

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

2004 NOV -1 A 11: 21
SUPERIOR COURT

Docket No. 04-E-0208

VENISE THERESA GONYA, as representative of the Estate of Joseph E. Gonya, deceased,
individually and on behalf of all others similarly situated
and

ROXANE S. SCAIFE, as representative of the Estate of Arnold L. Stone, deceased, individually
and on behalf of all others similarly situated

v.

ROGER A. SEVIGNY, Commissioner of the State of New Hampshire Insurance
Department, in his official capacity as Insurance Commissioner and liquidator of
The Home Insurance Company

**PLAINTIFFS' REPLY TO COMMISSIONER'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

On October 15, 2004, Plaintiffs and Defendant moved this Court for summary judgment on the question of whether RSA 402-C:40, I, of the New Hampshire Insurers Rehabilitation and Liquidation Act ("Act") is unconstitutional. This reply will clarify Plaintiffs' position on issues raised by the Commissioner in defense of the unconstitutional release provision contained in the statute.

I. STANDARD OF REVIEW.

Plaintiffs base their challenge of the release provision contained in RSA 402-C:40, I, on the New Hampshire Constitution's court access provision (N.H. CONST. Pt. 1, art. 14), equal protection clauses (N.H. CONST. Pt. 1, arts. 2, 12) and due process clause (N.H. CONST. Pt. 1, art. 15). Plaintiffs and Defendants both agree that the "fair and substantial" intermediate-scrutiny test applies to challenges under New Hampshire's court access provision. See Commissioner's Memorandum of Law in Support of Motion for Summary Judgment at 10; Plaintiff's Cross-Motion for Summary Judgment at 7. Defendant's assertion that a rational basis test applies to Plaintiffs' equal protection challenge is incorrect as a matter of law for the reasons set forth below. The

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appropriate standard of review for Plaintiff's due process challenge is not addressed in the Commissioner's memorandum, but is analyzed under the two-part test set forth *Bragg v. N.H. Department Motor Vehicles*, 141 N.H. 677 (1997), and *Opinion of the Justices (Limitations on Civil Actions)*, 137 N.H. 260 (1993) (the first prong of the analysis determines whether a legally protected right is implicated, and if so, the second prong is whether the procedures at issue have provided the plaintiff the appropriate safeguards). See Plaintiff's Cross-Motion for Summary Judgment at 16-20.

A. The Equal Protection Analysis Under Articles 2 and 12 is the "Fair and Substantial Relationship" Intermediate-Scrutiny Test.

The Commissioner is incorrect that rational basis scrutiny applies to Plaintiffs' equal protection challenge based on Articles 2 and 12. The New Hampshire Supreme Court clearly explained:

We have applied the "fair and substantial relation" test not only in scrutinizing gender-based classifications, but also in examining economic and social legislation and ordinances which did not involve distinctions based on gender or illegitimacy. We therefore hold that, in determining whether RSA ch RSA 507-C (Supp. 1979) denies medical malpractice victims equal protection of the laws, the test is whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation.

Carson v. Maurer, 120 N.H. 925, 930-32 (1980) (discussing classifications which place restrictions on an individual's right to recover in tort under Articles 2 and 12); *see also, Brannigan v. Usitalo*, 134 N.H. 50, 52 (1991) (holding RSA 508:4-d violated Article 12); *City of Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109, 120 (1990) ("we hold that RSA 507-B:2, I, is not constitutionally justified because it violates equal protection provisions found in part I, articles 2 and 12 of the State Constitution by impermissibly denying parties injured on municipal highways and sidewalks a right to recover as provided in part I, article 14"). While RSA 402-C:40, I, may not *automatically* take away a third party's cause of action against a policyholder, it is nonsensical to

suggest that RSA 402-C:40, I, does not *implicate* a third party's important substantive right to sue for a redress of injuries.¹ Under the statutes at issue in *Carson* and *Brannigan*, the plaintiffs never lost the right to sue. The statutes were nevertheless declared unconstitutional by the New Hampshire Supreme Court using intermediate scrutiny -- not the rational basis test.

The Commissioner's reliance on *Verizon New England, Inc. v. City of Rochester*, 855 A.2d 497 (N.H. 2004) is misplaced, and completely ignores the fact that the classifications at issue here involve "an important substantive right." *Carson*, 120 N.H. at 931-32. In *Verizon*, the issue before the court was a city amendment of a pole license. The Court applied the rational basis test in *Verizon* by following the Court's most recent clarification of New Hampshire's equal protection jurisprudence. In *In re Sandra H.*, the court explained that if the classification **did not involve** either a suspect class, a fundamental right **or an 'important substantive right;'** the rational basis test would apply. 150 N.H. ---, 846 A.2d 513, 518 (2004) (emphasis added). Contrary to the impression that may be created by the Commissioner's memorandum, the Court's analyses of the equal protection challenges in *Carson*, *City of Dover*, and *Brannigan* remain good law. The intermediate-scrutiny fair and substantial relationship test applies to Plaintiffs' equal protection challenge because it involves the same important substantive right at stake in those cases.

B. RSA 402-C:40, I, Violates Equal Protection Because it Creates Unconstitutional Distinctions Between Otherwise Similarly Situated Tort Victims.

As set forth in Plaintiff's Cross-Motion for Summary Judgment and consistent with the Court's analysis in *Carson*, *City of Dover* and *Brannigan*, RSA 402-C:40, I, creates several classifications among otherwise similarly situated tort victims. For instance, it creates unconstitutional distinctions between:

¹ If Plaintiffs wish to file a claim, they must release the policyholder. If this does not *implicate* their