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THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2006-613

SCOTT A. MURLEY

v.

HANOVER INSURANCE COMPANY

Argued: April 5, 2007
Opinion Issued: June 8, 2007

Jensen & Zumbado, of Hampton Falls (John P. Elmore and Hector E. Zumbado on the brief, and Mr. Zumbado orally), for the plaintiff.

Horn & Lauretti, of Boston, Massachusetts (Michael S. Kinson on the brief and orally), for the defendant.

Normand & Associates, P.A., of Manchester (James A. Normand on the memorandum of law), for MaryBeth St. Laurent, as amicus curiae.

GALWAY, J. The defendant, Hanover Insurance Company, appeals the decision of the Superior Court (McHugh, J.) finding that an exclusion in the policy issued by the defendant was void and ordering the defendant to pay the plaintiff, Scott A. Murley, \$5,000 for medical payments. We affirm.

The trial court found the following facts. The plaintiff purchased an insurance policy providing \$100,000 in personal liability, \$100,000 in

underinsured motorist coverage and \$5,000 in medical payments coverage from the defendant. In February 2002, he sustained injuries in a motor vehicle accident caused by William Martino in Manchester. The plaintiff collected the \$5,000 policy limit from the defendant in medical payments coverage and obtained \$25,000 from Martino's insurance company, which was the limit of his liability coverage. Because the plaintiff suffered more than \$25,000 in damages, he pursued an underinsured motorist claim against the defendant for the remaining damages. Through arbitration, the value of the plaintiff's damages was determined to be \$52,500. The \$25,000 that the plaintiff collected from Martino's policy was deducted from the arbitration award, leaving a balance of \$27,500. The defendant, however, paid only \$22,500, relying upon the fact that it had already paid \$5,000 in medical payments and upon an exclusion in the policy that prohibits duplicate payments for a single element of loss.

The plaintiff brought suit to recover the remaining \$5,000 under his underinsured motorist coverage. The superior court ruled that the exclusion in the policy limiting recovery for a single element of loss was void under RSA 264:15, I (2004) and RSA 259:61, I (2004). This appeal followed.

On appeal, the defendant argues that the exclusion violates neither statutory policy nor statutory requirements under RSA 264:15, I, and RSA 259:61, I. "In matters of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." Swain v. Employers Mut. Cas. Co., 150 N.H. 574, 576 (2004). We first look to the statute's language itself, and, unless the statutory scheme defines the words used, we ascribe to them their plain and ordinary meanings. Id.

The insurance policy at issue provides:

PART A - LIABILITY COVERAGE

....

LIMIT OF LIABILITY

....

- C. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
1. Part B or Part C of this policy; or
 2. Any Underinsured Motorists Coverage provided by this policy.

.....

PART B – MEDICAL PAYMENTS COVERAGE

.....

LIMIT OF LIABILITY

.....

- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
1. Part A or Part C of this policy; or
 2. Any Underinsured Motorists Coverage provided by this policy.
-

PART C – UNINSURED MOTORISTS COVERAGE

.....

LIMIT OF LIABILITY

.....

- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
1. Part A or Part B of this policy; or
 2. Any Underinsured Motorists Coverage provided by this policy.

The parties agree that this language purports to prohibit the plaintiff from recovering both \$5,000 under the medical payments coverage and \$5,000 for the same injury under the underinsured motorist claim.

Absent public policy or statutory provisions to the contrary, insurers have the right to limit their liability by exclusions written in terms appropriate to convey their meaning and effect to a reasonable person in the position of the insured. Empire Ins. Co. v. National Union Fire Ins. Co., 128 N.H. 171, 175 (1986). Exclusions are void only when their application defeats a statutory policy or violates a statutory requirement. Id. at 174. Neither party argues that a reasonable person would not understand the meaning and effect of the exclusion. Thus, we must determine whether the exclusion violates statutory policy or requirements.

We first address the defendant's argument that the trial court erred in finding the exclusion void under RSA 264:15, I. RSA 264:15, I, states, in pertinent part: "When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, his uninsured motorist coverage shall automatically be equal to the liability coverage elected." Uninsured motorist statutes, like RSA 264:15, I, are designed to provide an innocent victim with a source of restitution when he cannot recover the full amount of damages from the tortfeasor. Swain, 150 N.H. at 576. The legislature intended RSA 264:15, I, to allow policy holders to protect themselves against injury from an uninsured motorist to the extent that they protect themselves against liability. Turner v. St. Paul Prop. & Liab. Ins. Co., 141 N.H. 27, 29 (1996); Bertolami v. Merchants Mutual Ins. Co., 120 N.H. 308, 312 (1980) (applying predecessor statute).

The case before us presents the same issue that we decided in Bertolami. In Bertolami, the plaintiff's minor daughter was injured by an uninsured motorist. Bertolami, 120 N.H. at 309. The plaintiff's insurance policy provided that medical payments could be deducted from payments made to a policy holder who was injured by an uninsured motorist, but did not provide for such a deduction under liability coverage. Id. at 310. Under the policy, the plaintiff's insurance company deducted \$500 from the plaintiff's \$7,000 uninsured motorist coverage recovery because the insurer had already made a \$500 medical payment to the daughter. Id. at 309-10. We held that the policy's deduction of medical payments violated RSA 268:15-a (Supp. 1970), which was the predecessor statute to RSA 264:15, I, because the exclusion placed the daughter in an inferior position to that which she would have been in had the plaintiff, rather than the uninsured motorist, been liable for her injuries. Id. at 312. We described the inequality created by the policy in the following manner:

The exclusion relates only to uninsured motorist coverage and not liability coverage. Thus, if the plaintiff and her daughter had been riding in the plaintiff's insured automobile, and [the daughter] had been injured through the plaintiff's negligence, [the daughter] could have settled with the defendant for \$7,000 and still recovered \$500 in medical payments. If the medical payments deduction clause is given effect, however, [the daughter] gets her \$7,000 settlement and no more.

Id. at 312.

The defendant attempts to distinguish Bertolami by stating that the defendant's policy deducts medical payments from both underinsured motorist and liability coverage, thus eliminating the inequality created by the policy in

Bertolami. The defendant asserts that, under its policy, had the mother and daughter from Bertolami been riding in the mother's insured automobile, and had the daughter been injured through the mother's negligence, the daughter would have received a total of only \$7,000, rather than \$7,500, because the defendant's policy prevents double recovery under liability coverage as well as under uninsured motorist coverage. Such a policy would violate a different statute, however.

RSA 264:17 (2004) prohibits subrogation, stating: "The right of subrogation against any third party shall not exist or be claimed in favor of the insurer who has paid or reimbursed, to or for the benefit of the insured, medical costs under coverage provided for pursuant to RSA 264:16." In Bertolami, had the mother's negligence injured her daughter, the daughter would have been treated as the "insured," as that term is used in RSA 264:17, while the mother would have been treated as the "third party" who injured the insured. The mother's insurance company thus would play two roles: (1) it would be the "insurer" of the daughter, paying the daughter the medical payments she is due; and (2) it would provide liability coverage to the mother, paying damages to the daughter to compensate her for the mother's negligence. Under this scenario, if the insurance company, in its role as provider of liability coverage to the mother, paid \$7,000 in damages to the daughter, the insurance company, in its role as insurer of the daughter, could not deduct or otherwise withhold \$500 from that amount to offset the \$500 in medical benefits that it paid to the daughter. To do so would violate the statutory policy stated in RSA 264:17, because it would, in effect, constitute subrogation. Because such a provision would violate statutory policy, it would be void, and the defendant's insurance policy in this case would not eliminate the inequality condemned in Bertolami. Because RSA 264:17 prohibits subrogation against a liability claim, the daughter would receive \$7,500 if she were injured by her mother's negligence. If the insurer could enforce the double recovery exclusion where the daughter was injured by an uninsured motorist, then the daughter would receive only \$7,000. This result is prohibited by the statutory policy stated in RSA 264:15, I, and interpreted in our decision in Bertolami.

To the extent that the defendant's insurance policy prohibits duplicate payments for the same element of loss under its liability and medical benefits coverages, the provision is void. Once that prohibition of duplicate payments under liability coverage is void, the same inequity that arose in Bertolami arises here. The policy permits duplicate medical benefits payments under a liability claim, but prevents duplicate medical benefits payments under an uninsured motorist claim. This inequity violates RSA 264:15's "legislative intent to allow a person to protect himself against injury from uninsured motorists to the extent that he protects himself against ordinary personal liability." Bertolami, 120 N.H. at 312. Accordingly, we agree with the trial court's ruling that the defendant's policy violates RSA 264:15.

The defendant argues that allowing the plaintiff to recover both the medical payments and uninsured motorist payments would require rewriting the insurance policy because it would allow the plaintiff to recover benefits in excess of what he purchased. We disagree. Where a plaintiff pays a separate premium for each type of coverage, we see nothing unjust in allowing the plaintiff to recover under each endorsement. *Id.* at 310. Further, the illegality of the clause does not require rewriting the policy. The policy is simply now read as if the offending language were not there. *Id.* at 313.

Because we agree with the superior court's determination that the exclusion invoked by the defendant is void, we need not determine whether the exclusion violates RSA 259:61, I.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and HICKS, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Strafford
No. 2007-920

HAIR EXCITEMENT, INC.

v.

L'OREAL U.S.A., INC.

Argued: November 12, 2008
Opinion Issued: February 19, 2009

Shaines & McEachern, P.A., of Portsmouth (Robert A. Shaines and Laurie A. Lacoste on the brief, and Mr. Shaines orally), for the plaintiff.

Nixon Peabody, LLP, of Manchester (W. Scott O'Connell and David W. Ruoff on the brief, and Mr. O'Connell orally), for the defendant.

BRODERICK, C.J. The plaintiff, Hair Excitement, Inc. (Hair Excitement), appeals from a judgment entered by the Superior Court (Houran, J.) rejecting its claim that the defendant violated the Consumer Protection Act, RSA chapter 358-A (1995 & Supp. 2008). The defendant, L'Oreal U.S.A., Inc., (L'Oreal) cross-appeals. We affirm.

I

The record supports the following facts. Hair Excitement is a New Hampshire corporation which owns and operates a number of hair salons in New Hampshire, Maine and Massachusetts. L'Oreal manufactures and distributes hair care products, including Matrix and Redken brand products.

In 1993, Hair Excitement entered into purchase contracts with a Matrix distributor for the purchase of Matrix products, a line now owned by L'Oreal, for its salons. The contracts provided that Hair Excitement would "not resell or redistribute Matrix retail products to anyone other than [its] legitimate salon clients for home maintenance use." Either party could terminate the contracts "immediately upon notice."

In 1997, Hair Excitement entered into a Redken Products Chain Account Agreement (chain account agreement) with Redken Laboratories, Inc., a subsidiary of L'Oreal. Pursuant to this agreement, Hair Excitement was appointed "as an authorized, non-exclusive Redken Chain Account for the Redken products." The products to be sold under the account were either products that Hair Excitement could only sell to consumers for their own use or products that its professionals applied on clients at its salons. The chain account agreement provided that Hair Excitement would "sell the products . . . solely from Chain Account's salons to consumers for their own use, and that it [would] not sell, offer for sale or otherwise transfer such products to anyone other than consumers for their own use." As for products labeled "For Professional Use Only," the agreement provides that Hair Excitement would "use such products only in [its] salons." The agreement also provided that "[e]ither party may terminate this Agreement at any time, with or without cause, by giving sixty (60) days prior written notice of such termination to the other party."

These provisions restricting the sale of L'Oreal's products are intended to serve as protection against the sale of products outside of salons in the so-called "gray market." The "gray market" is a market in which legal but perhaps unethical methods are used to avoid a manufacturer's distribution chain and thereby sell goods at prices lower than those envisioned by the manufacturer. As the trial court's order explains:

The diversion of product, and in particular product designed and marketed for salon-only sales, is a very large problem in the beauty industry. Manufacturers are constantly battling this problem, which harms the business reputations of both the manufacturer and the salon owner, which creates a mistaken impression that the manufacturer permits or endorses the sale of salon-only products outside of a professional salon setting, and which is likely to cause confusion concerning the quality of salon-only products. Among the few tools available to manufacturers to battle diversion are tips from informants, coding of product to track the product's distribution routes, and buying programs, known at L'Oreal as "loyalty tests." Buying programs or loyalty tests involve the manufacturer sending in an investigator to pose as someone other than a consumer purchasing for the consumer's

own use, and are generally used by a manufacturer to confirm whether a salon reported to be reselling in violation of contracts is in fact doing so. Both the problem and the tools used by manufacturers to combat it are well known and well understood by those involved in the industry.

In December 2001, a distributor in Rhode Island informed Charles Domroe, L'Oreal's director of corporate security, that it had learned from at least two sources that Hair Excitement was engaged in product diversion. As part of its subsequent investigation, L'Oreal retained Paul Cosentino to pose as a "collector" in order to conduct a "loyalty test" to determine whether Hair Excitement would make an unauthorized sale of L'Oreal's products. In early January 2002, Cosentino, posing as Paul Kostanza, telephoned Hair Excitement's salon in Rochester seeking to purchase Redken and Matrix hair care products for resale. That same day he received a return call from John Langlois, the owner of Hair Excitement, and was directed to contact purchasing manager, Ed Sharon, to discuss the proposed sale. Langlois knew that Cosentino intended to resell the products. The next day Cosentino spoke by telephone with Sharon and confided that he planned to sell the Redken and Matrix products outside of the United States. Sharon agreed to sell the requested products but told Cosentino that he needed to "be careful because Hair Excitement, Inc. [was] a franchise" and it "could run into problems with the manufacturer." The following day, Cosentino arrived at the Rochester salon and purchased 150 bottles of consumer-use only Redken and Matrix products at fifty percent of their retail value. Cosentino was told that Hair Excitement could supply whatever additional products he needed.

By letter dated February 8, 2002, L'Oreal informed Hair Excitement that due to its alleged product diversion and based upon other independent investigation, it was terminating the chain account agreement and would no longer sell it any Redken products. L'Oreal also barred its distributors from further sales of any of its product brands, including Matrix products, to Hair Excitement.

II

Hair Excitement brought suit against L'Oreal alleging that it had violated RSA chapter 358-A. It contended that L'Oreal willfully and knowingly misrepresented the identity of its agent and also misrepresented the agent's intent with the purpose to deceive and induce it to sell the products to third parties in violation of its purchase contracts and chain account agreement, resulting in its termination as an approved franchise. L'Oreal brought a counterclaim alleging that Hair Excitement violated RSA chapter 358-A because its distribution of Redken products outside of the salon-only sales to consumers harmed Redken's business reputation with both salon owners and

consumers, created a mistaken impression that L'Oreal permits or endorses the sale of Redken products outside of a professional salon setting, and was likely to cause confusion concerning the quality of Redken products.

The parties agreed to bifurcate the trial of liability and damages. Over Hair Excitement's objection, the case was tried to the court and not to a jury. Following a four-and-a-half-day trial, the trial court found in favor of L'Oreal on Hair Excitement's claim and in favor of Hair Excitement on L'Oreal's counterclaim. This appeal followed.

Hair Excitement argues that the trial court erred in finding that: (1) it was not entitled to a jury trial; (2) L'Oreal did not engage in unfair and deceptive acts under RSA chapter 358-A; (3) L'Oreal's anti-diversion policy contained in the distributor contracts is a legitimate business practice; and (4) L'Oreal did not engage in price fixing. L'Oreal's cross-appeal raises four issues, including whether the trial court erred in ruling that: (1) the choice of law provision in the contract was inapplicable; (2) Hair Excitement's claims are not barred by the economic loss doctrine; (3) Hair Excitement's claims may not be limited by the terms of the contract; and (4) the doctrine of unclean hands does not bar Hair Excitement's claims. L'Oreal does not appeal the trial court's ruling in favor of Hair Excitement on L'Oreal's RSA chapter 358-A counterclaim. Accordingly, because we affirm the trial court's ruling in favor of L'Oreal on Hair Excitement's consumer protection claim, we need not address the issues raised by L'Oreal's cross-appeal. For purposes of this appeal, we assume without deciding that RSA chapter 358-A applies.

III

Prior to trial, L'Oreal moved to strike Hair Excitement's jury trial demand. The trial court granted the motion on the basis that "there is neither a constitutional nor statutory right to a jury trial on a claim brought under RSA 358-A:10." Noting that it "has the discretion to seek the advice of a jury on such a claim," the court declined to exercise such discretion.

Part I, Article 20 of the New Hampshire Constitution provides:

In all controversies concerning property, and in all suits between two or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred, unless, in cases arising on the high seas and in cases relating to mariners' wages, the legislature shall think it necessary to alter it.

The right to a jury trial under the New Hampshire Constitution “is not without limitation; it extends only to those cases for which the jury trial right existed when the constitution was adopted in 1784.” State v. Morrill, 123 N.H. 707, 712 (1983); see Hallahan v. Riley, 94 N.H. 338, 339 (1947) (constitutional guaranty of trial by jury in civil matters determined generally by historical test of its use at common law). Part I, Article 20 “did not create or establish a right [to a jury trial] not before existing. It was a recognition of an existing right, guaranteeing it as it then stood and was practiced, guarding it against repeal, infringement, or undue trammel by legislative action, but not extending it so as to include what had not before been within its benefits.” Davis v. Dyer, 62 N.H. 231, 235 (1882). “The right does not extend . . . to special, statutory or summary proceedings unknown to the common law.” In re Sandra H., 150 N.H. 634, 636 (2004).

“To resolve whether a party has a right to trial by jury in a particular action, we generally look to both the nature of the case and the relief sought, and ascertain whether the customary practice included a trial by jury before 1784.” Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 591 (2003) (quotation and citation omitted). “When a plaintiff seeks relief for breach of codified rights, we further consider the comprehensive nature of the statutory framework to determine whether the jury trial right extends to the action.” Id.

The legislature enacted RSA chapter 358-A in 1970 to “ensure an equitable relationship between consumers and persons engaged in business.” Hughes v. DiSalvo, 143 N.H. 576, 578 (1999). RSA chapter 358-A is “a comprehensive statute designed to regulate business practices for consumer protection by making it unlawful for persons engaged in trade or commerce to use various methods of unfair competition and deceptive business practices.” Chase v. Dorais, 122 N.H. 600, 601 (1982). Thus, RSA chapter 358-A creates new statutory rights which did not exist in New Hampshire common law in 1784 when this state adopted its constitution. Because of this, our constitution does not confer the right to a jury trial for a claim under RSA chapter 358-A. See Morrill, 123 N.H. at 713.

Moreover, nothing in the language of RSA chapter 358-A specifically provides for a right to a jury trial. The statute states that:

Any person injured by another’s use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3

times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. . . . Injunctive relief shall be available to private individuals under this chapter without bond, subject to the discretion of the court."

RSA 358-A:10, I (emphases added). We are the final arbiter of the meaning of a statute as expressed by the words of the statute itself. Green Crow Corp. v. Town of New Ipswich, 157 N.H. 344, 346 (2008). We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history unless the statutory language is ambiguous, consider what the legislature might have said, or add words not included in the statute. Id. In its ordinary meaning, the word "court" refers to a judge rather than a jury. Had the legislature intended to provide for a jury trial, it could have expressly done so. See, e.g., RSA 354-A:21-a, I (Supp. 2008) (in action for damages based upon unlawful discrimination "either party is entitled to a trial by jury on any issue of fact"). Accordingly, under the plain language of the statute, the court is vested with the authority to decide claims brought under RSA chapter 358-A.

Nonetheless, Hair Excitement argues that its claim is similar to a common law fraud or deceit claim. "In order to prove deceit, the plaintiff must prove that the defendant intentionally made material false statements to the plaintiff, which the defendant knew to be false or which he had no knowledge or belief were true, for the purpose of causing, and which does cause, the plaintiff reasonably to rely to his detriment." Caledonia, Inc. v. Trainor, 123 N.H. 116, 124 (1983). Fraud must be proved by clear and convincing evidence. Id. In contrast, to prove a violation of RSA chapter 358-A, a plaintiff must prove that the defendant is a person, that the defendant used an unfair method of competition or a deceptive act or practice, that the act occurred in trade or commerce, and that the defendant's conduct rose to "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." ACAS Acquisitions v. Hobert, 155 N.H. 381, 402 (2007); see RSA 358-A:2. In addition, RSA chapter 358-A provides broader damages than a common law fraud action, allowing treble damages, attorney's fees and costs. See RSA 358-A:10, I. Thus, actions brought pursuant to RSA chapter 358-A require proof of significantly different elements and satisfaction of a different standard of proof. Accordingly, we decline to hold that RSA chapter 358-A is analogous to common law fraud or deceit.

We affirm the trial court's ruling that RSA chapter 358-A claims are not entitled to a trial by jury. Although Hair Excitement argues that many RSA chapter 358-A claims have been tried before juries, we note that the issue of whether a right to a jury trial existed was never raised or addressed in those

cases. See, e.g., Becksted v. Nadeau, 155 N.H. 615 (2007); Transmedia Restaurant Co. v. Devereaux, 149 N.H. 454 (2003).

Hair Excitement next argues that the trial court erred in finding that L'Oreal did not engage in unfair and deceptive acts under RSA chapter 358-A, asserting that many of its requests for findings of fact granted by the court support such a finding and that some of its requests denied by the court constitute error and are contrary to the evidence. When reviewing a trial court's decision, we will "sustain [its] findings and rulings . . . unless they are lacking in evidential support or tainted by error of law." In the Matter of Letendre & Letendre, 149 N.H. 31, 34 (2002). "Absent an unsustainable exercise of discretion, we will not overturn its ruling or set aside its factual findings." Id.

RSA 358-A:2 states that it "shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." Unfair methods of competition or unfair or deceptive acts or practices include "[c]ausing likelihood of confusion or of misunderstanding as to affiliation, connection or association with . . . another." RSA 358-A:2, III. Not all conduct in the course of trade or commerce falls within the scope of the statute. To recover under RSA chapter 358-A, a plaintiff must show that the defendant's acts attained "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Hobert, 155 N.H. at 402. "[S]elfish bargaining and business dealings will not be enough to justify a claim for damages under the Consumer Protection Act." Barrows v. Boles, 141 N.H. 382, 390 (1996) (quotation omitted).

Although the trial court found that Mr. Cosentino misrepresented both his identification and intent in approaching Hair Excitement, it also found that those misrepresentations did not constitute a violation of RSA chapter 358-A. As the trial court noted, "Given this state of the beauty supply industry, L'Oreal did what is well understood in the industry and what made sense to do in this case: It charged an investigator with approaching Hair Excitement to find out if [it] would sell a quantity of Redken and Matrix product." The trial court ruled that:

L'Oreal's conduct was not immoral, unethical, oppressive, or unscrupulous, did not offend public policy as established by law or by other established concepts of unfairness, was not the type proscribed by the Consumer Protection Act, and did not attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce. L'Oreal was instead, in the context of a rough and tumble business, exercising its rights under the Hair Excitement agreements. Hair Excitement

has fallen far short of its burden of proving that L'Oreal engaged in an unfair or deceptive act or practice in violation of the Consumer Protection Act.

There is sufficient evidence in the record to support these findings. The anti-diversion provisions in the contracts and chain account agreement entered into by the parties are included by L'Oreal to protect its brand name, trade name, and other intellectual property rights for its salon-only products such as Redken and Matrix. Such contractual terms are common in the industry. Anti-diversion campaigns are prominently advertised in trade shows, training seminars and trade publications. The beauty supply industry enforces its anti-diversion policies by terminating its contractual relationships with distributors, chain accounts, or salons that are caught engaging in diversion. L'Oreal publicizes the fact that it polices salons and distributors, has a zero-tolerance policy for diversion, and cancels contracts with salons and distributors that engage in diversion. Hair Excitement was aware of the practices of diversion, the gray market, and efforts by the industry to police and curtail it. We hold that the trial court's ruling that L'Oreal did not engage in unfair and deceptive acts under RSA chapter 358-A is not an unsustainable exercise of discretion.

The third issue raised by Hair Excitement is whether the trial court erred in finding that L'Oreal's anti-diversion policy contained in its distributor contracts is a legitimate business practice. Hair Excitement's position is that the policy violates the "first sale" doctrine under which a trademark owner cannot control distribution of a trademarked item beyond its first sale. Section 106(3) of the Copyright Act of 1976, 17 U.S.C. § 106(3) (2000), gives the owner of a copyright the exclusive right to distribute copies of a copyrighted work. "After the first sale of a copyrighted item . . . , any subsequent purchaser . . . is . . . an owner of that item." Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 145 (1998) (quotations omitted). Pursuant to federal law, "such an owner is entitled, without the authority of the copyright owner, to sell that item." Id. (quotation omitted). The "first sale" doctrine is a defense to an infringement action under federal copyright law. Hair Excitement's cause of action was limited to a single theory of recovery: a violation of RSA chapter 358-A. We reject its "first sale" argument and hold that the doctrine has no application to this Consumer Protection Act claim.

Finally, Hair Excitement argues that the trial court erred in finding that L'Oreal did not engage in price fixing. Hair Excitement argues that the evidence "in toto" shows that L'Oreal's conduct surrounding its termination of the chain account agreement supports that L'Oreal engaged in "price fixing" by preventing Hair Excitement from purchasing L'Oreal's products and selling them at discount prices. As the trial court found, L'Oreal did not need a pretext to terminate its contracts with Hair Excitement. The chain account agreement permitted unilateral termination without cause with sixty-day notice

and the purchase contracts could be terminated by either party without cause or notice. Notwithstanding that the contracts could be terminated without cause, Hair Excitement in fact breached the express prohibitions against reselling Matrix products to anyone "other than [its] legitimate salon clients for home maintenance use" and against reselling Redken products to anyone "other than consumers for their own use," thereby giving L'Oreal cause to terminate them. We affirm the trial court's ruling that the evidence does not "reasonably support" a conclusion that L'Oreal deceived Hair Excitement into selling product with an underlying purpose of illegal price control.

Affirmed.

DALLANIS, DUGGAN and HICKS, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2008-420

GEOFFREY J. RALLIS

v.

DEMOULAS SUPER MARKETS, INC.

Argued: June 16, 2009
Opinion Issued: July 10, 2009

Shaines & McEachern, P.A., of Portsmouth (Robert A. Shaines and Laurie A. Lacoste on the brief, and Mr. Shaines orally), for the plaintiff.

Getman, Stacey, Schulthess & Steere, P.A., of Bedford (John A. Curran and Edwinna C. Vanderzanden on the brief, and Mr. Curran orally), for the defendant.

DALIANIS, J. The plaintiff, Geoffrey J. Rallis, appeals a jury verdict in favor of the defendant, Demoulas Super Markets, Inc., in his negligence case. He argues that the jury instructions given by the Superior Court (McHugh, J.) were erroneous. We reverse and remand.

The record supports the following facts. On August 22, 2004, the plaintiff slipped and fell while shopping at the Market Basket Supermarket in Stratham. He alleged that he was walking in the produce aisle when his left

foot slipped out from under him because the floor was wet and had green beans on it. He fell on his left hip and shoulder, refracturing his left hip, which he had injured six weeks earlier. In June 2005, the plaintiff sued the defendant for negligence.

Before trial, the plaintiff filed a motion in limine asking the court to give the following jury instruction:

If the plaintiff proves that he suffered an injury which occurred as a result of an unsafe condition in the defendant's self-service store and that unsafe condition was reasonably foreseeable as a result from the defendant's self-service mode of operation and the defendant failed to take reasonable steps to protect patrons from such foreseeable risk, the law imposes liability on the defendant store owner. The store owner has the burden of proving by a preponderance of the evidence that it exercised reasonable care in the maintenance of the premises under the circumstances of the case.

The trial court denied the plaintiff's motion. Over the plaintiff's objection, the court ultimately instructed the jury as follows:

Now, ladies and gentlemen, we're going to talk a little bit about liability of property owners and there's a general law with respect to that and a particular law, and I'm going to review both of those with you now. The general law, with respect to property owners, is as follows:

All property owners are under a duty to use reasonable care under all circumstances in the maintenance and operation of their properties. The test of reasonable care is what the ordinary, prudent person would do under the same or similar circumstances. It is up to you to decide whether or not the defendant exercised reasonable care under all of the circumstances in the maintenance and operation of the property on the day in question.

The character of and the circumstances surrounding the entry onto the property by the plaintiff will be relevant and important in determining whether the defendant acted with reasonable care under all the circumstances. A failure to fulfill this duty of reasonable care would amount to legal fault if it [were] a cause or substantial cause of the accident.

The defendant, as an owner, cannot be expected to guarantee the safety of those entering the premises, nor is the defendant required to keep or maintain their property absolutely safe. In short, no liability is imposed merely because an accident occurred on the defendant's property without a showing of legal fault on the defendant's part.

Now, the following is the specific law with respect to retail store owners:

When a business invitee, such as the plaintiff in this case, is injured as a result of a foreign substance on the floor of the premises of the retail store, the business invitee must prove that the owner's negligence existed by establishing only one of the following three things:

First, that the defendant caused the substance to be on the floor prior to the fall. That is, it was the defendant's employees, not customers, that caused the substance to be on the floor.

Secondly, that the defendant had actual knowledge of the existence of the foreign substance. That is, on the specific day and time of the plaintiff's fall, the defendant knew there was a foreign substance on the floor in the area of the plaintiff, that caused him to fall.

And, thirdly, that the foreign substance was on the floor for such a length of time that the defendant should have known it, in fact, existed.

On appeal, the plaintiff first argues that the jury instruction the court gave was flawed because it failed to inform jurors that he could establish the defendant's negligence by showing that it knew or should have known that green beans in the produce section of its store tended to fall on the floor, thereby creating an unsafe condition for customers.

The purpose of jury instructions is to identify issues of material fact, and to explain to the jury, in clear and intelligible language, the proper legal standards to be applied to factual findings in reaching a verdict. N.H. Ball Bearings v. Jackson, 158 N.H. ___, ___, 969 A.2d 351, 363 (2009). The scope and wording of jury instructions are within the sound discretion of the trial judge and are evaluated as a reasonable juror would have interpreted them. Id. at ___, 969 A.2d at 363. In reviewing the instructions, we consider the jury charge as a whole to determine whether the instructions fairly presented the

case to the jury in such a manner that no injustice was done to the legal rights of the litigants. See id. at ___, 969 A.2d at 363.

We apply a two-step analysis to determine whether to reverse a jury verdict in a civil case based upon an erroneous jury instruction. O'Donnell v. HCA Health Servs. of N.H., 152 N.H. 608, 615 (2005). First, the appealing party must show that it was a substantial error such that it could have misled the jury regarding the applicable law. Francoeur v. Piper, 146 N.H. 525, 531 (2001). Second, if we conclude that the error was a substantial one, we will reverse the jury verdict unless the opposing party shows that the error did not affect the outcome at trial; in other words, the error was harmless. Id. at 532; see Hodgdon v. Frisbie Mem. Hosp., 147 N.H. 286, 292 (2001).

Having reviewed the jury charge in its entirety, we conclude that it inaccurately summarized the applicable law and could have misled the jury. We further conclude that this was a substantial error.

The trial court instructed the jury that the plaintiff could establish the defendant's negligence by showing either that: (1) its employees caused the green beans to be on the floor; (2) it had actual knowledge that they were on the floor, whatever the cause; or (3) the length of time that the green beans were on the floor charged the defendant with constructive knowledge of their presence. By so limiting the circumstances under which the plaintiff could establish the defendant's constructive knowledge that there were green beans on the floor, the trial court erred.

Under New Hampshire law, premises owners are governed by the test of reasonable care under all the circumstances in the maintenance and operation of their premises. See Simpson v. Wal-Mart Stores, 144 N.H. 571, 574 (1999). A premises owner owes a duty to entrants to use ordinary care to keep the premises in a reasonably safe condition, see True v. Meredith Creamery, 72 N.H. 154, 156 (1903), to warn entrants of dangerous conditions and to take reasonable precautions to protect them against foreseeable dangers arising out of the arrangements or use of the premises. Pridham v. Cash & Carry Bldg. Center, Inc., 116 N.H. 292, 294-95 (1976). Accordingly, under New Hampshire law, a premises owner is subject to liability for harm caused to entrants on the premises if the harm results either from: (1) the owner's failure to carry out his activities with reasonable care; or (2) the owner's failure to remedy or give warning of a dangerous condition of which he knows or in the exercise of reasonable care should know. Partin v. A & P Tea Co., 102 N.H. 62, 63-64 (1959); see Restatement (Second) of Torts §§ 341-A, 343 (1965).

With respect to the second theory of liability -- the owner's failure to remedy or warn of a dangerous condition of which he knows or in the exercise of reasonable care should know -- the landowner's duty of care depends upon

whether he had actual or constructive notice of the dangerous condition. See Partin, 102 N.H. at 64; Restatement (Second) of Torts, supra § 343.

In “slip and fall” cases, we have found that a landowner may have constructive knowledge that an item has fallen to the floor based upon the length of time it was there. See Sears, Roebuck & Co. v. Philip, 112 N.H. 282, 283, 286 (1972); Partin, 102 N.H. at 64.

This is not, however, the only way to prove constructive knowledge under New Hampshire law. In Tremblay v. Donnelly, 103 N.H. 498, 500 (1961), for instance, we upheld the trial court’s denial of the defendants’ motion for nonsuit when there was evidence from which the jury could find that the defendants knew or should have known that pears tended to fall from the tree onto the porch and could have taken steps to prevent it. Upon entering the defendants’ premises, the plaintiff slipped and fell on a pear on the porch. Tremblay, 103 N.H. at 499. We held that the fact that there were no pears on the porch when the plaintiff originally left her apartment did not necessarily relieve the defendants of liability. Id. at 504. The jury could still find the defendants liable if “in the exercise of reasonable care they should have previously taken steps to prevent pears from falling upon the porch, regardless of when they might fall.” Id.

Similarly, in Simpson, 144 N.H. at 573-74, we ruled that the trial court properly denied the defendant’s motions for directed verdict and judgment notwithstanding the verdict when there was evidence from which the jury could have found that the defendant knew or should have known that icy conditions on the exit way created a hazard to its customers and the defendant failed to take preventative action. The jury could have found actual or constructive knowledge from evidence that: (1) on the day in question, there was so much precipitation that a plowing company spent between four and one-half and five hours clearing snow and spreading nine tons of salt on the store’s parking lot; (2) snow and ice were seen up against the store building that day; and (3) the head of maintenance testified that during the winter, ice and snow posed a hazard to customers. Simpson, 144 N.H. at 573-74.

Thus, by informing the jury here that the plaintiff could establish that the defendant had constructive knowledge of the green beans only by showing the length of time they were on the floor, the trial court inaccurately stated the applicable law. Under New Hampshire law, constructive knowledge may also be established by other means. The jury in this case could have been misled by the trial court’s instructions to find that the defendant was not negligent even if the defendant knew that green beans regularly fell on the floor, creating a hazard to customers, but failed to take corrective action. This was a substantial error because it could have led the jury to reach a different verdict from that it might have reached had the error not occurred. See Jackson v.

Morse, 152 N.H. 48, 51 (2005) (court will find reversible error if an erroneous civil jury instruction could have misled the jury into basing its verdict upon a misperception of the law).

Additionally, even without showing that the defendant had actual or constructive notice of green beans being on the floor, the plaintiff might have established the defendant's negligence on the first theory of liability – that the defendant failed to make its premises reasonably safe and to carry out its duties with reasonable care. To prevail under this theory, the plaintiff would have had to show that the defendant's conduct created a foreseeable risk of harm; in other words, it was reasonably foreseeable that an injury might occur because of the defendant's actions or inactions. See White v. Asplundh Tree Expert Co., 151 N.H. 544, 547 (2004); cf. Kellner v. Lowney, 145 N.H. 195, 198 (2000).

We applied this first theory of liability in Jacobson v. Yokens, Inc., 104 N.H. 331 (1962), a case that is similar to the instant case. The plaintiff in that case was injured when she slipped and fell on the floor while attending a coffee hour at the defendant's restaurant. Jacobson, 104 N.H. at 332. Coffee and cream were on the floor where she fell. Id. The floor was made of hard maple and had been cleaned with "Super Shine-All" the day before the plaintiff fell. Id. at 332-33. Thus cleaned, when dry, the floor "more than met the minimum standards of slip resistance," but when wet with coffee and cream, the floor became dangerously slippery. Id. at 333.

We ruled that the trial court properly withdrew from the jury the question of whether the coffee and cream were on the floor for a long enough time to afford notice of their presence and opportunity to remove them. Id. at 334. We concluded, however, that the jury was properly asked to decide whether the defendant was negligent for failing to make its premises reasonably safe and to carry out its duties with reasonable care when there was evidence that the defendant knew that the floor became dangerously slippery when it was wet with coffee and cream and that such spillages regularly occurred. Id. at 334-35. "While the question of knowledge on the part of the defendant that coffee and cream had been spilled was withdrawn from the jury, the issue remained as to whether the defendant exercised reasonable care to guard against the risk of injury as a result of spillage on the floor." Id. at 334-35. We noted that "[t]he fact that coffee was spilled by one or more of the guests rather than an employee would not relieve the defendant of its duty to exercise care." Id. at 335.

Having concluded that the jury instruction error was substantial, we next consider whether the defendant has met its burden of showing that the error did not affect the outcome below. In its brief, the defendant argues only that the trial court's instruction was correct. The defendant does not argue

that even if it were erroneous, the error did not affect the outcome. At best, the defendant asserts that there was evidence to support a jury finding that the defendant exercised reasonable care under the circumstances, even assuming constructive knowledge. The defendant neither contends nor demonstrates, however, that the evidence compelled such a finding. See Kallgren v. Chadwick, 134 N.H. 110, 117 (1991). Accordingly, we reverse the jury's verdict.

Because the issue is likely to arise on remand, we next address the plaintiff's alternative argument that the court should abandon its traditional approach to premises liability under which the burden of proof remains with the plaintiff at all times and adopt an approach that shifts the burden to the defendant. See Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 331 (Fla. 2001), overruled in part by Fla. Stat. Ann. § 768.0710 (LexisNexis 2008). Under this approach, once the plaintiff proves that an injury occurred as a result of a premises hazard or a transitory foreign substance in a self-service store, the owner of the premises is presumed to have been negligent unless the owner shows by a preponderance of evidence that it exercised reasonable care in maintaining the premises under the circumstances. See id. Courts in Colorado, Florida, Georgia and Kentucky have adopted this burden-shifting approach. See Safeway Stores, Inc. v. Smith, 658 P.2d 255, 258 (Colo. 1983); Owens, 802 So. 2d at 331; Davis v. Bruno's Supermarkets, Inc., 587 S.E.2d 279, 280-81 (Ga. Ct. App. 2003); Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 436-37 (Ky. 2003). Courts in New Jersey and Oklahoma use a form of this approach. See Wollerman v. Grand Union Stores, Inc., 221 A.2d 513, 514-15 (N.J. 1966); Lingerfelt v. Winn-Dixie Tex. Inc., 645 P.2d 485, 489 (Okla. 1982).

We decline the plaintiff's invitation to adopt the burden-shifting approach to premises liability. "The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Jacobs v. Director, N.H. Div. of Motor Vehicles, 149 N.H. 502, 504 (2003) (quotations omitted). Thus, when asked to reconsider a previous holding, the question is not whether we would decide the issue differently de novo, but "whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." Id. at 504-05 (quotation omitted); see Planned Parenthood of Southeastern PA. v. Casey, 505 U.S. 833, 854 (1992). Several factors inform our judgment, including: (1) whether the rule has proven to be intolerable simply in defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have

robbed the old rule of significant application or justification. Jacobs, 149 N.H. at 505; see Planned Parenthood, 505 U.S. at 854-55.

The plaintiff has failed to demonstrate that our traditional approach to premises liability meets this stringent standard. Nothing in his argument persuades us that our traditional approach to premises liability has proven unworkable or was badly reasoned. Nor does the fact that, at most, six jurisdictions have adopted the burden-shifting approach to premises liability persuade us that related principles of law have so far developed as to have left our traditional approach to premises liability no more than a remnant of abandoned doctrine.

Reversed and remanded.

BRODERICK, C.J., and DUGGAN and HICKS, JJ., concurred.

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NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

Manchester District Court
No. 2008-706

SOUTH WILLOW PROPERTIES, LLC

v.

BURLINGTON COAT FACTORY OF NEW HAMPSHIRE, LLC

Argued: September 10, 2009

Opinion Issued: December 16, 2009

Sheehan Phinney Bass + Green, P.A., of Manchester (James F. Ogorchock and John Mark Turner on the brief, and Mr. Ogorchock orally), for the plaintiff.

Cleveland, Waters and Bass, P.A., of Concord (William B. Pribis on the brief and orally), for the defendant.

BRODERICK, C.J. This is a commercial landlord/tenant dispute between the landlord, plaintiff South Willow Properties, LLC (South Willow), and the tenant, defendant Burlington Coat Factory of New Hampshire, LLC (BCF). BCF appeals an order of the Manchester District Court (Emery, J.) finding that it failed to obtain South Willow's permission before replacing the roof at its retail store, and that such failure constitutes a breach of the lease and grounds for eviction. We affirm.

The record contains the following facts. BCF, a retail clothing merchant, is a tenant in a shopping plaza in Manchester owned by South Willow. In late 2002, BCF assumed the obligations under a 1974 lease between the parties' predecessors-in-interest and took occupancy of the space at issue.

When BCF moved into the premises, there were occasional leaks in the roof that were satisfactorily repaired by South Willow. In 2003, BCF undertook renovations to the property that included removing an interior concrete load-bearing wall, which caused serious structural problems; removing seven HVAC units and installing sixteen new units, which resulted in several large holes in the roof; and changing the façade of the building, which required four large holes in the roof to attach the support beams. As a result of these renovations, the roof developed numerous, severe leaks. The deflection in the roof caused by removal of the load-bearing wall and the negligent installation of the structural steel installed to support the remaining wall resulted in a "waterfall" coming through the roof. In 2004, BCF acknowledged responsibility for the structural problems, including the leaks, and agreed to pay for the engineering services and construction costs required to remedy them.

In September 2004, South Willow informed BCF that "none of the outstanding issues," including those concerning roof damage, had been resolved. The parties continued to disagree about the adequacy of BCF's repairs to the roof into 2005. In August 2005, BCF alleged that fixing the roof leaks was South Willow's responsibility and that it would replace the roof if South Willow did not. South Willow responded by instructing BCF not to engage in any type of roof replacement without its written consent and notifying BCF that doing so would be "a default under the lease."

On September 8, 2005, BCF sent a letter to South Willow in which it stated, "[R]eplacement of the roof is Landlord's responsibility under Article 14 of the Lease. Further, under Article 28 of the Lease, in the event Landlord fails to perform any of its obligations under the Lease, and after seven (7) days notice, Tenant may cure such default on Landlord's behalf." By letter dated the following day, South Willow reiterated that BCF "does not have the Landlord's permission to perform any work on the roof" and doing so "without landlord's written consent would be a default under the lease." On October 13, 2005, BCF sent an email to South Willow attaching bids for a new roof and requesting a decision by October 19. On October 31, without notification to South Willow, BCF signed a contract for replacement of the roof.

On February 23, 2006, South Willow sent a letter to BCF stating that it was locating a contractor to install a new roof. On March 2, BCF faxed a letter to South Willow stating that it had "already contracted with a roofing contractor to replace the roof." Demolition of the roof commenced that same

day. South Willow responded on March 2, instructing BCF to cease all roof work, but BCF proceeded to have its contractor replace the existing roof.

On October 17, 2006, South Willow served a notice to quit and in May 2007, filed its landlord-tenant writ. On October 31, 2007, the district court concluded that the notice to quit was not sufficiently specific and dismissed the case. Two days later, South Willow issued a new eviction notice and notice to quit. A new possessory action was filed and, following a bench trial, the court ordered the issuance of a writ of possession.

BCF appeals, arguing that the trial court erred: (1) in ruling that South Willow's second action was not barred by the doctrine of res judicata; (2) in ruling that South Willow's continued acceptance of rent did not constitute a waiver of South Willow's right to evict; (3) in its interpretation of the lease; (4) in excluding expert testimony; (5) in failing to find that BCF's replacement of the roof was a non-material breach of the parties' lease; and (6) in finding that there was insufficient evidence to prove the property was not safe or unsuitable for its intended use.

We first address BCF's argument that the trial court erred by not dismissing South Willow's second lawsuit under the doctrine of res judicata. BCF argues that the judgment in the first lawsuit was a "final judgment on the merits" in that South Willow failed to prove service of a proper eviction notice, which BCF contends was a "material element of its claim."

The applicability of res judicata is a question of law, which we review de novo. Meier v. Town of Littleton, 154 N.H. 340, 342 (2006). Res judicata precludes litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. Id. For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. Id. The parties do not dispute that the first two elements are met. The issue before us, therefore, is whether a final judgment on the merits was rendered in the first action.

On October 17, 2006, South Willow served BCF with a thirty-day notice to quit. The notice stated: "You are hereby notified to quit and deliver possession of 1525 South Willow Street . . . no later than November 18, 2006 (30 days from the date of this Notice) for your failure to comply with Section 15 of the Lease requiring the tenant to provide plans and specifications and obtain the written consent of the Landlord prior to engaging in structural work on the demised Premises." BCF filed a special plea and brief statement of defenses arguing, in part, that the notice to quit was defective because it set forth two

different notice periods, it failed to allege that BCF committed a material breach of the lease, it failed to state with sufficient specificity the reason(s) for the eviction, and its notice period was insufficient.

The court held a bench trial and at the close of evidence BCF argued that the notice to quit failed to comply with RSA 540:3 because the notice was not specific as to the tenant's alleged conduct and it did not give a sufficient notice period. The trial court agreed and granted BCF's motion to dismiss. In its order, the court stated: "Given this decision, the court did not address the other issues raised by the defendant nor did the court rule on the requests for findings." Two days later, South Willow served BCF with a second eviction notice and notice to quit.

RSA chapter 540 (2007 & Supp. 2008) authorizes summary possessory actions to simplify and facilitate the landlord's recovery of possession of the premises. Lavoie v. Szumiez, 115 N.H. 266, 267 (1975). The purpose of such actions "is to permit the landlord to recover possession on termination of a lease without suffering the delay, loss and expense to which he may be subjected under a common-law action." Matte v. Shippee Auto, 152 N.H. 216, 218 (2005) (quotation omitted). Because RSA chapter 540 "establish[es] rights and benefits which a landlord did not enjoy at common law, strict compliance with [its] terms is required." Lavoie, 115 N.H. at 267. Pursuant to RSA 540:2, I, "[t]he lessor or owner of nonrestricted property may terminate any tenancy by giving to the tenant . . . a notice in writing to quit the premises in accordance with RSA 540:3." RSA 540:3 requires that an eviction notice "state with specificity the reason for the eviction."

A judgment based upon a "plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after . . . the precondition has been satisfied." Restatement (Second) of Judgments § 20(2) (1982). This rule applies whether the fact that a precondition has not been satisfied "appears on the face of the pleadings, as a result of pretrial discovery, or from the evidence at trial." Id. § 20 cmt. k. Here, the trial court determined that South Willow's first notice to quit did not "state with specificity the reason for the eviction" as required by RSA 540:3. "If the first suit was dismissed for defect of pleadings . . . or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." Costello v. United States, 365 U.S. 265, 286 (1961); see Hamilton v. William Calomiris Inv. Corp., 461 A.2d 466 (D.C. 1983) (dismissal based upon landlord's failure to give a notice to quit did not preclude landlord from filing a new suit for possession). We hold that the trial court's dismissal, based upon a technical defect in the notice to quit, was not a decision on the merits and, accordingly, did not bar South Willow's second lawsuit.

The next issue is whether South Willow waived its right to proceed with the eviction by its continued acceptance of rent. BCF argues that based upon Miller v. Slania Enters., 150 N.H. 655 (2004), and Colonial Village v. Pelkey, 157 N.H. 91 (2008), “the landlord must take some affirmative step to put the tenant on notice that the landlord’s acceptance of future rent after claiming a breach and serving an eviction notice will not operate as a waiver of the landlord’s right to proceed with an eviction.”

“A finding of waiver must be based upon an intention expressed in explicit language to forego a right, or upon conduct under the circumstances justifying an inference of a relinquishment of it.” N. Country Envtl. Servs. v. Town of Bethlehem, 146 N.H. 348, 354 (2001) (quotation omitted). Waiver is a question of fact and we will not overturn the trial judge’s determination unless clearly erroneous. Id.

In Miller, the tenant, whose lease was due to expire at the end of May, did not pay rent for April and the landlord prevailed on its possessory action. Miller, 150 N.H. at 657. Thereafter, the landlord and tenant verbally agreed that if the tenant paid the April and May rent, the tenant could remain in the premises until the end of May. Id. After the tenant held a party that the landlord believed was a violation of the original lease and the subsequent verbal agreement, the landlord had the tenant removed with the previously issued writ of possession. Id. We concluded that eviction was improper because the parties had expressly agreed to create a new tenancy that lasted until the end of May. Id. at 661. Accordingly, the landlord was obligated to start a new possessory action if it wanted to evict the tenant because of the party. Id.

In Colonial Village, after the landlord served a notice to quit, it accepted ongoing rent payments from its tenant. Colonial Village, 157 N.H. at 91. The trial court ruled that the landlord’s acceptance of rent waived its right under the eviction notice. Id. at 92. The landlord thereafter served a new notice to quit, advising the tenant that its acceptance of rent “should not be construed as a waiver to issue a notice to quit.” Id. The trial court issued a writ of possession, rejecting the tenant’s argument that the acceptance of rent waived the landlord’s right to evict. Id. We affirmed, holding that the acceptance of future rent does not create a new tenancy where there is evidence a landlord intended to continue with eviction proceedings despite the payment. Id. at 93.

Based upon these cases, BCF argues that South Willow’s “unqualified acceptance of rent,” following its claim of breach of the lease for BCF’s unauthorized replacement of the roof, constituted a waiver. We do not agree that Miller and Colonial Village compel a finding that South Willow waived its right to bring an eviction proceeding. Throughout 2003, 2004, and into 2005, the parties engaged in numerous communications concerning BCF’s negligent

construction work, and South Willow repeatedly informed BCF that it was in default of the lease for conducting unauthorized work. On March 2, 2006, the date that BCF notified South Willow that it was proceeding with demolition and replacement of the roof, South Willow notified BCF in writing that it was reserving all of its rights to pursue whatever remedies were available to it. Similarly to Colonial Village, on November 2, 2007, South Willow served its second eviction notice and notice to quit, which stated that “[a]ll payments hereafter received from you for the use and occupancy of said Premises shall be accepted with the reservation of all rights under this Notice and any subsequent eviction proceedings.”

Based upon the totality of the parties’ conduct, we conclude that South Willow neither expressed in explicit language its intent to forego its right to pursue eviction nor conducted itself in such a way as to justify an inference that it relinquished such a right. See N. Country Envtl. Servs., 146 N.H. at 354. We hold that the trial court did not err in finding that South Willow’s “acceptance of rent, under the circumstances of this case, does not constitute waiver of the right to evict.”

Next BCF argues that the trial court erred in interpreting paragraphs 14, 15 and 28 of the parties’ lease. “The proper interpretation of a lease is ultimately a question of law for this court to determine. As with any contract, we interpret a lease by giving its terms their reasonable meaning.” Alexander v. Blackstone Realty Assocs., 141 N.H. 366, 368-69 (1996) (brackets, quotation and citation omitted). “It is this court’s task to interpret the contract, using facts found by the trial court. In our search for the interpretation that will best reflect the parties’ intention, the court considers the written agreement of these parties, all of its provisions, its subject matter, the situation of the parties at the time, and the object intended.” Thiem v. Thomas, 119 N.H. 598, 602 (1979) (citation and quotation omitted).

On September 8, 2005, BCF notified South Willow that “replacement of the roof is Landlord’s responsibility under Article 14 of the Lease. Further, under Article 28 of the Lease, in the event Landlord fails to perform any of its obligations under the Lease . . . Tenant may cure such default on Landlord’s behalf and at Landlord’s expense.” South Willow responded by informing BCF that it “does not have the Landlord’s permission to perform any work on the roof of the Premises. To do so without landlord’s written consent would be a default under the lease.”

Paragraph 14 of the lease provides:

Tenant shall make and pay for all . . . nonstructural repairs and replacements to the interior of Tenant’s buildings which it deems necessary to keep the premises in a good state of repair, but

in no event shall Tenant be obligated to make repairs and replacements which Landlord shall be required to make under any provision of this lease or which shall be necessitated by Landlord's negligence, default or failure to repair. Landlord shall make and pay for all repairs and replacements (except those which Tenant shall be specifically obligated to make under the provisions of this Article and those due to Tenant's negligence) to said buildings which shall be necessary to maintain the same in a safe, dry and tenantable condition, and in good order and repair.

Paragraph 15 of the lease provides:

Tenant may, at its own expense, from time to time make such interior alterations, additions or changes, structural or otherwise, in and to its buildings as it may deem necessary or suitable; provided, however, Tenant shall obtain Landlord's prior written consent to plans and specifications for structural alterations, additions or changes; provided, further, Landlord shall not withhold its consent thereto if the structural strength of the building will not be impaired by such work.

Paragraph 28 of the lease provides:

In the event Landlord shall . . . fail to perform any obligation specified in this lease, then Tenant may, after the continuance of any such default for seven (7) days after notice thereof by Tenant . . . cure such default, all on behalf of and at the expense of Landlord, and do all necessary work and make all necessary payments in connection therewith

Pursuant to paragraph 14 of the lease, repairs due to the tenant's negligence are the responsibility of the tenant. The trial court found that BCF engaged in negligent construction when it undertook renovations to the property. Because BCF caused the damage at issue to the building by its negligent construction, it was BCF's responsibility to fix the damage. However, as the trial court found, it is "undisputed that removal and replacement of the roof is a structural alteration, addition and change" to the structure as contemplated in paragraph 15 of the lease. Thus, before undertaking "alterations, additions or changes," BCF was required to submit plans and specifications for the proposed work to South Willow and receive its written approval. It is only after the landlord, despite receiving plans and specifications, refuses to authorize "alterations, additions or changes" that the tenant may exercise self-help under paragraph 28 of the lease.

BCF argues that the roofing bids it provided South Willow in October 2005 were detailed plans and specifications regarding the work to be performed, in satisfaction of paragraph 15 of the lease. BCF characterizes the bids as describing “the scope of work to be performed, the type of roof to be used, and generally [giving] ‘a pretty detailed report of the work’ to be performed in the roof replacement.” Thus, BCF argues that it “made every effort to comply with the lease – providing South Willow with detailed plans and specifications regarding the work to be performed. Nonetheless, South Willow continued to withhold permission for BCF to do what was necessary to properly operate its business. Under the circumstances, BCF could hardly be faulted for doing what was indisputably necessary.”

However, as the president of South Willow, Charles Kramer, testified at trial, the Academy Roofing quote, like the other bids received, only provided “a general description” of the work the roofer intended to perform. He testified that the quote lacked specificity because it did not discuss, for example, how the flashing would be installed, the details for preventing water leakage around each of the vents and pipes to be installed with the HVAC units, how the 84,000 square feet of old roofing material would be disposed of, and whether the material contained asbestos and, if so, how it would be treated in compliance with New Hampshire environmental laws. Kramer also testified that in addition to a general quote, “plans and specifications” would include “detailed conversations with the roofer,” “detailed drawings,” “shop drawings to handle certain specific, unique situations,” a “field walk-through,” and an “inspection.” Furthermore, BCF did not specify which of the several bids it was going to choose. Based upon the evidence at trial, we affirm the reasonableness of the trial court’s finding that the bids forwarded to South Willow on October 13, 2005, “were not plans and specifications, as those terms are normally used, to satisfy the requirements of paragraph 15.”

Next, BCF argues that the trial court erred in excluding expert testimony offered by its commercial roofer. New Hampshire Rule of Evidence 103(b)(2) requires a contemporaneous offer of proof in order to preserve for appeal an objection to a ruling excluding evidence. The record, however, does not indicate that BCF made an offer of proof at trial with respect to the evidence it now alleges was improperly excluded. We hold, therefore, that BCF is precluded from raising this issue on appeal. See State v. Saulnier, 132 N.H. 412, 413-14 (1989).

BCF argues next that the trial court erred in finding that a material breach of the lease occurred. “Whether conduct is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case.” Barrows v. Boles, 141 N.H. 382, 388 (1996) (quotation and brackets omitted). On appeal, we will not reverse the findings of the trial court unless they lack support in the record. Id. BCF does not argue that the trial court’s

findings lack support. Rather, it argues that because South Willow delayed before serving notice and commencing an eviction action and because it "received a . . . brand new roof with a fifteen year warranty," it was erroneous for the trial court to find a material breach of the lease. However, we conclude that the record supports the trial court's finding that BCF's unauthorized demolition and reconstruction of the roof, over South Willow's express written objection, justified eviction.

Finally, BCF argues that the trial court erred in finding the evidence insufficient to prove the property was not safe or unsuitable for its intended use. When BCF undertook renovations to the property in 2003 the work initially resulted in "severe and numerous leaks." However, as the trial court's order notes, "[o]ver the course of the next year various repairs were made . . . [which] lessened the number and severity of the leaks." There was testimony at trial that the leaks required employees to "move racks of clothing," "[c]over them with plastic," "[b]ring out barrels to catch the drips," and "tape off some areas where customers couldn't get in there till we got it mopped and got it cleaned up." Based upon the record, we affirm the trial court's finding that "[a]lthough there was evidence the leaks were inconvenient, there was insufficient evidence to prove the property was not safe or unsuitable for its intended use."

Affirmed.

DALIANIS, DUGGAN, HICKS and CONBOY, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2011-219

AXENICS, INC. F/K/A RENTEC CORPORATION

v.

TURNER CONSTRUCTION COMPANY & a.

Argued: September 12, 2012
Opinion Issued: March 13, 2013

David N. Cole, of Hanover, by brief and orally, for the plaintiff.

Pierce Atwood LLP, of Portsmouth (David A. Anderson and Mark B. Rosen on the brief, and Mr. Anderson orally), for the defendants.

BASSETT, J. The defendants, Stryker Biotech, LLC (Biotech) and Stryker Sales Corporation (Sales) (collectively Stryker), and Turner Construction Company (Turner), appeal a ruling of the Superior Court (McNamara, J.) finding them liable on a theory of unjust enrichment and awarding damages to the plaintiff, Axenics, Inc. f/k/a RenTec Corporation (Axenics). Axenics cross-appeals, challenging the amount of damages awarded and the trial court's failure to find the defendants liable on its breach of contract and New Hampshire Consumer Protection Act (CPA) claims, see RSA ch. 358-A (2009 & Supp. 2012). We affirm in part, reverse in part, vacate in part, and remand.

The trial court found, or the record establishes, the following facts. This case arises out of the construction of a biotech facility (facility) in West Lebanon. Biotech operates the facility, and Sales owns the property where it is located. Turner was hired as the general contractor to build the facility. Axenics provides "manufacturing, installation, and field services for ultrapure gas and liquid distribution systems in the biotechnology, pharmaceutical, and semiconductor industries."

On April 15, 2004, Axenics entered into a subcontract with Turner to furnish labor, materials, equipment, and services for the installation of "process pipe" at the facility. The original subcontract price was \$1,992,506. Both parties agreed that the facility would be completed as quickly as possible. The "mechanical completion" date for the facility, including the process pipe installation, was December 2004. Ultimately, Axenics' last day on the job was June 2, 2005.

The subcontract contemplated the possibility of delays and hindrances as well as changes to the scope of the work and its cost. The subcontract provided that "all instructions given to [Axenics'] supervisory or management personnel by Turner's Superintendent, Engineer, or other duly authorized representative shall be understood to be included as part of this Subcontract." If Axenics believed "work to be beyond the scope of" the subcontract, it was required to inform Turner before proceeding. In the event that the parties could not reach an agreement at that time, Turner could issue "an S.I.S. (Superintendent's Instructions to Subcontractors) for record purposes until such an agreement [could] be reached."

In the event that Turner directed additional work to be performed "and the value of such work [was] to be determined other than by actual signed tickets for material," Axenics was to "submit a lump sum proposal accompanied by an itemized breakdown of material, using established contract unit rates where applicable." The "lump sum proposal" had to be "accompanied by accurate written estimates of the cost" and "be submitted to Turner within five (5) calendar days of the receipt of the directive." If the "[p]roposals for additional work" were not received within five calendar days, Turner would "assign a fair and reasonable value for the additional work, and the additional work w[ould] become part of [Axenics'] scope of work."

Likewise, when Axenics initiated requests for changes to the work, it had to "provide [a] written request for change and obtain Turner's written concurrence before proceeding with any Work believed not to be within the scope of [the] subcontract." The subcontract further provided that if Axenics was "delayed, obstructed, hindered or interfered with in the commencement, prosecution or completion of the" work, it was required to notify Turner in writing about what caused the delay within forty-eight hours "of the

commencement thereof." Axenics also had to demonstrate that it could not have anticipated or avoided the delay and had "used all available means to minimize the consequences thereof." This notice was "an essential condition precedent to [Axenics'] rights in connection with any such delays, obstructive hindrances or interferences."

In addition, in the subcontract, Axenics agreed:

that it shall not be entitled to nor claim any cost reimbursement, compensation or damages for any delay, obstruction, hindrance or interference to the Work except to the extent that Turner has actually recovered corresponding cost reimbursement, compensation or damages from the Owner under the Contract Documents for such delay, obstruction, hindrance or interference, and then only to the extent of the amount, if any, which Turner on behalf of [Axenics], actually received from the Owner on account of such delay, obstruction, hindrance or interference.

Notwithstanding any term or provision herein to the contrary, [Axenics] expressly waives and releases all claims or rights to recover lost profit (except for profit on work actually performed), recovery of overhead (including home office overhead), and any other indirect damages, costs or expenses in any way arising out of or related to the [subcontract], including the breach thereof by Turner, delays, charges, acceleration, loss of efficiency or productivity disruptions and interferences with the performance of the work.

Axenics' "work [was] to be coordinated with the structural, architectural and [mechanical, electrical, and plumbing] services prior to fabrication," and "[p]roject coordination procedures [were] outlined in [an] attached project coordination plan." The project coordination plan provided that: (1) Turner was responsible for scheduling, facilitating, and controlling the "coordination process"; (2) the engineer was responsible for supporting and reviewing "design changes required due to field coordination issues"; and (3) Axenics was responsible for producing, maintaining, and approving "coordination drawings" as well as implementing "coordination[-]driven images."

Several delays, which affected Axenics' work, arose during construction of the facility. Some of the delays caused the schedule to be compressed and required Axenics personnel to work overtime to complete the work on time. In addition, there were occasions when Turner requested changes to the process piping, which Axenics believed to be a "change in scope." When this occurred, Axenics was instructed to continue working and that "SISs [would] follow."

During construction, Turner met with Stryker weekly to review change order requests. Change order requests, as well as applications for payment, had to be approved by Stryker. Axenics submitted eight written change orders, which upon approval by Turner and Stryker, increased the contract price to \$2,518,078. The change orders that increased the contract price contained the following language:

Through acceptance of this Change Order, [Axenics] acknowledges that it has reviewed the progress of the Work related to this Project and the potential impact of the added work on the progress of the project in the future. As a result, this Change Order includes compensation to [Axenics] for any and all effects, delays, inefficiencies or similar demands associated with this Project and [Axenics] recognizes that there is no basis for any such claim in the future.

Please note that all other terms and conditions of the subcontract remain unchanged and that all costs to maintain our original contract schedule with the inclusion of the adjusted scope of work as set forth by this change order are included within the lump sum change order amount stated herein.

Axenics later submitted a ninth change order, in the amount of \$435,929, which it characterized as a "Claim Settlement." The defendants did not pay this change order.

In late 2004, a dispute arose when Axenics notified Turner of additional change orders related to delays and work that it believed to be outside the scope of the contract. Turner initially responded to Axenics' request with an email "rejecting the claim." However, during the next several months, Axenics worked with Turner to obtain payment from Stryker for these change orders. Stryker questioned some of the work for which Axenics sought payment and requested that Axenics submit backup documentation for its requests. Turner assisted Axenics in preparing a presentation for Stryker regarding the requested funds, and Axenics made its presentation to Stryker in April 2005. Before the presentation, Turner representatives provided Stryker with rebuttal to some of Axenics' requests for additional payment, but also told Stryker that it agreed with several of them. Subsequently, Stryker refused to pay Axenics the requested funds.

In November 2007, Axenics sued the defendants, asserting that Turner had breached the subcontract when it failed to pay Axenics sums due. Axenics also brought claims against Turner and Stryker for violation of the CPA and unjust enrichment. It sought \$1.7 million in damages for materials, labor, equipment, and services as well as enhanced damages under the CPA and

attorney's fees. In response, the defendants counterclaimed, alleging breach of contract and violations of the CPA.

At the conclusion of the eighteen-day trial, in its post-trial memorandum Axenics alleged that "Turner deviated from the . . . subcontract . . . in so many material respects" that Turner had "abandoned the [s]ubcontract, and [Axenics], rather than declaring breach, continued working." According to Axenics, this reflected the parties' mutual agreement to abandon the subcontract, making unjust enrichment "available to compensate [Axenics] for the benefits it conferred on Turner and Stryker through its work at the" facility. Axenics further alleged that Turner breached the subcontract by intentionally delaying payments and failing to coordinate Axenics' work with that of the other subcontractors, which hindered and delayed Axenics' performance of its contractual duties.

The court issued a lengthy decision in which it found that neither party had abandoned the subcontract and ruled against Axenics on its breach of contract claim. However, the trial court ruled in favor of Axenics on its unjust enrichment claim, concluded that the defendants were jointly liable, and awarded Axenics \$1,080,000 in restitution damages. With respect to Axenics' CPA claim, the court ruled "that neither Stryker's nor Turner's actions" violated the CPA. Finally, the court ruled against the defendants on all of their counterclaims, including their request for attorney's fees. This appeal and cross-appeal followed.

On appeal, the defendants argue that the trial court erred in allowing Axenics to recover "in unjust enrichment because a valid, express contract governed the precise subject matter of Axenics' unjust enrichment claim, and that contract was neither abandoned nor breached." They further contend that the court erred in finding them "liable for unjust enrichment when they did not receive a benefit that would be unconscionable to retain," and "the record was devoid of any evidence showing the value of any extra-contractual benefit [they] purportedly received." Finally, they argue that the court violated New Hampshire Rule of Evidence 408 by failing to exclude evidence of an offer to compromise.

Axenics cross-appeals, arguing that the trial court erred in failing to find that the parties had abandoned the subcontract. In the alternative, Axenics argues that the trial court should have found "that Turner breached the [s]ubcontract." Axenics also claims that, regardless of whether the subcontract was abandoned or breached, the trial court erred by not awarding it "damages measured by its costs plus reasonable profit, or \$1.7 million." In addition, Axenics maintains that the trial court erred in failing to find that the defendants violated the CPA. We first address the parties' arguments regarding

abandonment and breach of contract and then turn to their arguments regarding unjust enrichment, damages, and the CPA.

I. Contract Abandonment

Axenics argues that the trial court erred in failing to find that the subcontract was abandoned because it was “referred to by all parties on a ‘guideline’ basis if at all and was never adhered to by any of the parties.” “Generally, contract abandonment occurs when both parties depart from the terms of the contract by mutual consent.” J.A. Jones Constr. v. Lehrer McGovern Bovis, 89 P.3d 1009, 1019 (Nev. 2004); see Young v. Barry, 107 N.H. 294, 296 (1966). Abandonment “may be accomplished by express mutual consent or by implied consent through the actions of the parties.” O’Brien & Gere Technical v. Fru-Con/Fluor Daniel, 380 F.3d 447, 455 (8th Cir. 2004) (quotation omitted) (applying Missouri law). “Where acts and conduct are relied on to constitute an abandonment, they must be positive, unequivocal and inconsistent with an intent to be further bound by the contract.” Fru-Con/Fluor Daniel v. Corrigan Brothers, 154 S.W.3d 330, 335 (Mo. Ct. App. 2004); see also Harris v. IES Associates, Inc., 69 P.3d 297, 308 (Utah Ct. App. 2003) (“A contract may be [abandoned] by acts or conduct of the parties inconsistent with the continued existence of the contract.” (quotation omitted)); 17A Am. Jur. 2d Contracts § 528 (2004) (“A contract will generally be treated as abandoned when one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior.”). Abandonment of a construction contract may occur because of “the aggregation of numerous changes to the contract over time.” Clarendon America v. General Sec. Indem., 124 Cal. Rptr. 3d 1, 6 (Ct. App. 2011).

“Abandonment of a contract is a mixed question of law and fact; what constitutes an abandonment is a matter of law, and whether there has been an abandonment is a question of fact.” 17A Am. Jur. 2d Contracts § 529. But see J.A. Jones Const., 89 P.3d at 1019 (“The issue of whether contract abandonment has occurred generally presents a question of fact.”); Fru-Con/Fluor Daniel, 154 S.W.3d at 335 (same). “We will not overturn the trial court’s ruling on a mixed question unless it is clearly erroneous.” Hogan Family Enters. v. Town of Rye, 157 N.H. 453, 456 (2008) (quotation omitted). If the court misapplies the law to its factual findings, however, we will review the matter de novo. See id.

In this case, there was no express agreement to abandon the contract. Rather, in support of its abandonment theory, Axenics points to specific instances where Axenics and Turner deviated from, or failed to follow, provisions of the subcontract, and it argues that the parties’ conduct evinced an intention to abandon the subcontract. We disagree. Although there were a number of change orders that caused the work and its cost to differ from that

to which the parties originally agreed, the scope of the work – the installation of process pipe – did not change. See Clarendon America, 124 Cal. Rptr. 3d at 6 (finding there was no “evidence that an excessive number of changes to the scope of work resulted in abandonment”). In Fru-Con/Fluor Daniel, 154 S.W.3d at 335, the Missouri Appeals Court found that, despite a large number of changes, the parties had not abandoned the construction contract because the contract itself allowed such changes. Likewise, the subcontract in this case contemplated that there might be changes to the work and its cost. Importantly, the subcontract also provided for possible schedule adjustments, delay, hindrances, and obstructions. Accordingly, the fact that there were numerous change orders does not evidence the parties’ intent to abandon the subcontract. Moreover, there is no evidence that either party failed to preserve its rights under the contract. See Clarendon America, 124 Cal. Rptr. 3d at 6 (finding no contract abandonment, in part, when underlying parties expressly retained rights under contract); EMF General Contracting Corp. v. Bisbee, 774 N.Y.S.2d 39, 43 (App. Div. 2004) (citing cases in which abandonment was found when parties took steps inconsistent with enforcing their rights under contract). Under these circumstances, we conclude that the trial court correctly determined that the parties did not abandon the subcontract.

II. Breach of Contract

Axenics next argues that the trial court erred in failing to find that Turner breached the subcontract. Axenics maintains that the trial court conflated breach of contract with contract abandonment, “which led [it] to erroneously conclude that because it found no abandonment there was no breach, although the court’s specific findings detailed numerous breaches.” Thus, Axenics asserts that “the court failed to consider the elements of breach . . . and failed to consider whether Turner had breached the contract by any means other than abandoning it.”

The defendants maintain that Axenics waived this issue by failing to raise it in its notice of cross-appeal. See Progressive N. Ins. Co. v. Argonaut Ins. Co., 161 N.H. 778, 784 (2011). Axenics’ notice of cross-appeal presented the question: “Did the Superior Court err in determining that the parties had not abandoned the subject Subcontract?” Supreme Court Rule 16(3)(b) provides, in relevant part

While the statement of a question [in a brief] need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

Because of the fashion in which the trial court addressed Axenics' breach of contract and abandonment claims, we conclude that Axenics' abandonment question fairly encompasses the issue of whether the trial court erred in conflating abandonment with breach of contract. Cf. In re Juvenile 2003-187, 151 N.H. 14, 16 (2004) (concluding that, under facts and circumstances of case, question of whether evidence of juvenile's actus reus was sufficient was "inextricably linked with, and fairly comprise[d] a subsidiary question to, the ultimate issue of the sufficiency of the evidence as to the juvenile's mens rea with regard to that action"). Accordingly, we will address this argument.

We agree with Axenics that the trial court conflated breach of contract and contract abandonment and, therefore, failed to rule specifically on Axenics' breach of contract claim. In its order, the trial court characterized Axenics' breach of contract claim as alleging "that Turner breached its contractual agreement by abandoning the contract." It then analyzed whether the parties had abandoned the subcontract, finding that "neither Axenics nor Turner expressed any intent to abandon the contract," and concluding not only that "the contract was not abandoned," but that Turner had not breached the subcontract.

Whether the parties abandoned the subcontract, and whether Turner breached the subcontract, however, are two separate questions. As stated above, "contract abandonment occurs when both parties depart from the terms of the contract by mutual consent." J.A. Jones Constr., 89 P.3d at 1019. On the other hand, "[a] breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." Lassonde v. Stanton, 157 N.H. 582, 588 (2008) (quotation and brackets omitted). Here, because the trial court conflated contract abandonment with contract breach, it failed to specifically address Axenics' claim that Turner breached the subcontract. We, therefore, vacate the trial court's finding against Axenics on its breach of contract claim and remand for the trial court to determine whether Turner breached the subcontract as alleged by Axenics. See Barrows v. Boles, 141 N.H. 382, 388 (1996) ("Whether conduct is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case." (quotation and brackets omitted)). It is within the trial court's discretion as to whether it should hold an additional hearing.

III. Unjust Enrichment

The defendants argue that the trial court erred in ruling that they were unjustly enriched. "The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court." Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 210 (2009) (quotation omitted). Consequently, we review a trial court's equitable determination for an unsustainable exercise of

discretion. See id. To show an unsustainable exercise of discretion, the defendants must demonstrate that the court's ruling was clearly unreasonable or untenable to the prejudice of their case. Id. Although the award of equitable relief is within the sound discretion of the trial court, that "discretion must be exercised, not in opposition to, but in accordance with, established principles of law." Id. (quotation omitted). We will first address the trial court's finding that Turner was unjustly enriched and, therefore, liable to Axenics.

A. Turner

The defendants maintain that the trial court erred in allowing recovery against Turner under the theory of unjust enrichment "because the precise subject matter of Axenics' claim – the Extra Work purportedly performed in completing the piping installation – was covered by the parties' contract." Axenics counters that it was entitled to recover under a theory of unjust enrichment because the extra work that it performed was outside the scope of the subcontract.

Unjust enrichment is an equitable remedy that is available when an individual receives "a benefit which would be unconscionable for him to retain." Id. (quotation omitted). It is not a boundless doctrine, but is, instead, "narrower, more predictable, and more objectively determined than the implications of the words unjust enrichment." Id. (quotation omitted). One general limitation is that unjust enrichment may not supplant the terms of an agreement. Id. It is a well-established principle that the court cannot allow recovery under a theory of unjust enrichment when there is a valid, express contract covering the subject matter at hand. Id. at 210-11; see Singer Asset Finance Co. v. Wyner, 156 N.H. 468, 476 (2007) (finding that, in absence of valid and enforceable contract, trial court properly entered summary judgment for plaintiff on unjust enrichment claim). This is so because "[r]estitution is . . . subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach." Restatement (Third) of Restitution and Unjust Enrichment § 2 comment c at 17 (2011). Nevertheless, unjust enrichment may be available to contracting parties if the benefit received is outside the scope of the contract. Clapp, 159 N.H. at 211.

We agree with the defendants that Axenics cannot recover against Turner under an unjust enrichment theory. The gravamen of Axenics' unjust enrichment claim is that Turner's failure to properly coordinate construction of the facility caused Axenics personnel to work overtime and to incur additional costs that it would not have had to incur in order to fulfill its obligations in a timely manner. This subject matter – Turner's responsibilities for coordinating changes to the work and Axenics' entitlement to payment for any resulting extra work it performed or extra costs it incurred – was addressed in the

subcontract itself. Axenics does not argue that the ultimate contractual objective – installing process piping – changed during the course of the contract. Instead, it argues that to achieve that objective on time required extra work and costs. As laid out above, the terms of the subcontract expressly addressed the possibility of delays and hindrances as well as the process by which Axenics would receive payment for any extra work that it performed because of change orders. The subcontract also established a mechanism for proceeding when Axenics believed the “work to be beyond the scope of” the subcontract, and delineated Turner’s responsibilities for coordinating changes to the work. Since the subcontract governed the subject of Axenics’ unjust enrichment claim, and the subcontract was not abandoned by the parties, the trial court erred in allowing Axenics to recover against Turner under a theory of unjust enrichment. See id. at 211-12; ADP Marshall, Inc. v. Noresco, LLC, 710 F. Supp. 2d 197, 230 (D.R.I. 2010) (applying Rhode Island law and finding that subcontractor could not recover against general contractor under theory of unjust enrichment when majority of subcontractor’s claims were based upon work that was within scope of parties’ agreement).

Axenics argues that the parties orally modified the change order process set forth in the subcontract and that the extra work it performed pursuant to the modifications necessarily fell outside the scope of the subcontract. It asserts, therefore, that it is entitled to unjust enrichment damages. As discussed above, we disagree that the extra work performed fell outside the scope of the subcontract. Simply because the parties may have orally modified the change order process does not render the work Axenics performed after such modifications outside the scope of the subcontract itself.

Axenics further relies upon R.J. Berke & Co. v. J.P. Griffin, Inc., 116 N.H. 760 (1976), in arguing that it is entitled to recover against Turner on a theory of unjust enrichment. In R.J. Berke, we held that quantum meruit is a restitutionary remedy available to a party that materially breaches a contract, and thus, has no contract remedies. R.J. Berke, 116 N.H. at 764. This holding does not support Axenics’ argument. Here, Axenics does not argue that it breached the subcontract, is therefore without contract remedies, and, consequently, would be entitled to recover the value of the labor and materials furnished under the breached subcontract. Rather, Axenics claims that “the parties orally modified the change order procedure for Axenics’ extra work and that the extra work fell outside the scope of the Subcontract.” Thus, R.J. Berke is inapposite.

Axenics’ reliance upon Puritan Mills, Inc. v. Pickering Construction Co., 262 S.E.2d 586 (Ga. Ct. App. 1979), is also misplaced. In Puritan Mills, the defendant entered into a contract with the plaintiff to construct loading docks. Puritan Mills, 262 S.E.2d at 587. Upon completion, the defendant sought recovery against the plaintiff in quantum meruit for expenses incurred

resulting from a change order, which required the removal of rock. *Id.* The Georgia Court of Appeals found that “[t]he contract between the parties clearly set[] forth the work to be performed and none of the five items describing the work or the drawings reflect[ed] the removal of rock as a part of the contract.” *Id.* Accordingly, since the contract did not contemplate the removal of rock, and there was no question that the plaintiff knowingly accepted the defendant’s services in removing the rock, the court upheld the trial court’s monetary award for the reasonable value of removal of rock. *Id.* at 587-88. Here, however, the subcontract addressed the subject matter of Axenics’ unjust enrichment claim. Accordingly, we reverse the trial court’s decision finding Turner liable to Axenics on its theory of unjust enrichment.

B. Stryker

The defendants further argue that Axenics’ “unjust enrichment claim [against Stryker] must fail as a matter of law because [Stryker] has paid for the contractual benefit it received – the construction of [the facility] according to [the] contract.” They maintain that any benefit received by Stryker was both bargained and paid for and that Stryker, therefore, should not be required to “make restitution.”

“The party seeking restitution must establish not only unjust enrichment, but that the person sought to be charged had wrongfully secured a benefit or passively received one which it would be unconscionable to retain” Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611 (2010) (quotation omitted)). When, as here, no express contractual relationship exists between the parties, “a trial court may require an individual to make restitution for unjust enrichment if he has received a benefit that would be unconscionable to retain.” Pella Windows and Doors v. Faraci, 133 N.H. 585, 586 (1990) (quotation and brackets omitted).

“[T]he circumstances under which an unjust enrichment claim may be brought by a subcontractor against an owner, absent privity, are . . . limited.” Haz-Mat Response v. Certified Waste Serv., 910 P.2d 839, 847 (Kan. 1996). There may be “special circumstances that would justify requiring the owner to pay,” such as when the owner accepts “benefits rendered under such circumstances as reasonably notify the owner that the one performing such services expected to be compensated therefor by the owner.” *Id.* However,

[t]he general rule in this area is that a subcontractor who furnishes material or labor pursuant to an agreement with, or upon the order and credit of[,] a general contractor cannot recover against the property owner upon the basis of an implied promise to pay arising from the owner’s receipt and acceptance of the benefit of the material and labor furnished.

Great Plains Equipment v. N.W. Pipeline, 979 P.2d 627, 641 (Idaho 1999) (quotation omitted); see also A & V 425 LLC Contracting v. RFD 55th St., 830 N.Y.S.2d 637, 646 (Sup. Ct. 2007) (“It is a firmly established principle that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor’s performance.” (quotation and brackets omitted)).

Consistent with this rule, other courts have found that “[w]here an owner has fulfilled its financial obligation to a general contractor, a subcontractor cannot rely on the owner to satisfy the relationship between the subcontractor and the general.” DJ Painting v. Baraw Enterprises, 776 A.2d 413, 418 (Vt. 2001) (collecting cases). This is so, in part, because “[t]he point of hiring a general contractor for a construction job is for the general to manage the job and hire the subcontractors.” Id. at 419. “The owner pays the general contractor, but if the general does not pay the subcontractors, the subcontractors have the statutory lien mechanism to attach money as yet unpaid to the general contractor.” Id.; see RSA 447:5 (Supp. 2012).

Here, there appears to be no dispute that Stryker has fulfilled its financial obligation to Turner. Nor is there any indication that Stryker accepted benefits under circumstances reasonably notifying it that Axenics expected to be compensated directly by Stryker rather than by Turner. While the trial court found that Stryker “thanked all of the subcontractors for staying on schedule despite several problems that occurred,” the court’s reliance on this finding to support its award against Stryker is misplaced. In our view, Stryker’s expression of gratitude does not demonstrate that Stryker had knowledge that it would be directly liable to Axenics for the cost of additional work requested by Turner; to the contrary, this finding arguably supports the conclusion that Stryker did not expect to pay additional sums directly to subcontractors such as Axenics. Thus, there is no evidence that Stryker accepted a benefit that would be unconscionable to retain. See Pella Windows and Doors, 133 N.H. at 586; see also S & M Rotogravure Service, Inc. v. Baer, 252 N.W.2d 913, 916-18 (Wis. 1977) (reviewing cases involving actions for money by subcontractors against property owners upon whose property subcontractor had performed construction work pursuant to agreement with general contractor and finding rationale to be that when “the defendant had paid another for the benefits conferred, . . . it was not inequitable to permit the defendant to retain the benefits without paying the plaintiff”). Indeed, as the trial court itself found, what Stryker “received was a project completed on time and in accordance with the contract specifications.” Accordingly, we hold that the trial court erred in allowing Axenics to recover against Stryker under a theory of unjust enrichment. We, therefore, reverse its decision with respect to that issue.

In view of our rulings that the trial court erred in finding the defendants liable under the theory of unjust enrichment, we need not address Axenics' argument concerning the proper measure of damages under that theory.

IV. Damages – Admission of Internal Memoranda

The defendants argue that the trial court erred in admitting and considering as evidence of damages a communication regarding an offer to compromise in contravention of New Hampshire Rule of Evidence 408. Because this issue may arise on remand, we address it. See George v. Al Hoyt & Sons, Inc., 162 N.H. 123, 138 (2011).

At trial, Axenics sought to admit an internal email memorandum composed by Turner, which listed possible contribution amounts from both Turner and Stryker toward a potential settlement with Axenics. The defendants objected on the ground that the memorandum constituted a statement made in compromise negotiations and, thus, was inadmissible under New Hampshire Rule of Evidence 408. The trial court overruled the defendants' objection, finding that because the memorandum "was never communicated to the . . . other side," it was not a statement made in compromise negotiations. In its final order, the court reaffirmed this ruling and relied upon the memorandum in its determination of damages.

New Hampshire Rule of Evidence 408 provides, in relevant part:

[E]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The Rule "states the basic proposition that evidence of compromise offers[,], compromise agreements, and conduct or statements made in compromise negotiations is inadmissible on questions of liability and damages." N.H. R. Ev. 408 Reporter's Notes. "The Rule . . . reflects both doubt as to the probative value of the fact of settlement and a policy to encourage settlements." Id.

To the extent that Axenics argues that the internal memorandum did not constitute a statement made to compromise the claim or during compromise negotiations, we disagree. The language in the memorandum demonstrates that the amounts listed were under consideration by the defendants as part of

a settlement package to be submitted to Axenics. Cf. Slattery v. Norwood Realty, 145 N.H. 447, 450 (2000) (finding that statement was not offer to compromise disputed claim but was admission of contractual obligations). The trial court itself observed that the memorandum “suggests an ‘offer’ to settle the case.”

We have not had occasion to address whether an internal memorandum, evincing an offer to compromise, which has not been disclosed to the opposing party, is protected under Rule 408. However, “[t]he [federal] circuits that have addressed this issue have agreed that internal memoranda, although not communicated to the opposing side, are encompassed within” the similar Federal Rule of Evidence 408. Xcoal Energy & Resources, LP v. Smith, 635 F. Supp. 2d 453, 454 (W.D. Va. 2009) (discussing cases from the Third, Fifth, Seventh, Eighth, and Eleventh Circuits). Conversely, in Blue Circle Atlantic v. Falcon Materials, 760 F. Supp. 516, 522 (D. Md. 1991), aff’d on other grounds, 960 F.2d 145 (4th Cir. 1992) (unpublished opinion), the United States District Court for the District of Maryland ruled that Federal Rule of Evidence 408 “does not apply to internal memoranda unless communicated to the other side in an attempt at settlement.”

We now join the federal circuits in concluding that the policy objectives of Rule 408 weigh in favor of exclusion of internal memoranda prepared for the purpose of compromise negotiations. “The spirit of the Rule, as recognized by several circuits and as set forth in the commentary to the Rule, supports the exclusion of certain work product, internal memos, and other materials created specifically for the purpose of conciliation, even if not communicated to the other party.” Xcoal Energy & Resources, LP, 635 F. Supp. 2d at 454 (quotation omitted). Accordingly, we hold that the trial court erred in admitting the internal memorandum outlining the defendants’ possible contributions to a settlement with Axenics. Since we have found the internal memorandum was admitted in error, we further find that the trial court erred in relying upon it in assessing damages.

V. CPA Claim

Finally, Axenics challenges the trial court’s conclusion that the defendants did not violate the CPA. “The trial court’s findings of fact and rulings of law will be upheld unless they lack evidentiary support or constitute clear error of law.” George, 162 N.H. at 129 (quotation omitted).

Axenics argues that the trial court’s finding that the defendants’ conduct did not violate the CPA was erroneous “as a matter of law because the court did not make adequate findings” and “merely jumped to an unsupported conclusion.” Axenics maintains that Turner instructed it to perform extra work, which was necessary to complete the facility on time, and “then secretly

subvert[ed] Axenics' legitimate efforts to be paid." Specifically, Axenics asserts that Turner assured Axenics that it would support Axenics' claims for payment from Stryker for the extra work performed and "then presented [a] rebuttal to Stryker without disclosing to Axenics the existence of the rebuttal or that Turner had given it to Stryker." According to Axenics, these actions constituted unfair or deceptive acts under the CPA. Axenics also argues that "[g]iven [the defendants'] business sophistication and the length and breadth of the steps each took to subvert, delay, and deny Axenics' claims, the only reasonable conclusion is that their [conduct] constitutes a willful or knowing violation of the [CPA]," entitling Axenics to exemplary damages. We note that the parties do not dispute on appeal that RSA chapter 358-A applies.

RSA 358-A:2 (2009) states that "[i]t shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." We have previously recognized that, although this provision is broadly worded, not all conduct in the course of trade or commerce falls within its scope. *Id.* "An ordinary breach of contract claim, for example, is not a violation of the CPA." *Id.* (quotation omitted). In determining which commercial actions not specifically delineated are covered by the CPA, we have employed the "rascality" test. *Id.* Under the rascality test, "the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Beckstead v. Nadeau, 155 N.H. 615, 619 (2007) (quotation omitted).

Here, the trial court found that Turner's conduct in attempting to rebut certain claims by Axenics for payment for the extra work it performed "may have been unjustified or inaccurate based on its own failure to coordinate, but neither Turner's nor Stryker's behavior rose to the level of rascality required under the" CPA. Although the court noted Axenics' allegation that "Turner never requested additional funds from Stryker" for the extra work performed by Axenics, it ultimately found that was "not the case." The court found that "Turner merely requested back-up from Axenics [to support its claims for payment] and provided Stryker with a rebuttal to some of Axenics' claims." Indeed, the court found that Turner provided documentation to Stryker concerning Axenics' claims for payment, "stating that many of Axenics' claims had merit." The trial court further found that:

Although Turner's own documents suggest that it knew that Axenics' claim had value, Axenics did a poor job of documenting why its claims exceeded the amount bid. Moreover, both the documents introduced at trial and the public record of the litigation establish[ed] a level of brinkmanship and hard bargaining, by both sides, which is hardly commendable, but far from uncommon.

These findings are sufficient to support the trial court's ultimate conclusion "that the parties' conduct, in the context of the 'rough and tumble' construction business, did not violate the CPA."

Moreover, the record supports the trial court's findings that Turner made efforts to collect and organize back-up documents to support some of Axenics' claims for payment, and that Turner supported the validity of some of Axenics' claims for payment. In addition, trial testimony indicated that "there was no secret" that Turner was going to review the back-up. Although Turner did not inform Axenics that it was preparing a rebuttal to some of Axenics' claims because it believed it "had an obligation to Stryker to review the backup and present it to them," this conduct is not of the type proscribed by the CPA. Cf. State v. Moran, 151 N.H. 450, 453-54 (2004) (defendant violated CPA by inducing homeowners to enter into contract with him to install siding when he did not intend to perform work, and he made misrepresentations to homeowners in effort to avoid performing work or refunding deposit).

Axenics further contends that certain of the defendants' litigation strategies violated the CPA because they were "unfair" and were "designed to further delay the adjudication of Axenics' claim and make the litigation prohibitively expensive." Assuming, without deciding, that unfair litigation tactics fall within the scope of the CPA, Axenics has failed to demonstrate that the defendants' litigation tactics in this case were so egregious as to satisfy the rascality test. Accordingly, we conclude that the trial court did not err in finding that the defendants did not act "in a way that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Boles, 141 N.H. at 391 (quotation omitted).

Affirmed in part; reversed in part; vacated in part; and remanded.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Strafford
No. 2005-268

GENERAL LINEN SERVICES, INC.

v.

ELIAS SMIRNIOUDIS

Argued: February 9, 2006
Opinion Issued: April 26, 2006

Hanlon & Zubkus, of Rochester (Mark D. Hanlon on the brief and orally),
for the plaintiff.

Crisp & Richmond, PLLC, of Concord (Jack P. Crisp, Jr. and Andrew M. Mierins on the brief, and Mr. Mierins orally), for the defendant.

BRODERICK, C.J. The defendant, Elias Smirnioudis, appeals a decision of the Superior Court (Fauver, J.) awarding the plaintiff, General Linen Services, Inc. (General Linen), damages plus interest, costs and reasonable attorney's fees for breach of contract. Smirnioudis challenges aspects of the damages award. We affirm in part, vacate in part, and remand.

We recite the facts as found by the trial court. General Linen is engaged in the business of leasing linens, clothing and other items. Smirnioudis is the owner and operator of two restaurants, Windmill Restaurant I (Windmill I) in east Concord, and Windmill Restaurant II (Windmill II) in Franklin. In July

2000, Smirnioudis and General Linen entered into a rental service agreement whereby General Linen would provide the restaurants certain linens, including cook shirts, pants, aprons, and towels. The agreement was negotiated between Smirnioudis and John Jamrog, a General Linen sales representative. Smirnioudis signed the documents as the customer and executed a personal guaranty. General Linen provided linens to the restaurants until November 2000 when Smirnioudis notified General Linen that he wanted to cancel the contract. Smirnioudis and his employees testified at trial that they had told the delivery driver on a regular basis that the linens were substandard. Other than the cancellation letter, however, no evidence was offered to show that any written notification was provided to General Linen describing the poor quality of the linens. Smirnioudis began doing business with another linen supplier, and in May 2001, Windmill II was destroyed by fire.

General Linen filed suit against Smirnioudis for breach of contract. It claimed that Smirnioudis failed to comply with the contract's notice provision concerning customer dissatisfaction and contract cancellation. Smirnioudis argued, however, that because General Linen breached the contract by providing inadequate linens, his cancellation of the agreement was justified. He also claimed that his poor command of the English language obstructed his understanding of the terms and conditions of the agreements, making the contract voidable.

After a trial on the merits, the trial court ruled that Smirnioudis breached the agreement. In so ruling, the trial court rejected Smirnioudis' various arguments concerning the inadequate quality of the linens and determined that he had the requisite understanding of the terms and conditions of the agreement. The trial court subsequently conducted a hearing on damages. In assessing damages, the trial court concluded that General Linen was entitled to the average weekly rental charge for the remaining term of the three-year contract, less costs General Linen would not incur for servicing the contract. It rejected Smirnioudis' claim that the doctrine of commercial frustration limited the calculation of damages for Windmill II up to the date it was destroyed by fire because the date of Smirnioudis' breach preceded the fire. The trial court awarded General Linen contract damages, plus interest, costs and reasonable attorney's fees under the contract. After a motion to reconsider, the court made one alteration to the damages award but otherwise denied the remainder of the motion. Smirnioudis appealed.

On appeal, Smirnioudis argues that the trial court erred in its calculation of damages by: (1) not applying the doctrine of commercial frustration based upon the destruction of Windmill II; (2) failing to properly determine the replacement cost deduction; (3) misinterpreting evidence establishing its final payment to General Linen; and (4) awarding damages for the three-year contract term when the parties lacked a meeting of the minds on that term.

We observe that mathematical certainty is not required in computing damages. T&M Assoc. v. Goodrich, 150 N.H. 161, 164 (2003). “The law does, however, require an indication that the award of damages was reasonable.” Id. We will not overturn a damage award unless it is clearly erroneous. Id. Further, we will review all questions of law de novo and uphold all findings of fact unless they are lacking in evidentiary support or erroneous as a matter of law. Sherryland v. Snuffer, 150 N.H. 262, 265 (2003).

We first address Smirnioudis’ argument that the trial court erred by not applying the doctrine of commercial frustration. He argues that the destruction of Windmill II by fire eliminated the need for linens at that location and thus excused his performance under the contract. Thus, Smirnioudis contends that General Linen should only receive lost profit damages for Windmill II up to the date of the fire. We disagree.

The doctrine of commercial frustration “assumes the possibility of literal performance but excuses performance because supervening events have essentially destroyed the purpose for which the contract was made.” Perry v. Company, 101 N.H. 97, 98 (1957). Under the doctrine, “a contract is to be considered subject to the implied condition that the parties shall be excused in case, before breach, the state of things constituting the fundamental basis of the contract ceases to exist without default of either of the parties.” Days Inn of America, Inc. v. Patel, 88 F. Supp. 2d 928, 934 (C.D. Ill. 2000) (quotations omitted; emphasis added) (applying New Jersey law); see also Johnson v. Atkins, 127 P.2d 1027, 1028 (Cal. Dist. Ct. App. 1942). Therefore, for the doctrine to apply, the supervening event must occur before the party seeking its protection otherwise breaches the contract. Accordingly, because “the party claiming the benefit of the doctrine may not already be in breach of contract at the time of the events giving rise to the application of the doctrine,” Days Inn of America, Inc., 88 F. Supp. 2d at 934 (quotation omitted) (applying New Jersey law), and Smirnioudis breached the leasing agreement prior to the fire, we conclude that the doctrine of commercial frustration does not apply to this case. See Gen. Elec. Capital Corp. v. Charleston, 1989 WL 9363, at *7 (E.D. Pa. Feb. 6, 1989) (party could not claim benefit of commercial frustration doctrine when party was in breach of contract at time of hotel fire) (applying New Jersey law).

Smirnioudis next argues that the trial court failed to properly calculate the replacement cost of linens when deducting that cost from damages due General Linen. Specifically, he contends that the trial court erred by deducting the replacement cost for a single type of linen item, such as a pair of pants, rather than accounting for his use of multiples of each type of linen item. We conclude that the record is sufficiently confusing as to warrant remand for reconsideration of that portion of the damages award.

At the trial on damages, General Linen's witness reviewed the company's methodology for calculating damages. In short, to determine its anticipated lost profit, the company calculated the average weekly rental charge, then deducted certain costs. Specifically, it deducted those costs it would not have to incur to service the Smirnioudis account, such as delivery and laundry costs, since the contract was not carried out. Included in the deductions was the replacement cost of the linens that General Linen otherwise would have incurred to replace items as they wore out from normal usage. A trial exhibit included on appeal appears to itemize the replacement cost for single items, such as an apron bib and a kitchen towel. The total cost of replacing these single items was calculated to be \$65.59. The trial court used this figure when calculating damages and does not appear to have determined how many of each item Smirnioudis had been using. For example, while the replacement cost for a single apron bib was \$12.73, if Smirnioudis were using twenty apron bibs, the replacement cost for that category of item presumably would have been \$254.60. Indeed, another trial exhibit included in the appellate record suggests that Smirnioudis had been using multiples of the different linen items.

Notably, in its brief, General Linen did not address Smirnioudis' argument concerning the replacement cost aspect of the trial court's calculation of damages. At trial, General Linen acknowledged that deduction for replacement cost was proper. Although mathematical certainty is not required for the calculation of damages, see T&M Assoc., 150 N.H. at 164, the record leaves us uncertain whether the trial court recognized Smirnioudis' multiple use of linen items when calculating the replacement cost deduction. Accordingly, we vacate that portion of the damages award and remand.

We next address Smirnioudis' argument that the trial court misinterpreted evidence demonstrating that his last payment to General Linen occurred in November, not October, 2000. Thus, he contends that he should be credited for three additional weeks that he accepted and paid for linen deliveries. The trial court accepted General Linen's calculation of 140 weeks remaining on the contract to determine damages. The invoice exhibits Smirnioudis relies upon to assert that he had accepted and paid for an additional three weeks of deliveries show two different dates: date of invoice and purchase order date. While the date of invoice changes and extends into November 2000, the purchase order date is fixed on each. Further, testimony at trial supports the calculation of 140 weeks. Because the trial court's finding is supported by the evidence, we will not disturb it. See Crown Paper Co. v. City of Berlin, 142 N.H. 563, 566 (1997).

Finally, we address Smirnioudis' argument that the parties did not have a meeting of the minds on the duration term in the contract. He contends that

the General Linen representative did not verbally disclose the three-year term of the contract and that the evidence established that he cannot read the English language. Therefore, according to Smirnioudis, the three-year duration term is unenforceable. We disagree.

While originally from Greece, as of 2004 Smirnioudis has been in the United States for thirty years and in the restaurant business for thirteen years. At trial, Smirnioudis made the global assertion that he should be excused from the contract in its entirety because he did not understand its terms due to his poor command of the English language. The trial court rejected his argument, finding:

The defendant has spent a number of years in this country and he has been owner and operator of two commercial establishments for some time. The Court finds that he had the requisite understanding of the terms and conditions of the agreement to bind himself to its terms. Further, the terms and conditions were explained to him by [the General Linen representative].

In his argument before us, Smirnioudis isolates his purported inability to read English to nullify one term of the contract. The trial court, however, rejected the notion that Smirnioudis had limited understanding of the English language which encumbered his ability to understand the terms of the contract. While a General Linen representative testified at trial that he did not verbally discuss with Smirnioudis the duration of the contract, the trial court's finding that Smirnioudis had the "requisite understanding of the terms and conditions of the agreement" was not solely based upon the verbal discussion between the two. Because Smirnioudis makes no allegation that the contract itself lacked clarity on its duration, and the trial court made sufficient findings based upon the evidence that he understood the terms and conditions of the agreement, we will not disturb the trial court's assessment of damages for the three-year duration of the contract. See Crown Paper Co., 142 N.H. at 566 (finding of fact upheld unless unsupported by the evidence).

Affirmed in part; vacated in part;
and remanded.

DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-southern judicial district
No. 2012-599

LAWRENCE LEEDS

v.

BAE SYSTEMS

Argued: September 18, 2013
Opinion Issued: November 5, 2013

Gawryl MacAllister & O'Connor, of Nashua (Jared O'Connor on the brief and orally), for the plaintiff.

Devine, Millimet & Branch, of Manchester (Daniel E. Will and Laurel A.V. McClead on the brief, and Mr. Will orally), for the defendant.

HICKS, J. The plaintiff, Lawrence Leeds, appeals an order of the Superior Court (Nicolosi, J.) granting summary judgment to the defendant, BAE Systems (BAE), in this wrongful discharge action. We affirm.

The record supports the following facts, presented in the light most favorable to Leeds. Leeds worked for BAE as a quality control inspector from 2001 until his discharge in April 2009. Throughout his employment at BAE, Leeds was an "at-will" employee. On April 30, 2009, BAE discharged Leeds for violating the company's standards of conduct as a result of two separate

incidents at the company's Hudson facility. Leeds represents that, prior to these incidents, he had never been involved in disciplinary action at BAE.

On February 17, 2009, BAE issued Leeds a "written warning" for engaging in "abusive" behavior toward another employee in violation of BAE policy. After interviewing Leeds, the employee, her supervisor, and another co-worker who witnessed the incident, BAE determined that Leeds had "angrily approached" the employee about her work and, while pointing a finger at her, "yelled" obscenities. Leeds signed a form acknowledging receipt of the warning, but denied BAE's version of events. Specifically, Leeds wrote on the form that he "[d]ispute[d] swearing." Instead, Leeds maintains that he was doing his job by criticizing the employee for a deficient work product and admits only that his "voice level was a little bit higher" during the exchange.

The warning informed Leeds that his conduct was, in BAE's view, a "major violation of MDP 22:20: Standards of Conduct" (MDP 22:20). In particular, BAE determined that Leeds had violated a provision against using "abusive or threatening language" toward a co-worker. The warning also gave Leeds a directive: "There must be an immediate and sustained improvement in your conduct in the workplace. Failure to do so will result in further disciplinary action up to and including termination of your employment."

Approximately three months later, Leeds was involved in an altercation that BAE determined was a second "major violation" of the same "abusive or threatening language" provision of MDP 22:20, which also applied to language directed toward "[a]ny other person on [BAE] premises." On April 28, 2009, while driving to work, Leeds passed a female driver as the road merged into one lane. The driver then tailgated Leeds, gestured obscenely at him, and followed him into the BAE parking lot even though she did not work there. After Leeds parked, the driver pulled up and stopped perpendicular to Leeds's car, blocking his path to the BAE facility. While remaining in her car, the driver "stuck her cell phone out of the window and pointed it at Leeds," purportedly to take pictures of Leeds's license plate. Leeds, who did not recognize the object as a cell phone and thought it may have been a weapon, swatted the phone away from his face, causing part of it to break. The two engaged in a shouting match involving obscenities for at least thirty seconds before Leeds was able, in his words, to "squeeze" past the driver's car and enter the BAE facility. Leeds does not dispute that he swore at the driver and raised his voice during their exchange.

BAE conducted an internal investigation by obtaining a statement from the driver, interviewing both parties, and speaking with several BAE employees who had indirect knowledge of the incident. In an April 30 interview with a BAE investigator, which Leeds states lasted approximately five minutes, Leeds

portrayed the driver as the aggressor, yet, according to the investigator, he acknowledged that he “got caught up in the moment.”

Following her interview with Leeds, the investigator asked for Leeds to turn over his employee badge and to leave the premises. Upon the investigator’s recommendation, a BAE management team made the decision to discharge Leeds that same day, after taking into account both the parking lot incident and the prior written warning. Leeds received notice of his discharge by telephone that day and by letter.

Leeds’s discharge letter, dated April 30, indicated that he had committed a “major violation” of MDP 22:20 by (a) “engag[ing] in an altercation with an individual that involved abusive & threatening actions and language in the parking lot of the Hudson, NH, facility” and (b) “[d]isobeying [BAE] policies or proper instructions issued by [a] supervisor or other authority” in light of the written warning against using abusive language. The letter also stated that Leeds had violated BAE’s “Workplace Violence Policy.”

After an unsuccessful internal BAE appeal, Leeds sued BAE for, among other things, wrongful discharge. The trial court granted BAE’s motion for summary judgment and denied Leeds’s cross-motion for partial summary judgment. Leeds filed a motion for reconsideration, arguing in part that the court erred in its application of the summary judgment standard. In an order denying the motion, the court acknowledged that it “may have inadvertently drawn inferences more liberally in favor of the defendant than it should have.” After reconsideration, the court again ruled that BAE was entitled to judgment as a matter of law. Leeds appeals the grant of summary judgment in favor of BAE.

Our standard of review is well established:

When reviewing a trial court’s grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. If our review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court’s decision. We review the trial court’s application of the law to the facts de novo.

Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 248 (2006) (quotation omitted).

The prevailing rule in New Hampshire is that, absent an agreement to the contrary, employment contracts are “at-will,” meaning that “both parties are free at any time to terminate the employment relationship, with or without

cause.” Porter v. City of Manchester, 151 N.H. 30, 37 (2004) (quotation and brackets omitted). An exception to the “at-will” rule is that even at-will employees may pursue a cause of action in tort for wrongful discharge. See id. at 37-39. In order to succeed on a wrongful discharge claim, a plaintiff must establish two elements: (1) that the discharge was “motivated by bad faith, retaliation or malice”; and (2) that the plaintiff was discharged “for performing an act that public policy would encourage or for refusing to do something that public policy would condemn.” Karch v. BayBank FSB, 147 N.H. 525, 536 (2002). “Although ordinarily the issue of whether a public policy exists is a question for the jury, at times the presence or absence of such a public policy is so clear that a court may rule on its existence as a matter of law, and take the question away from the jury.” Short v. School Admin. Unit 16, 136 N.H. 76, 84 (1992) (citation omitted).

Leeds argues that the trial court erred in granting summary judgment in favor of BAE on each of the two wrongful-discharge prongs. Because we hold that the trial court did not err in granting summary judgment on the public-policy prong, we need not address the bad faith, retaliation, or malice prong. See id. at 78.

Leeds argues that the trial court should have allowed a jury to determine whether public policy would encourage his conduct, which he characterizes as self-defense. As support for his argument, Leeds points to our case law recognizing that “[t]he public policy contravened by the wrongful discharge can be based on statutory or nonstatutory policy.” Cilley v. N.H. Ball Bearings, Inc., 128 N.H. 401, 406 (1986). Leeds argues that, if a public policy can be established on nonstatutory grounds, see id. at 406 (reversing summary judgment in favor of employer because a jury could conclude plaintiff was “discharged for refusing to lie and that public policy supports such truthfulness”); Cloutier v. A. & P. Tea Co., Inc., 121 N.H. 915, 923 (1981) (“[W]ith or without the existence of [the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)], the facts before us support the conclusion that the plaintiff was discharged for furthering the laudable public policy objective of protecting the employees who worked under him.”), “then surely pointing to a statute meets the employee’s burden, especially on summary judgment.” Here, Leeds relies upon RSA 627:4, which provides that self-defense is a justification for certain actions that would otherwise be criminal. See RSA 627:4 (2007) (amended 2010, 2011). Because the trial court assumed that “whatever force . . . used [by Leeds] was appropriate,” implying that it would fall under the self-defense statute, Leeds argues that public policy must support his “justified use of force.”

We need not opine whether an employee’s use of self-defense could ever constitute an act that public policy would encourage. Moreover, we need not determine whether Leeds could rely upon RSA 627:4 were he to face criminal

charges. Rather, we hold that Leeds has failed to articulate a public policy that would encourage the conduct which led to his discharge.

Whether the other driver was the primary aggressor, and whether Leeds mistook the cell phone for a gun, are immaterial considerations. Even assuming, without deciding, that Leeds's contact with the cell phone was an act of self-defense in response to unprovoked aggression, the remainder of his conduct on company property was not self-defense. We therefore hold, as a matter of law, that public policy neither encourages Leeds's actions nor favors them over BAE's policy prohibiting abusive language and behavior in the workplace. See Short, 136 N.H. at 84-85 (holding, as a matter of law, that loyalty to one's supervisor "does not form the basis of a public policy because a countervailing public policy supports the [employer's] exercise of its employment and management responsibilities").

After examining all material facts in the light most favorable to him, we conclude that the trial court did not err in ruling that Leeds cannot show that public policy would encourage his actions. See Lacasse, 154 N.H. at 248. Because Leeds fails on the public-policy prong of his wrongful discharge claim, and both prongs are required in order to succeed, BAE is entitled to judgment as a matter of law. Id.

Affirmed.

DALIANIS, C.J., and CONBOY and BASSETT, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
Nos. 2013-779
2013-780

ICHIBAN JAPANESE STEAKHOUSE, INC.

v.

KYMBERLY ROCHELEAU

ICHIBAN JAPANESE STEAKHOUSE, INC.

v.

SAMANTHA GREANEY

Argued: October 9, 2014
Opinion Issued: November 13, 2014

Tarbell & Brodich Professional Association, of Concord (Friedrich K. Moeckel on the brief and orally), for the petitioner.

Law Office of Kenneth J. Barnes, of Concord (Kenneth J. Barnes on the brief and orally), for the respondents.

DALIANIS, C.J. In these consolidated appeals, the petitioner, Ichiban Japanese Steakhouse, Inc. (employer), appeals orders of the Superior Court

(McNamara, J.) upholding the determinations of the New Hampshire Department of Labor (DOL) that the respondents, Kymberly Rocheleau and Samantha Greaney (employees), were entitled to lost wages and attorney's fees because the employer's tip pooling arrangement violated RSA 279:26-b (2010) (amended 2012). We affirm.

The DOL found, or the record establishes, the following facts. The employer hired the employees as wait staff for its restaurant in August 2010. When they applied for the jobs, they were given a packet of documents, including a tip pooling agreement, to review. The agreement required wait staff to give approximately 60% of their tips to other employees and specified the percentage of tips that were to be given to other employees depending upon where in the restaurant the wait staff worked. For instance, the agreement stated that when wait staff worked in the hibachi grill area, they had to give 5% of all liquor sales to the bartenders, and distribute their tips as follows: 5% to the hibachi servers, 5% to the "bussers," and 45% to the hibachi chefs. Similarly, when working in the sushi area, wait staff were required to give 5% of all liquor sales to the bartenders and 5% of their tips to the bussers, 5% to the sushi bar, and 50% to the sushi chef. When Rocheleau told the manager of the restaurant that she disagreed with the tip pooling agreement, the manager told her that if she failed to sign the agreement, she could not work at the restaurant. At Greaney's hearing, the employer's attorney conceded that if Greaney had not signed the tip pooling agreement, she would not have been hired as wait staff, but might have been employed in another position.

Both employees left their jobs at the restaurant in 2011 – Rocheleau on April 30, 2011, and Greaney on May 21, 2011. Upon leaving their positions, each filed a wage claim with the DOL, seeking to recover lost wages. Following hearings on their claims, the DOL ruled in favor of the employees. The employer appealed those determinations to the superior court, which upheld the DOL's decisions. See RSA 275:51, V (2010). These consolidated appeals followed.

"Any party aggrieved by [a DOL wage claim] decision may appeal to the superior court . . . by petition, setting forth that the decision is erroneous, in whole or in part, and specifying the grounds upon which the decision is claimed to be in error." Id. "The scope of review by the superior court shall be limited to questions of law." Id. "After hearing and upon consideration of the record, the [superior] court may affirm, vacate or modify in whole or in part the decision of the commissioner, or may remand the matter to the commissioner for further findings." Id. We, in turn, review de novo the trial court's decisions on questions of law. Grimard v. Rockingham County Dep't of Corr., 161 N.H. 69, 71 (2010).

The employer first argues that its tip pooling arrangement did not violate RSA 279:26-b because "both employees testified that they read, understood

and voluntarily signed” the tip pooling agreement. During the time pertinent to this appeal, RSA 279:26-b provided:

I. Tips are wages and shall be the property of the employee receiving the tip and shall be retained by the employee, unless the employee voluntarily and without coercion agrees to participate in a tip pool which is not required and not controlled in any manner by the employer.

II. If the employee agrees to participate, the employer is not precluded from administering a valid tip pool in which participation is voluntary, not coerced and the employer exercises no control over the manner in which tips are pooled other than for accounting and bookkeeping purposes.

The employer contends that there was no “coercion” within the meaning of the statute because neither employee was “physically coerce[d]” or “pressure[d]” into signing the agreement.

We reject the employer’s suggestion that coercion requires application of physical force. Although the employer argues that the employees signed the tip pooling agreement “voluntarily,” the DOL expressly found to the contrary. In Rocheleau’s case, the DOL found credible her testimony that the process was not voluntary and found not credible the employer’s “statement that the practice was voluntary.” The DOL credited Rocheleau’s testimony that “she felt pressure to sign the agreement or not work at the establishment,” and that “there was no way out of the employer’s mandated program.” In Greaney’s case, the DOL relied upon the employer’s admission to find that participating in the tip pooling arrangement was not voluntary, observing that the employer conceded that “a prospective employee would not be hired into a wait staff position if they did not sign the tip distribution sheet agreeing to the disbursement of their tips.” Because these factual findings are not erroneous as a matter of law, they must be upheld. See RSA 275:51, V. Moreover, even if the employees were not “coerced” within the meaning of the statute, the employer would still not prevail because, as the DOL found, the employer controlled the tip pooling arrangement. See RSA 279:26-b, I (a valid tip pooling arrangement is “not controlled in any manner by the employer”).

The employer next asserts that the amount of lost wages awarded to the employees was improper. The DOL awarded Rocheleau \$4,214. At the DOL hearing, Rocheleau produced records and explained, in detail, that she took home only 40% of the tips she earned. Rocheleau also produced evidence that, in all, she took home approximately \$3,426 in tips, which means that her total tips, including the 60% she distributed to other employees, was \$8,565. As \$4,214 is less than 60% of \$8,565, we conclude that the employer has failed to

demonstrate that the DOL erred, as a matter of law, when it awarded \$4,214 in lost wages to Rocheleau. See RSA 275:51, V.

The DOL awarded Greaney \$8,390. At the hearing, Greaney produced her 2010 W-2 form and her final paycheck from the restaurant. Greaney testified that the amounts listed on her W-2 and her final paycheck were the amounts she “took home,” and did not include “the amounts [she] [gave] away.” Greaney produced evidence that she took home \$4,869.50 in tips in 2010 and \$3,663 in tips in 2011, which means that the total of her tips in 2010 was \$12,173.75, and in 2011 was \$9,157.50. As \$8,390 is less than 60% of the total tips Greaney earned, we conclude that the employer has failed to demonstrate that the DOL erred, as a matter of law, when it awarded \$8,390 in lost wages to Greaney. See RSA 275:51, V.

The employer next argues that the trial court erred when it awarded the employees their attorney’s fees pursuant to RSA 275:53, III (2010). The employer contends that because the employees’ wage claims were brought under RSA 275:51, V, they are not entitled to recover attorney’s fees. The employer asserts that attorney’s fees may be awarded only in a direct superior court action brought under RSA 275:53 (2010). In Galloway v. Chicago-Soft, 142 N.H. 752, 759-60 (1998), we expressly rejected identical arguments. See Demers Agency v. Widney, 155 N.H. 658, 664 (2007) (relying upon Galloway to conclude that “attorney’s fees and interest are available in superior court appeals under RSA 275:51”). The employer invites us to overrule Galloway, arguing that it is “inherently unworkable” because it conflicts with Ives v. Manchester Subaru, Inc., 126 N.H. 796, 803-04 (1985). We decline the employer’s invitation.

“The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results.” Appeal of Phillips, 165 N.H. 226, 231 (2013) (quotation omitted). “When asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.” Id. (quotation omitted). Generally, we will overrule a prior decision only after considering:

(1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. at 231-32 (quotation omitted). The employer has not briefed any of these factors.

Its sole argument in its brief as to why we should overrule Galloway is that, in the employer's view, it conflicts with Ives. The employer is mistaken. In Ives, we did not address whether attorney's fees could be awarded in an action brought under RSA 275:51, V. Ives, 126 N.H. at 803-04. We addressed only whether such fees could be awarded in a case brought under RSA 275:53 and noted that they could. Id. at 803. Until Galloway, we were not presented with the question of whether fees could be awarded in a case brought under RSA 275:51, V. In that case, we concluded that attorney's fees could be awarded, even though a "strict construction" of the language of RSA 275:53, III might lead to a different result. Galloway, 142 N.H. at 759. We reasoned that because RSA chapter 275 is protective legislation, see Ives, 126 N.H. at 804, we construe it in general, and RSA 275:53, III in particular, "to effectuate the broad purpose of protecting employees." Id. Accordingly, we held that when a wage claim has been found to be meritorious, whether brought directly to the court pursuant to RSA 275:53, or on appeal from a DOL decision pursuant to RSA 275:51, V, the court "should exercise its statutory discretion by awarding reasonable counsel fees, unless the court . . . finds particular facts that would render such an award inequitable." Id. (quotation omitted).

Significantly, it has been sixteen years since we decided Galloway, and, in that time, the legislature has not amended RSA 275:53, III. Thus, we assume that our holding conforms to legislative intent. See Appeal of Phillips, 165 N.H. at 232. We, therefore, affirm our decision in Galloway that attorney's fees are available in a claim brought pursuant to RSA 275:51, V. Should the legislature disagree with our statutory interpretation, it is free to amend the applicable statutes as it sees fit.

Affirmed.

HICKS, LYNN, CONBOY, and BASSETT, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2014-420

DEBORAH HOGAN & a.

v.

PAT'S PEAK SKIING, LLC

Argued: April 9, 2015
Opinion Issued: July 28, 2015

Christopher W. Driscoll, of Gloucester, Massachusetts, by brief and orally, for the plaintiffs.

Devine, Millimet & Branch, P.A., of Manchester (Thomas Quarles, Jr. and Leigh S. Willey on the brief, and Mr. Quarles orally), for the defendant.

HICKS, J. The plaintiffs, Deborah Hogan and Matthew Hogan, appeal the decision of the Superior Court (Smukler, J.) granting the motion to dismiss filed by the defendant, Pat's Peak Skiing, LLC. We reverse and remand.

The following facts are derived from the trial court's order or the record. On February 4, 2012, both plaintiffs fell from a ski chairlift while skiing at the defendant's premises. The plaintiffs were evaluated that day by a member of the defendant's ski patrol and incident reports were completed. Both plaintiffs reported injuries from the fall. On May 3, 2012, the plaintiffs sent notice to the

defendant, by certified return receipt mail, stating that they had retained counsel regarding the February 4, 2012 incident. The letter of notice was dated May 3, 2012, arrived at the Henniker post office on May 5, 2012, and was delivered to the defendant on May 10, 2012.

The plaintiffs filed a complaint against the defendant on December 3, 2013, seeking damages for negligence, recklessness, and loss of consortium. The defendant moved to dismiss the complaint, arguing that the plaintiffs did not provide notice by May 4, 2012 — ninety days from the date of the injury — as required by RSA 225-A:25, IV (2011). The defendant asserted that the plaintiffs failed to comply with the statute because the notice did not arrive until, at the earliest, May 5, 2012, the ninety-first day. In response, the plaintiffs countered that mailing the notice on May 3, 2012, the eighty-ninth day, satisfied the statutory requirement. Alternatively, the plaintiffs contended that they adhered to the notice provision by completing incident reports and giving verbal notice on the day of the incident and also by giving verbal notice on a later visit to the ski area. The trial court granted the defendant's motion to dismiss, concluding that the plaintiffs failed to give proper notice pursuant to RSA 225-A:25, IV. This appeal followed.

The question before us is whether the statutory phrase “shall be notified,” as it appears in RSA 225-A:25, IV, is satisfied upon dispatch of notice or upon receipt of notice. RSA 225-A:25, IV provides:

No action shall be maintained against any operator for injuries to any skier or passenger unless the same is commenced within 2 years from the time of injury provided, however, that as a condition precedent thereof the operator shall be notified by certified return receipt mail within 90 days of said injury. The venue of any action against an operator shall be in the county where the ski area is located and not otherwise.

RSA 225-A:25, IV (emphasis added).

“Statutory interpretation is a question of law, which we review de novo.” Appeal of Local Gov’t Ctr., 165 N.H. 790, 804 (2014). “In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole.” Id. “We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” Id. “We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” Id. “We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” Id. “Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole.” Id. “This enables us to better discern the legislature’s intent and to

interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.” *Id.* In the event that the statutory language is ambiguous, “we will resolve the ambiguity by determining the legislature’s intent in light of legislative history.” United States v. Howe, 167 N.H. 143, 148-49 (2014).

The plaintiffs ask that we adopt the common law “mailbox rule” in interpreting the notice provision of RSA 225-A:25, IV. The mailbox rule is one that is traditionally associated with contract law, and provides that acceptances are effective when they are no longer in the control of the sender. See Restatement (Second) of Contracts § 63 (1981). We have applied the doctrine in our contract jurisprudence. See Cushing v. Thomson, 118 N.H. 292, 294 (1978) (noting that a contract becomes complete when the acceptance has been mailed by the offeree, not when the acceptance is received by the offeror). The plaintiffs argue that we should apply the rule to RSA 225-A:25, IV notices. As a result, notice would become effective upon the date of mailing. Under the plaintiffs’ construction, therefore, notice was effectively given upon mailing, on May 3, 2012 — eighty-nine days after the date of the injury and within the statutory period.

The defendant, on the other hand, argues that the mailbox rule should not be read into the notice provision of RSA 225-A:25, IV. Instead, the defendant asks us to interpret the provision to require actual receipt of notice. Under the defendant’s construction, notice was given, at the earliest, upon its arrival at the Henniker post office on May 5, 2012 — ninety-one days after the date of the injury, and one day after the expiration of the statutory period.

We conclude that both the plaintiffs’ and the defendant’s proffered constructions are reasonable. Because RSA 225-A:25, IV’s language is subject to more than one reasonable interpretation, we would normally resolve the ambiguity by determining the legislature’s intent in light of legislative history. See Howe, 167 N.H. at 148-49 (quotation omitted). In this case, however, the legislative history is not helpful.

RSA 225-A:25, IV, originally codified as RSA 225-A:26, II, was enacted in 1965. See Laws 1965, 241:2. The provision was amended in 1978, increasing the notice period from within sixty days of injury to within ninety days of injury, among other changes. See Laws 1978, 13:5. In 2005, the provision was amended a final time in a manner not relevant to this appeal. See Laws 2005, 145:7. There are no committee reports, legislative debates, or other historical documents that shed light on the intentions of the legislature regarding the effectiveness of notice. As a result, a review of the legislative history is unavailing in resolving the ambiguity of RSA 225-A:25, IV.

Without legislative history to guide us, “[w]e construe statutes to address the evil or mischief that the legislature intended to correct or remedy.” State v.

Costella, 166 N.H. 705, 710 (2014) (quotation omitted). However, this case involves competing policy interests. On the one hand, RSA chapter 225-A was passed to “protect [New Hampshire’s] citizens and visitors” from hazards and the unsafe operation of ski areas and to allow those injured from such endangerments to seek compensation. RSA 225-A:1 (2011). On the other hand, the notice requirement allows ski operators to promptly investigate incidents; to evaluate the conditions of their premises and take any necessary remedial measures, and to adequately prepare to defend against claims. In the absence of legislative direction, we cannot determine the principal policy purpose of RSA 225-A:25, IV.

Nonetheless, a decision must be made. Cf. 1 J.M. Perillo, Corbin on Contracts, § 3.24, at 440-41 (rev. ed. 1993) (noting with respect to the mailbox rule, “One of the parties must carry the risk of loss and inconvenience. We need a definite and uniform rule as to this. We can choose either rule; but we must choose one. We can put the risk on either party, but we must not leave it in doubt.”). In accordance with the principles of uniformity and certainty, we hold that notice given pursuant to RSA 225-A:25, IV is effective upon mailing. In doing so, we narrowly apply the common law mailbox rule to RSA 225-A:25, IV, in consonance with holdings from other jurisdictions. See, e.g., Call v. Alexander Coal Co., 457 N.E.2d 356, 357 (Ohio Ct. App. 1983) (“Where a statute specifies that a person shall be notified by a particular means, such as certified or registered mail, notice is effective when deposited in the mails.”).

Our holding favors the party who would be harmed more by a lack of certainty. As in this case, actual receipt a day beyond the 90-day period creates minimal inconvenience for the ski operator, for it hardly affects the ski area’s ability to evaluate its premises and investigate the incident in a timely manner. In contrast, under the alternative construction of the statute, the party allegedly injured by the operator’s wrongdoing is denied the right to bring suit even when receipt is late due to circumstances beyond that party’s control. We elect not to allow such forfeiture. See Opinion of the Justices, 126 N.H. 554, 566-67 (1985).

Furthermore, “it is not to be presumed that the legislature would pass an act leading to an absurd result” Costella, 166 N.H. at 711 (quotation omitted). Were we to hold that notice under RSA 225-A:25 is effective upon actual receipt, delays caused by a carrier that postpones the delivery of notice, or loss or destruction of notice while in the mail system, would leave plaintiffs without recourse through no fault of their own — an absurd and unfair outcome which our holding avoids.

If the legislature disagrees with our interpretation of RSA 225-A:25, “it is free, subject to constitutional limitations, to amend the statute.” State v. Dor, 165 N.H. 198, 205-06 (2013).

Accordingly, having determined that the plaintiffs satisfied the notice provision of RSA 225-A:25, IV by mailing the notice on May 3, 2012, we need not address the plaintiffs' remaining arguments.

Reversed and remanded.

DALIANIS, C.J., and CONBOY, LYNN, and BASSETT, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Belknap
No. 2015-0477

MICHAEL NEWELL

v.

MARKEL CORPORATION & a.

Argued: January 13, 2016
Opinion Issued: June 28, 2016

Matthew J. Lahey, P.A., of Laconia (Matthew J. Lahey on the brief and orally), for the plaintiff.

Morrison Mahoney LLP, of Boston, Massachusetts (Kevin Truland on the brief and orally), for the defendants.

HICKS, J. The defendants, Markel Corporation, Markel Services, Inc. (Markel Services), and Essex Insurance Company (Essex), appeal an order of the Superior Court (O'Neill, J.) denying their motions for summary judgment and granting summary judgment to the plaintiff, Michael Newell, in this insurance coverage action. We affirm in part, reverse in part, and remand.

The following facts were recited in the trial court's order or appear in the record before us. On or about June 12, 2010, Newell was allegedly injured in a slip and fall accident at a property owned by Brames, Inc. (Brames) in Laconia.

Brames was insured under an Amusement Park General Liability Policy (the Policy) issued by Essex. Essex is a subsidiary of Markel Corporation and Markel Services is Markel Corporation's claims handling branch.

Newell's alleged injury occurred when he slipped on a wet bathroom floor on Brames's property during Motorcycle Week 2010. The floor had recently been washed by Ivy Banks (Banks) of I&L Cleaning Services. Banks had been cleaning the bathrooms at the Brames's property during the annual Motorcycle Week for several years up to and including 2010 under an arrangement that he had entered into with Brames's co-owner and treasurer, Robert Ames. Under this arrangement, Banks maintained the bathrooms on the Brames property during Motorcycle Week in exchange for tips he received from patrons using the bathrooms. Banks estimated that he would receive between \$75 and \$100 in tips per day during Motorcycle Week, and he neither sought nor received any other payment for his services. Banks offered similar services at other motorcycle shows and events throughout the country.

Newell filed two personal injury actions arising from his slip and fall. In the first (the Brames action), he sued Brames for negligence in leaving the floor wet without a warning. That action concluded with an out-of-court settlement.

In the second lawsuit (the Banks action), Newell sued Banks. The defendants received notice of the Banks action, but declined to defend Banks or intervene. Banks, although properly served, filed neither an appearance nor an answer and was defaulted. A default judgment was entered against Banks for \$300,000, the full amount of damages sought by Newell.

Newell then brought the instant action to recover the \$300,000 default judgment from the defendants. In his complaint, Newell alleged that "Banks was an insured under a liability insurance policy issued by Markel/Essex to Brames, and that Markel/Essex breached the insurance contract by failing to defend and indemnify Banks after receiving notice of the suit." Newell alleged that he was "a third party beneficiary under the contract."

In ruling on the parties' cross-motions for summary judgment, the court noted that the only issue before it was whether Banks was an insured under Brames's policy with Essex at the time of Newell's slip and fall. The court concluded: "[U]nder a reasonable interpretation of the relevant language in the Essex policy, Mr. Banks qualified as a 'volunteer worker.' Because more than one reasonable interpretation is possible, and one interpretation provides coverage, the Court construes this language against the defendants and in favor of the plaintiff." (Quotation, citation, and brackets omitted.)

On appeal, the defendants argue that the trial court erred in determining that the language of the Policy is ambiguous and that Banks was a "volunteer worker" under the Policy. In addition, Markel Corporation and Markel Services

claim that they are entitled to summary judgment because “they did not issue the policy in dispute and the plaintiff did not object to their motion for summary judgment.” Newell counters that Banks is a “volunteer worker” as defined under the Policy and that Essex is barred from denying the same under the doctrine of judicial estoppel.

In this appeal from the disposition of cross-motions for summary judgment, we employ the following standard of review:

We consider the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law. If our review of that evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, then we will affirm the grant of summary judgment. We review the trial court’s application of the law to the facts de novo.

Conant v. O’Meara, 167 N.H. 644, 648 (2015) (quotations, citations, and brackets omitted).

We first address the contention that summary judgment should have been granted to Markel Corporation and Markel Services. Those entities moved for summary judgment asserting that because Newell’s action was for breach of contract, and neither Markel Corporation nor Markel Services had a contractual relationship with Brames, the complaint failed to state a claim against them. Newell specifically noted in his own motion for summary judgment and objection to the summary judgment motion of defendant Essex that he did not object to Markel Corporation and Markel Services’s motion. Newell’s counsel at oral argument confirmed that this case concerns only Essex. Accordingly, we reverse the trial court’s summary judgment rulings with respect to Markel Corporation and Markel Services and remand for the entry of summary judgment in favor of those entities. The remainder of this opinion concerns only defendant Essex.

We now turn to the issue of coverage under the Policy. “The interpretation of insurance policy language is a question of law for this court to decide.” Great Am. Ins. Co. v. Christy, 164 N.H. 196, 200 (2012). “We construe the language of an insurance policy as would a reasonable person in the position of the insured based upon a more than casual reading of the policy as a whole.” Colony Ins. Co. v. Dover Indoor Climbing Gym, 158 N.H. 628, 630 (2009). “Policy terms are construed objectively, and where the terms of a policy are clear and unambiguous, we accord the language its natural and ordinary meaning.” Id. “If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be

construed against the insurer.” Great Am. Dining v. Philadelphia Indem. Ins. Co., 164 N.H. 612, 616 (2013) (quotation omitted).

The issue before us is whether Banks is an insured under the Policy as a volunteer worker. The Policy provides:

And your **Volunteer Workers** are **Insureds** only for activities or work they conduct or perform:

- at your direction; and
- within the scope of their duties for you.

(Emphasis omitted.) The Policy defines the term volunteer worker as follows:

Volunteer Worker means any person who:

- isn’t an employee or a leased temporary worker;
- donates his or her work; and
- isn’t paid a fee, salary or other compensation for that work.

(Emphasis omitted.)

Essex argues that “Banks fails to qualify as a ‘volunteer worker’” for three reasons: (1) he “did not donate his services”; (2) he “did receive compensation in the form of tips”; and (3) he “did not act at Brames’s direction.” We will address each in turn, beginning with the contention that Banks “did not ‘donate’ his work under the common meaning of that term.” Essex asserts that “[t]he common meaning of the term ‘donate’ is to present a gift or give property or money without consideration,” and argues that “Banks did not donate or bestow a gift of his services to Brames” because “Banks benefited from his use of” Brames’s property.

Newell counters that the term “donates” cannot mean “to give without compensation” when “the definition already includes ‘isn’t paid . . . other compensation’ in the conjunctive.” As Newell points out, “the usual rule[] of construction [is] that effect is to be given to all the clauses of a contract if it reasonably may be.” Shelby &c. Co. v. Lynch, 89 N.H. 510, 512 (1938).

Construing a similar definition of “volunteer worker,” the court in North Carolina Farm Bureau Mutual Insurance v. Burns, 767 S.E.2d 109 (N.C. Ct. App. 2014), concluded that “the term ‘donate’ must encompass more than working without receiving payment. Otherwise, the policy language that the work must be without ‘fee, salary or other compensation’ would be superfluous and the term ‘donate’ would have no effect.” N. Carolina Farm Bureau Mut. Ins., 767 S.E.2d at 112. The court then reasoned:

Having determined that the term “donate” as used in the policy must mean more than “without compensation,” and in order to give effect to every provision of the policy definitions, we consider the context in which the term is used: defining “volunteer worker.” We note that the common everyday meaning of the word “volunteer” is characterized by not only lack of compensation, but also choice and free will. Therefore, considering its common definitions, its use in the context of working as a volunteer, and the policy language as a whole, we conclude that to “donate” one’s work under the terms of the policy at issue necessitates the presence of choice and free will.

Id. at 112-13 (footnote omitted). Relying upon North Carolina Farm Bureau Mutual Insurance, Newell contends that “[a] reasonable interpretation of ‘donates’ in the context of this policy is to act by choice, free will and voluntarily, which Banks did.”

We conclude that the foregoing arguments demonstrate a “reasonable disagreement between [the] contracting parties lead[ing] to at least two interpretations of the [Policy’s] language,” Colony Ins. Co., 158 N.H. at 630 (quotation omitted). Although Essex’s interpretation employs the more common meaning of “donates,” Newell points out nonnegligible flaws with that interpretation and posits an alternative that has garnered acceptance by at least one court. Accordingly, we conclude that the term “donates” is ambiguous, see id., and we construe it in favor of coverage. See High Country Assocs. v. N.H. Ins. Co., 139 N.H. 39, 44 (1994).

Essex next argues that Banks does not meet the definition of “volunteer worker” because the tips he received from patrons “amount to compensation under the ordinary meaning of that term.” Essex cites cases and statutes that equate tips with compensation in other contexts. See, e.g., Marden v. State, 122 N.H. 751, 753-54 (1982) (construing the term wages in unemployment compensation statute to include tips received by waitress).

Newell, on the other hand, citing both the dictionary definition and case law differentiating compensation and gratuities in other contexts, contends that “[c]ompensation is for something that is owed, and not a gratuity or gift.” Newell also invokes the doctrines of eiusdem generis and noscitur a sociis, as well as the presence of the word “other” before “compensation” in the definition of “volunteer worker,” to argue that compensation must be construed to mean something like “fee” and “salary.” Newell also notes that “[t]he policy language is unclear as to whether [the] ‘fee, salary or other compensation’ applies just to [payments by] the policy holder Brames or includes receipts from third parties.” Newell points out that many insurance companies define “volunteer worker” with additional language specifying that the volunteer worker may not receive compensation from either the policy holder or anyone else. See, e.g., Dry v.

United Fire & Cas. Co., Inc., 420 S.W.3d 593, 594-95 (Mo. Ct. App. 2013) (quoting policy defining “volunteer worker,” in pertinent part, to be “a person who . . . is not paid a fee, salary or other compensation by you or anyone else for their work performed for you”). He argues that “[t]he practice of adding this language is so wide spread that it is reasonable to infer that Essex intended by omitting it that only fee, salary or other compensation by Essex itself would bar coverage.”

We again conclude that although Essex has put forth a reasonable interpretation of the term “compensation,” Newell has identified an ambiguity by articulating another reasonable construction. See Colony Ins. Co., 158 N.H. at 630. Accordingly, we will construe that term in favor of coverage. See High Country Assocs., 139 N.H. at 44.

Finally, Essex contends that Banks does not meet the coverage requirement of having acted at Brames’s direction. Citing the dictionary definition of “direction,” Essex argues that “in the context of the present case, the term ‘at your direction’ connotes supervision or guidance of an action or operation, or an order or command.” Essex then argues:

Here, the undisputed facts demonstrate that Banks did not conduct or perform work at Brames’s direction. Ames testified that when Banks first came to provide services at the [property], he did not show him what to do or tell him what to do. He showed Banks where the bathrooms were, but did not point [out] the area he wanted him to clean. When asked how I&L Cleaning Services would know what they are supposed to do with the two places where there are portable toilets, Ames testified that “They’re bathroom cleaning people. My assumption was that they knew what to do, that I didn’t have to tell them anything.”

(Citation omitted.)

Ames’s testimony suggests that the degree of supervision of Banks’s work — or lack thereof — by Brames was not a consequence of their work arrangement but of the nature of the work itself. Cf. Borello & Sons v. Dept. of Indus. Rel., 769 P.2d 399, 408 (Cal. 1989) (noting, in finding sharefarmers to be employees for purposes of workers’ compensation law that “[i]t is the simplicity of the work, not the harvesters’ superior expertise, which makes detailed supervision and discipline unnecessary”). As Newell contends, Banks’s services were “not complex” and did not constitute “work that required any supervision or instruction.” Newell therefore argues that, in this context, the policy term “at your direction” means “with the knowledge and approval of Brames.”

We agree with Newell that, at least in the context of unskilled labor, the phrase “at your direction” can reasonably be read to mean something other than “supervision or guidance” as urged by Essex. The provision at issue conditions coverage on the worker conducting or performing the activities “at [the policyholder’s] direction” and “within the scope of their duties for [the policyholder].” Taken together, these two conditions foreclose action taken on the worker’s own initiative and unrelated to the agreed-upon task — and certainly foreclose any “frolic of his own.” Cf., e.g., Perlstein v. American Exp. Co., 59 N.E. 194, 195 (Mass. 1901) (noting that the question for the jury in determining whether defendant was liable for negligence of its employee driver was “not whether the defendant owned the team, but whether the person who was driving it negligently was then acting for the defendant in doing the work which he was directed to do” or “was off ‘on a frolic of his own’”); Shakra v. Benedictine Sisters, 131 N.H. 417, 422 (1989) (concluding sufficient evidence supported trial court’s finding that former president of defunct corporate defendant “entered into [a purchase and sale] agreement while ‘on a frolic of her own,’ without . . . authorization or approval”). In this sense, “at your direction” could reasonably mean “authorized by you” or “instructed by you to do.” Employing that interpretation here, Banks would not be acting at Brames’s direction if, for instance, he unilaterally decided to tend bar at Brames’s establishment, but would be acting at Brames’s direction in carrying out the very task Brames engaged him to do — clean the bathrooms.

We conclude that, at the very least, the phrase “at your direction” is susceptible of two reasonable interpretations under the circumstances presented here. See Colony Ins. Co., 158 N.H. at 630. The phrase is therefore ambiguous and will be construed in favor of coverage. See High Country Assocs., 139 N.H. at 44. Having determined that all of the disputed provisions must be construed in favor of coverage, we conclude that the trial court did not err in ruling that Banks was a “volunteer worker” under the Policy. Given this conclusion, we need not address Newell’s judicial estoppel argument.

Affirmed in part; reversed
in part; and remanded.

DALIANIS, C.J., and CONBOY, LYNN, and BASSETT, JJ., concurred.