STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2018-0060

Pro Done, Inc.,
Plaintiff,

v.

Teresa Basham, Timothy John Hooper, Terrence Lee Hooper, John C. Ransmeier, Trustee of the Paul R. Hooper 1997 Trust, and Teresa Basham as Non-Independent Trustee of the Paul R. Hooper 1998 GST Exempt Trust f/b/o Teresa Basham,
Defendants.

Rule 7 Mandatory Appeal of Order of Merrimack County Superior Court

BRIEF OF SIBLING DEFENDANTS
Teresa Basham, Timothy John Hooper, Terrence Lee Hooper, and Teresa Basham as Non-Independent Trustee of the Paul R. Hooper 1998 GST Exempt Trust f/b/o Teresa Basham

William E. Christie, NH Bar No. 11255
Timothy J. McLaughlin, NH Bar No. 19570
Alexander W. Campbell, NH Bar No. 268958
SHAHEEN & GORDON, P.A.
107 Storrs Street, P.O. Box 2703
Concord, NH 03109-2703
(603) 225-7262

To Be Argued By: Timothy J. McLaughlin

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I. CLARIFICATION OF QUESTIONS PRESENTED FOR REVIEW

The sole question legitimately presented for review is whether the trial court correctly dismissed Plaintiff's lawsuit for failure to state a claim on the grounds that a covenant not to sue contained within the Release in question did not provide for consequential damages or any other form of relief to the non-breaching party in the event of an alleged future breach of the Release. The trial court correctly held that the Release provides an affirmative defense -- and nothing more. The Release and its legal effect, which is the sole subject of this appeal, may be read in its brief entirety at pages 190-192 of Plaintiff's Appendix ("Pl's App.").

Additional deficiencies in Plaintiff's statement of the questions presented for review are as follows.

First, Plaintiff's references to the "American Rule" in its introductory paragraph, in Question 4 and throughout its brief are misplaced. The trial court did not reference the American Rule in its dismissal. The primary cases on which the trial court relied do not reference the American Rule. The trial court's decision was not based in any part on the application of the American Rule. Plaintiff's effort to recast the trial court's decision as a referendum on the American Rule should not confuse the Court's analysis of the very simple issue at hand.

Second, and importantly, Plaintiff failed to preserve Question 4 for review. The pages of the Appendix that Plaintiff cites do not include any discussion of Defendants' alleged "obvious" or "bad faith" breach. *See* Pl's App. at 262-264.

II. STATEMENT OF THE CASE AND FACTS

Plaintiff's state court action, from which this appeal was taken, is a collateral attack on a pending federal court action. Sibling Defendants' federal court action against Joseph Willey, Janet Willey and Curtis Nuckols in the United States District Court for the District of New

Hampshire ("Federal Action") includes a claim of intentional misrepresentation against Mr. Willey for his failure to disclose to Sibling Defendants the prospects for a sale of Pro-Cut Licensing Company, LLC, Pro-Cut International Limited, LLC, and Brake Solutions, Inc. (collectively, "Pro-Cut") to Snap-on, Inc. ("Snap-on"). Pl's App. at 58-59. In the Federal Action, Sibling Defendants seek, in part, to set aside the Releases as the product of Mr. Willey's fraud, *id.*, and the defendants in the Federal Action have counterclaimed based on the very same incorrect legal theory at issue here -- that the Releases give rise to a cause of action. Pl's App. at 278-279. Because this Court will resolve the legal question of whether the Releases give rise to a cause of action, and due to the relevance to that determination to the counterclaim based on diversity jurisdiction in the Federal Action, the District Court has now stayed the Federal Action pending this Court's resolution of the legal question regarding the effect of the Release. Order Staying Case, *Hooper, et al., v. Willey, et al.*, No. 16-cv-44-JL (Laplante, J.) (D.N.H. May 16, 2018).

Plaintiff states in its brief: "The trial court granted Plaintiff's motion to amend and invited the parties to supplement their pleadings. While Ransmeier supplemented his pleadings and moved to dismiss the First Amended Complaint, the Sibling Defendants did not." Pl's Brief at 6 (citations to appendix omitted). This is an inaccurate depiction of the record. The trial court's order granting Plaintiff's motion to amend stated, in relevant part:

> [T]he prudent course of action is to grant Plaintiff's motion. In an effort to expedite the resolution of these issues, the Court shall not require the Defendants to refile their respective motions to dismiss but will, instead, construe the Defendants' arguments as relating to the amended complaint. However, should the Defendants wish to file supplemental pleadings they are given leave to do so within 20 days . . . .

App. 429-430 (emphasis added). The Sibling Defendants chose to stand on their prior motion to dismiss rather than submit additional briefing. Any suggestion the Sibling Defendants have not properly moved to dismiss the Complaint is not supported by the record below.

Sibling Defendants object generally to the disparaging nature of Plaintiff's recitation of the trial court's actions on page 7 and 8 of its Brief. As is explained further below, the trial court's actions in this matter were at all times proper and correct.

III. SUMMARY OF THE ARGUMENT

Plaintiff's First Amended Complaint ("FAC") includes a total of three claims – breach of contract, tortious interference with contractual relationships, and civil conspiracy – which are all based on an alleged breach of Releases[1] entered into by Sibling Defendants that are identical for all purposes relevant to this appeal. The trial court – in a clear and straight forward order – held that the Releases provided only affirmative defenses and did not give rise to any action for breach of contract. Because all of Plaintiff's claims relied on the existence of a valid claim for breach of contract, the trial court dismissed the entire FAC.

The trial court correctly found that the covenant not to sue language in the Releases does not contemplate an award of consequential damages to the non-breaching party, and therefore the covenant not to sue does not give rise to a claim for breach of contract but is instead construed merely as a release. The trial court's decision was based on sound case law and an historical analysis of the treatment of release and covenant not to sue language in this country. Rather than attack the central holding of the trial court's decision, Plaintiff instead makes various collateral attacks, most of which were not even presented below.

[1] Unless otherwise defined herein, capitalized terms used herein are intended to have the definitions assigned to them in Plaintiff's Brief.

First, Plaintiff argues that the trial court's decision denigrates traditional principles of contract law in favor of the American Rule, which Plaintiff spends multiple pages of its brief disparaging. Plaintiff's argument seemingly comes out of nowhere, given that the trial court's decision is not based in any sense on the application of the American Rule. In fact, the trial court does not once mention the American Rule in its decision.

Next, Plaintiff argues that in dismissing its entire action the trial court ignored Plaintiff's request for injunctive relief. Plaintiff ignores the distinction between a cause of action and a remedy, and conflates the trial court's determination that Plaintiff's FAC lacked any cognizable cause of action, on the one hand, with a determination merely that monetary damages were unavailable as a remedy for the breach of contract action, on the other. The trial court's determination that Plaintiff failed to sufficiently plead a cause of action left Plaintiff without any claim on which it could prevail, which is an essential requirement for obtaining the permanent injunction that Plaintiff sought. Accordingly, Plaintiff's request for injunctive relief properly did not factor into the trial court's decision that Plaintiff had not stated a claim.

Finally, Plaintiff argues that the trial court engaged in improper fact-finding by making a determination about the intent of the parties to the Releases. This argument ignores the plain language of the trial court's decision, which makes clear that the trial court's determination was based solely upon its reading of the plain language of the Releases, as pled in Plaintiff's FAC.

The Court must affirm the trial court's dismissal of Plaintiff's action with prejudice.

IV. ARGUMENT

A. The trial court correctly held that the Releases provide only affirmative defenses and do not give rise to independent claims for breach of contract.

The Releases state in relevant part:

> [T]he Seller hereby fully, finally and forever releases, discharges, quit claims and covenants not to sue and otherwise agrees not to enforce any claim, cause of action, right, title or interest (collectively, the "Claims") against, the Company, its respective officers, directors, managers, members, employees, agents, and representatives, as well as their successors and assigns ("Released Persons") of from, and with respect to any and all claims, counterclaims, covenants, agreements, obligations, liabilities, actions or demands of any kind or character in connection with any prior ownership interest in the Company by the seller, including but not limited to any claim based on any future transaction that the Company or any unit holder may enter into in relation to the equity of the Company.

Pl's App. at 190-191 (emphasis added). Notably, the Releases do not state that a suit brought in violation will give rise to a claim for breach of contract, nor do they contain any provisions for consequential or other damages, attorney's fees, litigation expenses or any other fee shifting provisions, nor does the Release provide any form of affirmative relief. *Id.*

The New Hampshire Supreme Court has not ruled on whether a plaintiff may maintain a breach of contract action based upon such a Release. However, the trial court, relying on the historical treatment of releases and covenants not to sue in this country, properly concluded that the Releases at issue do not give rise to a breach of contract claim because they fail to include any language contemplating any offensive properties including an award of consequential damages to the non-breaching party. Plaintiff's Addendum[2] ("Pl's Add.") at 10. As the trial court noted, the treatment of releases and covenants not to sue has evolved over time, resulting in the requirement that for covenant not to sue to give rise to a claim for breach, it must contain language indicating an intent that a non-breaching party may recover consequential damages. *Id.* at 7-9.

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[2] Initially, Plaintiff improperly included the trial court's order as part of its Appendix. After being notified of this mistake by the Court, Plaintiff submitted the trial court's order. Although it was not made clear in the cover letter accompanying Plaintiff's late submission, Defendant's will construe the trial court's order as an Addendum to Plaintiff's brief. The Addendum therefore consists of ten pages, which includes, at page 1, the clerk's notice of decision.

1. The release provisions within the Releases do not give rise to an independent cause of action for breach of contract.

The trial court began by observing that a release operates by "tak[ing] effect immediately, thereby instantaneously discharging any obligation created by the release in the party relinquishing a claim." Pl's Add. at 7. Therefore, because "[t]he release takes effect on delivery . . . and, subject to the occurrence of any condition, discharges the duty," Restatement (Second) of Contracts § 284, "[the] release cannot be breached because complete performance is tendered at the moment [the] release is effectuated." *Kaye v. Wilson-Gaskins*, 135 A.3d 892 (Md. App. 2016); Pl's Add. at 7.

This interpretation of a release is confirmed by the black letter law that "[a] release is an affirmative defense; it does not supply a defendant with an independent claim for breach of contract." *Bukuras v. Mueller Grp., LLC*, 592 F.3d 255, 266 (1st Cir. 2010). *See also, Boudinot v. Shrader*, 2013 WL 1481226 *8 (S.D.N.Y. April 10, 2013) (analyzing Delaware law and applying "the view of the First Circuit" in *Bukuras* – that a release is an affirmative defense, which does not give rise to a cause of action for breach of contract); *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 797 (7th Cir. 2005) ("The Release does not result in breach upon the filing of a suit. Instead, it provides [defendant] with an effective affirmative defense should a claim be raised."). "Waiver and releases are affirmative defenses on which the [defendant] bears the burden." *Melanson v. Browning-Ferris Indus., Inc.*, 281 F.3d 272, 276 (1st Cir. 2002) (citing Fed. R. Civ. P. 8(c)).

While the release provisions in the Releases could potentially provide an affirmative defense for use by Plaintiff in the event that it was sued by Sibling Defendants (it wasn't), they do not give rise to an independent cause of action for breach of contract.

2. The covenant not to sue extracts contained in the Releases do not give rise to an independent cause of action for breach of contract because they do not contemplate recovery of consequential damages by or any other form of relief for the non-breaching party in the event of a suit brought in breach.

Covenants not to sue were created as a remedy to the problems that arose from using releases in cases involving multiple joint obligors. As stated in *Corbin on Contracts* and cited by the trial court:

> The device of a contract not to sue was adopted to escape the technical rule, applicable to joint obligations, that the discharge of one joint obligor necessarily discharges all the others. Not wishing to give effect to this judicially created unreasonable rule, the common law courts held that a release of one joint obligor, expressly reserving all rights against the other joint obligors, would be interpreted as a mere contract not to sue the one rather than a release.

13 *Corbin on Contracts* § 67.14 at 143 (2003) (underline added). Thus, the covenant not to sue, at least initially, served a very particular purpose that is generally not applicable to this case. *See* Pl's Add. at 7-9.

A key distinction between the release and the covenant not to sue is that "a release is an immediate discharge, and performance is complete at the time the release is effectuated" however "a covenant not to sue . . . is a promise for the maker to undertake the future performance of forbearance from litigation." *Kaye*, 135 A.3d at 904. However, "[a]t early common law, a covenant not to sue, unlike a release, was no defense to a suit brought in breach of the covenant" and "[t]he covenantee's only remedy was a suit for damages in which he could recover any amount that had been recovered against him in the breaching action."[3] *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 586 F.Supp. 1286, 1287 (S.D.N.Y. 1984). In other words, while a covenant not to sue was helpful in the event of joint obligors, it did not provide an affirmative

[3] Under this interpretation, Pro Done would be unable to recover any damages in its suit for breach of the covenant not to sue, because no amount has been recovered against it.

defense to a suit brought in breach, but necessarily required that the non-breaching party bring a second suit to recover damages. Pl's Add. at 8.

In order to avoid this circuity of action, the common law courts began to treat covenants not to sue as releases. 13 *Corbin on Contracts* § 67.14 at 145 ("Historically, to refuse to give a contract not to sue effect as a discharge resulted in an unnecessary and highly undesirable circuity of action [and] [t]o avoid such a result, the contract not to sue operated as a release."). This is now the approach taken by modern courts when confronted with a covenant not to sue and no joint obligor(s). *Id.* at 144 ("In spite of its promissory form, a contract never to sue indicates an intention to discharge the obligor in any case not involving a joint obligor, and the parties are held to have consummated a discharge because of the legal effect of their intent."); Pl's Add. at 8-9.

As a result of this evolution over time, courts now require that in order to give rise to an action for breach, a covenant not to sue needs to include language evidencing an intent that a breach of the covenant would entitle the non-breaching party to recover consequential damages:

> [I]n order to avoid circuity of action, when parties agree that an obligee will never pursue a claim, we will give that language the effect of a discharge unless the parties clearly express that they intend for the obligor to recover consequential damages as a result of the obligee's failure to honor that discharge in their agreement.

Kaye, 135 A.3d at 907. *See also Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966) ("The question, in other words, is to be solved not by invoking an abstract rule of law but by seeking to determine what the parties fairly contemplated, or would have had they addressed their minds to the problem."); Pl's Add. at 9.

In its decision, the trial court relied on the reasoning of the Court of Special Appeals of Maryland in *Kaye v. Wilson-Gaskins*, 135 A.3d 892 (Md. App. 2016). *See* Pl's Add. at 7-9. In *Kaye*, the court held that a release contained in a settlement agreement entered into by the parties

did not give rise to a claim for breach of contract upon one party's suit against another because there was no "clear expression" in the release that the breaching party "would be liable for the consequential damages resulting from the breach." 135 A.3d at 908. That reasoning is entirely consistent with the issue presented in this appeal because the Release does not include a clear expression (or any expression) that a breaching party would be liable for consequential damages.

In an effort to distinguish *Kaye*, Plaintiff cites a subsequent unreported case from the U.S. District Court for the District of Maryland, *Cook v. SCI Maryland Funeral Services Inc.*, Not Reported in F.Supp.3d, 2016 WL 4536291 (D.Md 2016). However, contrary to Plaintiff's arguments, even the reasoning in their lone case *Cook* is consistent with the trial court's order. *Cook* does not alter or dispense with the trial court's reasoning or the *Kaye* requirement that the parties must expressly intend that a breach of the release and/or covenant not to sue entitles the non-breaching party to maintain a claim for breach of contract. *See Kaye*, 135 A.3d at 907 ("[W]hen parties agree that an obligee will never pursue a claim, we will give that language the effect of a discharge unless the parties clearly express that they intend for the obligor to recover consequential damages as a result of the obligee's failure to honor that discharge in their agreement").

In *Cook*, the District Court recognized, just as *Kaye* held, that "there could be situations where the settling party bargained for both a release and a covenant not to sue, with the breach of the latter entitling the non-breaching party to contract damages including consequential damages." *Cook*, 2016 WL 4536291 *3 (underline added). Under *Cook*, the covenant not to sue still must indicate that the parties intended that the non-breaching party could recover consequential damages. That is not the case here. While the Release does contain the words "covenant not to sue," the trial court cogently explained historically how that came to be, why

that is part and parcel of the Release, and explained the differing effects where a Release such as the one before the Court does not provide for an award of consequential damages for its breach. Pl's Add. at 7-9. Contrary to Plaintiff's claim that the trial court's decision ignored the covenant not to sue language included in the Releases, the trial court clearly explained that the inclusion of such language – when unaccompanied by language evidencing an intent to award consequential damages – is construed to operate as a release, providing an affirmative defense but not a claim for breach:

> [E]ven assuming the Releases were intended to operate as covenants not to sue, because the Releases are devoid of any suggestion that the parties bargained for consequential damages, the Court finds the Releases – as their names suggests – operated as releases and their performance was effectively completed upon consummation of the agreements. As such, a breach of the Releases cannot be grounds for a breach of contract action.

Pl's Add. at 10.[4]

Plaintiff's citations to New Hampshire Supreme Court decisions on contractual interpretation are inapposite, since the trial court did not "render [the terms of the Releases] a superfluous or a nullity," but rather interpreted those terms to operate as a release in accordance with the law. Similarly, Plaintiff's emphasis on its claimed entitlement to expectation damages ignores the law, which clearly requires an affirmative indication that the parties intended for consequential damages to be recoverable before even a claim for breach of covenant not to sue may be maintained, let alone any recovery of damages. *See Kaye*, 135 A.3d at 908.

Accordingly, the trial court properly dismissed Plaintiff's claim because the Release is devoid of any suggestion that the parties bargained for consequential damages.

B. Plaintiff's discussion of the American Rule is irrelevant because the trial court's dismissal had nothing to do with an award of attorneys' fees.

[4] As the court noted in *Artvale*, 363 F.2d at 1008, "certainly it is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages."

Plaintiff foreshadows its inapposite discussion of the "American Rule" in its "Questions Presented," which mischaracterizes the trial court's dismissal. Pl's Brief at 1. Plaintiff begins by inaccurately framing its appeal as "a conflict between, on the one hand, traditional contract law doctrines . . . and, on the other hand, the so-called 'American rule' and its questionable historical roots." *Id.* Plaintiff then claims that the trial court "grant[ed] a motion to dismiss Plaintiff's breach of contract claim by invoking the so-called 'American Rule,'" *id.*, which is patently incorrect, because nowhere in its decision dismissing Plaintiff's claim did the trial court ever once invoke the American Rule. *See* Pl's Add.

Plaintiff spends roughly three pages discussing the historical application of the American Rule in this and other jurisdictions, despite the very clear and obvious fact that the trial court's decision was not based on and did not reference the American Rule. Pl's Brief at 16-18. Additionally, the case on which the trial court primarily relied in its decision – *Kaye v. Wilson-Gaskins*, 135 A.3d 892 (Md. App. 2016) – does not mention the American Rule or discuss attorneys' fees in any significance; the court's discussion centered on whether the release and implied covenant not to sue in that case permitted a breach of contract action. Furthermore, even the case on which Plaintiff rests its entire chief argument – *Cook v. SCI Maryland Funeral Services Inc.*, Not Reported in F.Supp.3d, 2016 WL 4536291 (D.Md 2016) – fails to include any discussion of the American Rule. Ultimately, Plaintiff's dissatisfaction with the American Rule is irrelevant to this appeal. Plaintiff's insistence on attacking the American Rule as un-American is undeserving of this Court's attention. *Id.* For a doctrine so minor and easily ignored, as Plaintiff claims, it is enough of a core tenant of United States jurisprudence to have been coined the "American Rule."

Despite Plaintiff's protestations to the contrary, "New Hampshire generally follows the American Rule; that is, absent statutorily or judicially created exceptions, parties pay their own attorney's fees." *Shelton v. Tamposi*, 164 N.H. 490, 501 (2013) (citation omitted). *See also Halifax-Am. Energy Co., LLC v. Provider Power, LLC*, 180 A.3d 268, 284 (N.H. 2018) ("A prevailing party may be awarded attorney's fees when recovery of fees is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees."); *Fat Bullies Farm, LLC v. Devenport*, 170 N.H. 17, 29 (2017) (holding that no bad faith existed to justify award of attorneys' fees); *Harkeem v. Adams*, 117 N.H. 687, 691 (1977) (holding for the first time that "[w]here an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate.").

The Court need not entertain any argument from Plaintiff that ignores its long-standing position on the award of attorneys' fees. More importantly, however, the trial court's decision did not reference or rely on the American Rule. Accordingly, Plaintiff's argument on the American Rule is inapposite.

C. The trial court did not err in dismissing the FAC despite Plaintiff's request for equitable relief because, in dismissing its claim for damages, the Court dismissed the cause of action upon which equitable relief would be based.

Plaintiff's only request for equitable relief is at Paragraph F of the prayer for relief that concludes its FAC. Pl's App. at 19-20. Despite seeking a permanent injunction in this paragraph, Plaintiff fails to include any allegations elsewhere in its FAC to support the grant of a permanent injunction.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *ATV Watch v. N.H. Dep't of Resources & Econ. Dev.*, 155 N.H. 434, 437 (2007) (quotation omitted). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law[,] and the party seeking an injunction is likely to succeed on the merits." *Id.* (quotation, ellipses, and brackets omitted; underline added).

Injunctive relief is a remedy, it is not an independent basis for liability. Thus, the issuance of a permanent injunction necessarily requires: 1) an underlying claim; and 2) the party's success on that claim. Here, Plaintiff's request for injunctive relief is presumably made as an alternative to its request for monetary damages, since it is a prerequisite for the issuance of an injunction that "there [be] no adequate remedy at law." *ATV Watch*, 155 N.H. at 437. In arguing that the trial court improperly dismissed or ignored its request for a permanent injunction, Plaintiff conflates the trial court's determination that Plaintiff failed to plead a valid cause of action, on the one hand, with a determination that Plaintiff is not entitled to monetary damages, on the other.

The trial court's dismissal was not based on its determination that monetary damages were unavailable as a remedy for Plaintiff's action. Instead, as explained above, the trial court dismissed outright Plaintiff's underlying action because the covenant not to sue extract in the Releases that formed the purported basis of Plaintiff's breach of contract claim did not provide for consequential damages in the event of a breach, which is a prerequisite for any breach of contract action based on a breach of a covenant not to sue. *See Kaye*, 135 A.3d at 908. Because the trial court dismissed the underlying claim for which Plaintiff sought either damages or injunctive relief, Plaintiff is entitled to neither. In other words, because Plaintiff is unable to

show success on the merits of its breach of contract claim, it is not entitled to injunctive relief on that claim. *See ATV Watch*, 155 N.H. at 437.

Plaintiff cites *City of Keene v. Cleaveland*, 167 N.H. 731 (2015) for the proposition that "[a] court thus erred when dismissing a request for equitable relief without a separate consideration of the factual circumstances and basis for the request for injunctive relief." Pl's Brief at 19. In *City of Keene*, the plaintiff City brought claims – including tortious interference with contractual relations – against certain individuals who were protesting parking meter enforcement. 167 N.H. at 733. The City also sought preliminary and permanent injunctive relief. *Id.* The trial court dismissed the City's underlying claims and its request for injunctive relief. *Id.* In vacating the dismissal of the requests for injunctive relief, the Supreme Court found that the "trial court did not consider the factual circumstances of the case prior to making its determination as to whether injunctive relief was warranted." *Id.* at 742. The Court held that, despite the dismissal of the underlying claim for tortious interference with contractual relations, the City had sufficiently pled that the defendants were engaged in conduct that endangered its "significant governmental interests" in "providing a safe workplace for its employees." *Id.* at 743. The Court held that the trial court improperly dismissed the request for injunctive relief without analyzing the additional factual allegations that may provide support for that relief. *Id.* at 744.

This case is highly distinguishable from *City of Keene*. In that case, the plaintiff had pled sufficient allegations separate from its underlying claim of tortious interference with contractual relations that could independently support a request for injunctive relief. *Id.* at 742-743. Here, Plaintiff's claim for injunctive relief is entirely dependent on its underlying claims of breach of contract. Plaintiff seeks injunctive relief solely as a remedy to stop the alleged breach, and

therefore the requested injunctive relief is dependent entirely on the existence of the underlying claim. Accordingly, the trial court's dismissal of the underlying claims of breach of contract and tortious interference was fatal to any claim for injunctive relief.

D. The trial court did not conduct any improper fact-finding or credibility determinations in dismissing Plaintiff's case.

Plaintiff's argument that the trial court made fact-finding and credibility determinations in its order rests on Plaintiff's inaccurate recollection of its own pleading. Plaintiff claims the trial court improperly found that the parties to the Releases did not intend for a breach of the releases to give rise to an award of consequential damages to the non-breaching party. Pl's App. at 20-23. This is a mischaracterization of the trial court's decision. The trial court properly found that there was "no clear indication in the Releases that the parties contemplate consequential damages to be award[ed] as a result of their breach. . . . [B]ecause the Releases are devoid of any suggestion that the parties bargained for consequential damages, the Court finds the Releases . . . operated as releases . . . ." Pl's Add. at 10 (emphasis added). The language of the decision makes clear that the trial court found only that the language in the Releases was devoid of any contemplation of consequential damages. Interpretation of the unambiguous language of the Releases – as alleged by Plaintiff in its FAC, Pl's App. at 6 – is not improper at the motion to dismiss stage because the Releases form the entire basis of Plaintiff's claims.

New Hampshire courts "give an agreement the meaning intended by the parties when they wrote it." *General Linen Services, Inc. v. Franconia Inv. Associates, L.P.*, 150 N.H. 595, 597 (2004) (citation omitted). "When interpreting a written agreement, [courts] give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole." *In re State*, 147

N.H. 426, 429 (2002) (citation omitted). "Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used." *Id.* (emphasis added).

As alleged in the FAC, the language of the Releases is clear. *See* Pl's App. at 1-21. The trial court properly determined the parties' intent "from the plain meaning of the language used" in the Releases. *In re State*, 147 N.H. at 429. Based only on the unambiguous language of the Releases, the trial court properly found that there was "no clear indication in the Releases that the parties contemplated consequential damages to be awarded as a result of their breach." Pl's Add. at 10.

As explained above, Plaintiff may only maintain an action for breach of a covenant not to sue if the covenant not to sue "clear[ly] express[es]" that the breaching party "would be liable for the consequential damages resulting from the breach." *Kaye*, 135 A.3d at 908. The trial court's interpretation of the language of the Releases, as alleged by Plaintiff in the FAC, is proper at the motion to dismiss stage in order to determine if Plaintiff has stated a claim for breach of contract. It is obvious from a reading of the trial court's order that the trial court properly assessed the allegations in the FAC and found that Plaintiff had failed to sufficiently allege either: 1) that the Releases contemplated that consequential damages shall be awarded in the event of a breach; or 2) that the language of the Releases is ambiguous as to whether consequential damages shall be awarded in the event of a breach. Based on the controlling Releases, the FAC failed to state a claim for breach of a covenant not to sue.

V. CONCLUSION

For the foregoing reasons, Sibling Defendants respectfully request that this Court affirm the trial court's decisions dismissing this case.

VI. REQUEST FOR ORAL ARGUMENT

Sibling Defendants request oral argument of not less than fifteen minutes. Timothy J. McLaughlin will argue for the Sibling Defendants.

Respectfully submitted,

TERRENCE LEE HOOPER,
TIMOTHY JOHN HOOPER
TERESA BASHAM, and
TERESA BASHAM, as Non-Independent
Trustee of the P.R. Hooper 1998 GST
Exempt Trust f/b/o Teresa Basham

By their Attorneys,

SHAHEEN & GORDON, P.A.

Date: June 29, 2018

William E. Christie (Bar #11255)
Timothy J. McLaughlin (Bar # 19570)
Alexander W. Campbell (Bar # 268958)
P.O. Box 2703/107 Storrs Street
Concord, NH 03302
(603) 225-7262
tmclaughlin@shaheengordon.com
wchristie@shaheengordon.com
acampbell@shaheengordon.com

CERTIFICATE OF SERVICE

I, William E. Christie, certify that on this date service of the foregoing document was made upon counsel for all parties via electronic mail and First Class mail.

William E. Christie