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## STATUTORY 'ALBATROSS'

# Many Contractors Spared Days In Court

Frequently, they're not apportionment defendants

By **THOMAS B. SCHEFFEY**

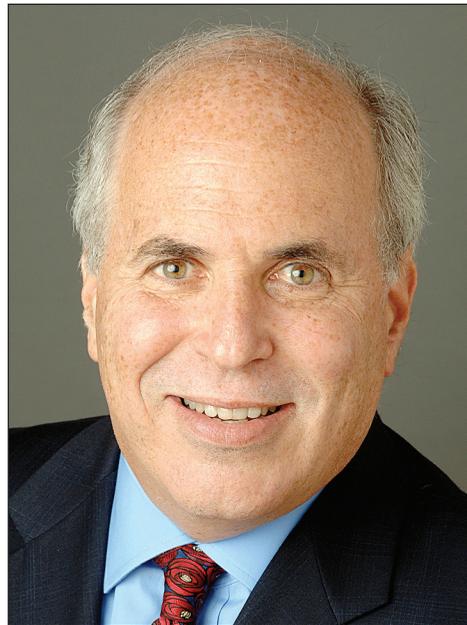
It's official. When a landowner has a non-delegable duty to keep his property reasonably safe, he can't bring in the contractor hired to discharge that duty as an apportionment defendant.

That's cold comfort for snow removal contractor Ronald R. Passarelli Jr., who it now appears was pointlessly dragged into the slip-and-fall case of *Flora Smith v. Greenwich*, officially decided by the state Supreme Court June 6.

Smith, a Darien homemaker, fell while walking on a Greenwich sidewalk on Jan 17, 2000, severely fracturing her ankle. Her lawyer is Stewart M. Casper, of Stamford's Casper & de Toledo. She sued two landlord companies, 200 Greenwich Acquisition and 19 West Elm Street Associates, on the theory that, a week before, they had piled snow in a way that melted and created the black ice which coated the city sidewalk. The sidewalk falls under the state Highway Defect Statute, and it quickly became clear through discovery that Greenwich would not be the sole proximate cause of her injuries, as the statute requires.

Rocky Hill lawyer Joseph A. LaBella, representing 200 Greenwich, cited snow contractor Passarelli as an apportionment defendant. Passarelli, represented by Karen K. Clark of Hartford's Kenny, O'Keefe & Usseglio, filed a motion to prevent Judge Trial Referee William Lewis from allowing any reference to Passarelli's alleged negligence, on the grounds that 200 Greenwich had no legal right to apportion its negligence.

Four days into Smith's case, Lewis ruled. "I've decided there's no apportionment under the circumstances." Passarelli "made



**STEWART M. CASPER**

this argument at the beginning of the case, but I didn't understand at the beginning of the case ...," Lewis explained in the October 2004 trial. The jury rendered a verdict of \$583,000 reduced by 30 percent for Smith's comparative negligence. After post-judgment interest, it amounts to approximately \$653,000.

LaBella, of Rocky Hill's D'Attelo & Shields, appealed on multiple grounds. He contended that under the 2001 state Supreme Court's *Gazo v. Stamford* rule that a landowner's non-delegable duty precluded an apportionment claim against the worker was only dicta, not an actual holding.

Former Supreme Court Chief Justice William J. Sullivan, in a 28-page decision, concluded that, regardless of *Gazo's* status in 2001, "we now formally adopt the reasoning of that decision [that] a defendant

that owns or controls property may not bring an apportionment claim against a contractor hired to carry out the defendant's nondelegable duties."

LaBella, who did not return a call for comment, also argued that Lewis improperly allowed evidence of Passarelli returning to the area of the accident to remove snow.

Sullivan noted the sound public policy in excluding evidence of subsequent repairs to prove negligence. Doing so would penalize a defendant for taking remedial measures "thereby perpetuating the danger," he wrote.

But even in negligence actions, it is fine to admit evidence of repairs to show who had ownership or control of the property in question. Passarelli—as the employee of 200 Greenwich—and Casper had photographic evidence of Passarelli arriving to remove snow. "If you didn't put it there," argued Casper in his closing arguments, "why in the world would you call your contractor to come remove it?"

Sullivan, for a unanimous panel, held that it would have been preferable if Lewis had instructed the jury that Passarelli's removal of the snow was irrelevant to the question of negligence, but that the absence of such a limiting instruction was ultimately harmless.

Casper, in an interview, said the case demonstrates the limits of the 20-year-old mechanism allowing defendants to "cite in" other non-party defendants for apportionment purposes: "The apportionment statute has been an albatross for the whole legal system," he said. "Unfortunately the legislature imposed this on us thinking it would stem some litigation. I think it's only spawned more controversy and expense." ■