

The DeBenedetto Disclosure: Disclosing Named Parties

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I. Introduction

In New Hampshire civil cases, the *DeBenedetto*² disclosure rule mandates that defendants that intend to apportion fault to non-litigant parties must proactively disclose their identity and the alleged basis of their fault. This rule is a cornerstone of fair litigation, designed to prevent "trial ambush" and ensure transparency in cases involving comparative fault and the apportionment of damages. In a few of our recent multi-defendant medical negligence cases, some defendants have attempted to skirt their *DeBenedetto* obligations by stating in their disclosures that they retain the right to apportion fault to parties that may settle out or may be released from the case, in an effort to avoid formally seeking to apportion fault to their co-defendants. Such disclosures are insufficient and impede the plaintiff's ability to engage in informed settlement discussions with the other co-defendants. To be consistent with this purported goal of fairness, the *DeBenedetto* disclosure deadline in multi-defendant medical negligence cases should not only apply to unnamed parties, but should also apply to named parties so that each defendant must expressly state whether or not he intends to blame another defendant. This prevents defendants in such cases from waiting for co-defendants to settle out of the case before disclosing experts against them.

II. *DeBenedetto* Disclosures that Retain the Right to Apportion Fault to Co-Defendants that Ultimately Settle are Insufficient

The New Hampshire Supreme Court's decisions in *Nilsson v. Bierman*³ and *DeBenedetto*⁴ gave civil defendants in this state something they never had before—the right to ask the jury to apportion fault to someone who is not present at trial to defend him or herself. The Court, however, recognized that this right comes with certain responsibilities. More specifically, a defendant who wants to apportion fault to someone else bears the burdens of persuasion and proof.⁵ Indeed, the *DeBenedetto* disclosure operates as an affirmative defense, placing the evidentiary burden on the defendant to establish the legal fault of the non-party tortfeasor.⁶ In *State v. Exxon Mobil Corp.*,⁷ the Court underscored this requirement, finding that *DeBenedetto* disclosures must clearly explain the theory of liability for the non-litigant parties and provide specific factual allegations to support that liability.⁸

The New Hampshire superior courts have consistently demonstrated a strict and unwavering enforcement of the *DeBenedetto* disclosure requirements, regularly striking disclosures that fail to meet the requisite specificity standard.⁹ These rulings reflect the Supreme Court's emphasis on

specificity, timeliness, and substantive support for apportionment claims, signaling that these disclosures are not mere formalities but critical procedural steps with significant consequences for litigation strategy and outcome. The consistent pattern of superior courts striking *DeBenedetto* disclosures for lack of specificity demonstrates a clear philosophy centered on preventing "trial ambush" and promoting transparency. These decisions evidently support the notion that *DeBenedetto* is not a tool for last-minute blame-shifting or vague, speculative allegations, but rather demands diligent, early, and detailed preparation from the defense.

Yet, this is precisely the result that the *DeBenedetto* disclosures in our recent multi-defendant cases will yield—last minute finger-pointing that will hamper the plaintiff's attempt to resolve the case with the co-defendants. We believe that disclosures that retain the right to apportion fault to co-defendants should they settle are clearly insufficient under New Hampshire law. Defendants in multi-defendant medical negligence cases must allege with specificity the liability claims they have against the other named defendants in the case. At least two superior court decisions support this position. In *Sevigny v. Quesada*,¹⁰ Judge Mangones barred the non-settling defendant from offering evidence of a settling defendant's fault because the non-settling defendant failed to disclose the settling co-defendant in its *DeBenedetto* disclosure.

The plaintiff in *Sevigny* had amended the standard structuring conference order form at the structuring conference to include the following language: "Pursuant to *DeBenedetto v. CLD* case, defendants shall disclose by 7.15.08 the identity of every person or party alleged to be at fault and the basis therefore...". The *DeBenedetto* deadline passed without any of the defendants disclosing an intent to blame anyone else. Accordingly, the plaintiff agreed to settle with one of defendants and withdrew the medical experts that the plaintiff had disclosed to testify against the settling defendant. As the trial date approached, counsel for the non-settling defendant sought to videotape the trial testimony of the plaintiff's withdrawn experts in an attempt to create evidence to support a *DeBenedetto* apportionment of fault to the settling defendant. The plaintiff refused to produce the withdrawn experts and the non-settling defendant filed a motion to compel their videotaped testimony. The plaintiff objected, asked the Court to enforce the *DeBenedetto* disclosure deadline, and emphasized she would not have settled with the settling defendant if the non-settling defendant had complied with the deadline and stated an intent to blame his co-defendant.

Judge Mangones noted that the Structuring Conference Order signed by Judge McGuire "required that [the non-settling defendant] identify 'every individual' alleged to be at fault for the plaintiffs' injuries, even if such individuals were parties to the litigation."¹¹ He then wrote that the non-settling defendant did not identify any such individuals prior to the disclosure deadline and had not alleged sufficient cause for not doing so.¹² Lastly, he recognized

that the plaintiffs would be prejudiced by allowing the non-settling party to seek a *DeBenedetto* apportionment against the settling defendant because the plaintiffs had relied on the absence of a *DeBenedetto* disclosure when they decided to resolve their claims against the settling doctor.¹³ Accordingly, he not only denied the non-settling defendant's motion to compel testimony from our withdrawn experts, he also held that the non-settling defendant was barred from presenting evidence of fault relative to any other person or party at trial.¹⁴

Similarly, in *Rallis v. Gladstone*,¹⁵ Judge McHugh granted the plaintiff's motion for reconsideration to include the phrase "named parties" as well as "unnamed parties" to the *DeBenedetto* language in the Structuring Conference Order. The plaintiff in *Rallis* argued that in multi-defendant cases it is necessary for the plaintiffs to know which named defendants are being blamed by another named defendant and the bases for such allegations of fault. That is so because settlement agreements are often reached with some but not all defendants and the non-settling defendants may ask the jury to apportion fault to the defendants who settled and were released before trial. Requiring defendants to identify their co-defendants in the *DeBenedetto* disclosure would allow the plaintiff to make an educated decision about whether to settle with a defendant and it would prevent defendants from making eleventh hour allegations of fault and waiting for co-defendants to settle out of the case before attempting to cast blame.

Judge McHugh acknowledged that the plaintiff would be substantially prejudiced by the defendants' failure to disclose a co-defendant in their *DeBenedetto* disclosure because the plaintiff would be unable to "assess the reasonableness of electing to settle with that co-defendant."¹⁶ In light of this potential prejudice, Judge McHugh explained:

If the remaining defendant is going to argue that a settling co-defendant was negligent, then that remaining defendant should be required to specify its reasons for that claimed negligence at the time of the *DeBenedetto* disclosure to that the plaintiff can assess any such claim and make the determination as to whether it is in her best interest to settle with any defendant prior to trial.¹⁷

Moreover, Judge McHugh found that requiring defendants to disclose co-defendants in their *DeBenedetto* disclosures is consistent with the Superior Court's discovery rules which aim to "assure openness and prevent trial ambush."¹⁸

As the foregoing cases demonstrate, allowing defendants to reserve the ability to apportion fault until a party settles defeats the purpose of the *DeBenedetto* disclosure and prevents the plaintiff from safely settling with other

parties. However, as demonstrated in the *Sevigny* and *Rallis* cases, it is important for plaintiffs to amend the *DeBenedetto* structuring conference language at the outset of the case to include named parties in order to preserve their ability to settle with one or more of the defendants in a multi-defendant case.

While the issue at hand is often framed in terms of *DeBenedetto* considerations, it can also be looked at as a pure expert disclosure deadline issue. Parties are obligated to disclose the experts they intend to present to support their claims at trial according to their agreed-upon Case Scheduling Order. After the significant discovery period that precedes the *DeBenedetto* disclosure deadline, defendants undeniably know or should know whether they will require experts to support the apportionment of blame to a co-defendant. Consequently, there is no viable justification for failing to meet the expert disclosure deadline concerning co-defendants, other than to gain an unfair strategic advantage.

III. Conclusion

Plaintiff's lawyers should always litigate this issue should defendants provide vague *DeBenedetto* disclosures in order to protect their client's ability to settle their claims against one or more co-defendants. As evidenced by numerous superior court rulings, failure to comply with the stringent *DeBenedetto* requirements—whether due to a lack of specificity in identifying parties or the basis of their fault, untimeliness in filing, or failing to identify named parties—almost invariably leads to the striking of the disclosure and the preclusion of crucial evidence at trial. Such outcomes can have severe and adverse consequences for a defendant's liability exposure, potentially forcing them to bear the full brunt of damages that might otherwise have been apportioned.

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² See *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 153 N.H. 793 (2006).

³ 150 N.H. 393 (2003).

⁴ See *DeBenedetto*, 153 N.H. 793 (2006).

⁵ See *Goudreau v. Kleeman*, 158 N.H. 236, 256 (2009).

⁶ See *id.*

⁷ 168 N.H. 211 (2015).

⁸ See *id.* at 256-260.

⁹ See e.g., *Omanovic v. Pariser*, No. 218-2017-CV-00229, (Rockingham County Superior Court, Aug. 6, 2018) (Wageling, J) (granting the plaintiff's motion to strike the defendants' *DeBenedetto* disclosures because the disclosures failed to "specifically identify the individuals at fault, the legal basis for shifting civil liability to them, or to meaningfully connect their fault to any of Plaintiff's claims"); *Coskren v. Watt*, No. 2016-CV-00407 (Merrimack County Superior Court, Jan. 8, 2018) (McNamara, J.) (granting plaintiff's motion to strike because defendant's *DeBenedetto* disclosure failed to allege specific facts to explain the theory of liability); *Reynolds v. Raslavicus*, No. 218-2016-CV-457, (Rockingham County Superior Court, May 25, 2017) (Anderson, J) (granting the plaintiff's motion to strike the defendants' *DeBenedetto* disclosure because the disclosure identified a potential category of people rather than identify anyone in particular and failed to provide a basis for their alleged fault); *Shepard v. Keskinen*, No. 226-2016-CV-00567, (Hillsborough County Superior Court, Southern District, May 9, 2017) (Colburn, J.) (finding that a civil defendant was not entitled to seek a *DeBenedetto* apportionment because the defendant was already liable as a matter of law for harm caused by the non-party); *McEneny v. Brady Sullivan Properties*, No. 216-2016-CV-00113, (Hillsborough County Superior Court, Northern District, March 16, 2017) (Brown, J.) (holding a defendant could not shift fault to a party that had already been dismissed from the case, finding defendants arguments that a dismissed party was akin to an unnamed party unpersuasive.). The Court explained "[r]egardless of how one categorizes a non-party—dismissed, immune, or not before the Court—the proper inquiry is whether defendant has alleged sufficient facts to establish that non-party was liable to the plaintiff, as even a party immune from liability can only be added for apportionment purposes if the defendant can allege the non-party would otherwise be liable to the plaintiff." *Id.*; *Joselow v. MNH Mall, LLC*, No. 216-2016-CV-00575 (Hillsborough County Superior Court, Northern District, May 1, 2017) (Abramson, J.) (granting the plaintiff's motion to strike the defendants' *DeBenedetto* disclosure because the disclosure failed to sufficiently explain the theory of liability of the non-litigant and the allegations upon which that liability was based); *Adolfini v. Lakeview Neurorehabilitation Center*, No. 212-2014-CV-00043, 00044, and 00045, (Carroll County Superior Court, March 18, 2015) (Temple, J.) (granting the plaintiff's motion to strike the defendants' *DeBenedetto* disclosure because the disclosure "completely fail[ed] to identify the factual and legal basis of the non-litigants' civil fault as it relate[d] to the underlying causes of action"); *Cummings v. MMG Insurance Company*, No. 220-2014-CV-48 (Sullivan County Superior Court, Sept. 23, 2016) (Tucker, J.) (granting the plaintiff's motion in limine to bar the defendant from proving a non-party's comparative fault because the defendant failed to make a *DeBenedetto* disclosure identifying the non-party).

¹⁰ No. 07-C-0422, (Hillsborough County Superior Court, Northern District, Aug. 26, 2009) (Mangones, J.).

¹¹ *Id.* at 9.

¹² *Id.*

¹³ *Id.* at 9-10.

¹⁴ *Sevigny*, No. 07-C-0422, at 10.

¹⁵ No. 09-C-0598, (Rockingham County Superior Court, May 11, 2010) (McHugh, J.).

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 3.