a duty to defend under workers compensation and employers liability policy no. WMV 3996638-01 is rendered moot by the Court's declaration that there is a duty to defend under the comprehensive general liability

policy. The cross motions of Third-party plaintiff and Third-party defendant are therefore denied in pertinent part without prejudice.

5. The parties shall attempt to resolve by agreement the amount of attorney's fees and expenses that have been reasonably incurred by Third-Party Plaintiffs in investigating and defending the Quesnel claim, and within 30 days shall file a stipulation, or notify the Court if they have been unable to agree.

6. Third-party Defendants' denial of coverage under all three of the insurance policies at issue in this case was reasonable, and therefore Third-party Plaintiffs' claims for attorneys' fees in prosecuting the third-party claims, and for punitive damages, are dismissed.

7. Third-Party Plaintiffs shall ~~[illegible]~~ recover from Massachusetts Bay Insurance Company their costs in bringing the third-party action.

8. All other motions are moot in the light of the above rulings, and any and all claims and counterclaims between Third-Party Plaintiffs and Third-Party Defendants are dismissed without prejudice.

Dated at Middlebury, Vermont this ___ day of May, 1996.

Matthew I. Katz, Presiding Judge

Approved as to form:

Allan R. Kayes, Esq.

Douglas D. Le Brun, Esq.

STATE OF VERMONT
Addison County, ss.:

SUPERIOR COURT
Docket No. S 151-94 Aciv

THOMAS QUESNEL et al. ]
]
v. ]
]
TOWN OF MIDDLEBURY ]
]
DUNDON et al. ]
]
v. ]
]
HANOVER INS. CO. et al. ]

ENTRY

Whether or not a final judgment has issued, the prayer for attorneys fees is in the nature of one seeking costs, and therefore within the jurisdiction of the court, even if an appeal from a true final judgment of this court has already been taken to the Vermont Supreme Court.

Claimant Dundon seeks reimbursal from his insurer for defense costs incurred prior to this court's declaration of a duty to defend. He has supported his motion with a sufficient prima facie factual showing. Hanover Insurance does not dispute the factual showing, per se. Instead it makes a showing that the Hanover Insurance Company ordinarily compensates its outside defense counsel according to a different, more economical rate schedule. Having wrongfully denied coverage, however, Hanover is not entitled to impose its own rate schedule. When it assumes the defense, and bargains with its own stable of attorneys, it may bargain for whatever schedule it can get. Presumably, its long record of prompt payment, sound financial condition, and promise of future employment, will induce otherwise high-charging attorneys to work for a mere $90 per hour. But that

ADDISON SUPERIOR COURT
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does not show why Dundon's own attorneys, who have not been guaranteed payment by Hanover, and enjoy no expectation of future employment from it, should have to work on Hanover's schedule. In the absence of any agreement, it is the court's obligation to award reasonable attorneys fees.

We find no factual dispute on this latter standard. Further, we have no difficulty finding that the fees charged were reasonable, under all the circumstances. We therefore approve the application for fees in the amount of $5,732.61, and will expect to execute a judgment incorporating such an award.

Dated at Middlebury, Vermont, this 22nd day of July, 1996.

Matthew I. Katz Judge

STATE OF VERMONT
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL
Plaintiffs,

vs.

THE TOWN OF MIDDLEBURY, ET AL
Defendants

CHRISTOPHER DUNDON and
DUNDON HEATING & PLUMBING, INC.,
Third-Party Plaintiffs,

vs.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE COMPANY,
Third-Party Defendants.

## JUDGMENT

By Order entered September 12, 1995, the Court granted Defendants' motions to dismiss Plaintiffs' claim. By Order entered May 17, 1986, the Court ruled on cross-motions for summary judgment filed by Third-Party Plaintiffs and Third-Party Defendants. By entry of August 22, 1996, the Court granted summary judgment approving Third-Party Plaintiffs' application for fees and requested submission of a judgment incorporating such award.

The entry of August 22, 1996, together with prior orders in the file, resolves all matters in controversy between all parties. Therefore, based on said orders:

IT IS ORDERED AND ADJUDGED

1. that Plaintiffs take nothing, that the action is dismissed on the merits, and that Defendants recover of the Plaintiffs Defendants' costs of action;

2. that Third-Party Defendants' Motion for Summary Judgment is Granted in part: In view of the dismissal of Quesnel's claim against Christopher Dundon in this Court's Entry

ADDISON SUPERIOR COURT
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dated September 12, 1995, the Third-Party Plaintiffs' claims for indemnity with respect to Quesnel's claim are also dismissed; the dismissal of these indemnification claims is without prejudice to their renewal if the dismissal of Quesnel's claim is reversed on appeal;

3. that Third-Party Plaintiffs' Motion for Partial Summary Judgment is granted in part: Under commercial general liability policy no. ZDV 3989031 issued to Dundon Heating & Plumbing, Inc., Third-Party Defendant Massachusetts Bay Insurance Company has a duty to defend Christopher Dundon against the Quesnel claim. Pursuant to the terms and conditions of policy no. ZDV 3989031, Massachusetts Bay Insurance Company is obligated to reimburse Third-Party Plaintiffs for those expenses and costs, including attorneys fees, that have been reasonably incurred in investigating and defending the Quesnel claim. Massachusetts Bay Insurance Company's defense of Christopher Dundon hereunder shall be without waiver or loss of any contractual or legal rights, including without limitation (i) its right to avail itself of any and all coverage defenses, and to appeal this Court's rulings with respect to such coverage defenses, and (ii) any right of recoupment of defense costs, in the event that this declaration that Massachusetts Bay Insurance Company must defend Christopher Dundon is reversed upon appeal.

4. that with respect to umbrella policy UHV 3989032 issued to Dundon Heating and Plumbing, Inc., there is no reason at this time to change the Court's Entry dated September 12, 1995; whether there is a duty to defend under that policy remains premature because the retained limit has not been reached. The cross motions of Third-Party Plaintiff and Third-Party Defendant are therefore denied in pertinent part without prejudice.

5. that the question of whether there is a duty to defend under workers compensation and employers liability policy no. WHV 3998638-01 is rendered moot by the Court's

declaration that there is a duty to defend under the comprehensive general liability policy. The cross motions of Third-Party Plaintiff and Third-Party Defendant are therefore denied in pertinent part without prejudice.

6. that Third-Party Plaintiffs recover of Third-Party Defendant Massachusetts Bay Insurance Company the sum of $5,732.61 representing attorneys fees and expenses of defending the Quesnel claim through April 9, 1996.

7. that Third-Party Defendants' denial of coverage under all three of the insurance policies at issue in this case was reasonable, and therefore Third-Party Plaintiffs' claims for attorneys fees' in prosecuting the third-party claims, and for punitive damages, are dismissed.

8. that Third-Party Plaintiffs shall recover from Massachusetts Bay Insurance Company their costs in bringing the third-party action;

9. that all other motions are moot in the light of the above rulings, and any and all claims and counterclaims between Third-Party Plaintiffs and Third-Party Defendants are dismissed without prejudice.

Dated this 25th day of October, 1996.

Matthew I. Katz, Presiding Judge

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STATE OF VERMONT
ADDISON COUNTY, SS.

THOMAS QUESNEL, ET AL.
Plaintiffs-Appellants,

v.

THE TOWN OF MIDDLEBURY, ET AL.
Defendants-Appellees.

SUPERIOR COURT
Docket No. S151-94Ac

CHRISTOPHER DUNDON, ET AL.
Third-Party Plaintiffs-Appellants

v.

HANOVER INSURANCE COMPANY, ET AL.
Third-Party Defendants-Appellees.

NOTICE OF APPEAL

Notice is hereby given that Thomas and Elizabeth Quesnel and Thomas Quesnel as co-administrator of the estate of Matthew Quesnel, Plaintiffs above named, hereby appeals to the Supreme Court from the final judgment entered in this action on October 25, 1996.

Dated at Middlebury, Vermont, this 5th day of November, 1996.

Sandra Lee

Sandra M. Lee, Esq.
Keiner & Dumont, P.C.
Attorneys for Plaintiffs

cc: Nancy Sheahan, Esq.
Allan Keyes, Esq.
Douglas D. Le Brun, Esq.
Harold Eaton, Esq.

ADDISON SUPERIOR COURT
FILED
NOV - 5 1996
KATHLEEN A. KEELER

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