STATE OF NEW HAMPSHIRE
SUPREME COURT

PRO DONE, INC.

v.

TERESA BASHAM, TIMOTHY JOHN HOOPER, TERRENCE LEE HOOPER, JOHN C. RANSMEIER, TRUSTEE OF PAUL R. HOOPER 1997 TRUST AND TERESA BASHAM AS NON-INDEPENDENT TRUSTEE OF THE PAUL R. HOOPER 1998 GST EXEMPT TRUST

Case No. 2018-0060

APPEAL FROM DECISION ON THE MERITS
MERRIMACK COUNTY SUPERIOR COURT PURSUANT TO NEW HAMPSHIRE SUPREME COURT RULE 7

BRIEF FOR THE PLAINTIFF-APPELLANT PRO DONE, INC.

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QUESTIONS PRESENTED

In this appeal, this Court is called upon to resolve a conflict between, on the one hand, traditional contract law doctrines rooted both in our common law and in the state constitution and, on the other hand, the so-called "American rule" and its questionable historical roots.

Accordingly, this appeal raises the following questions:

1) Did the trial court err by ruling that Plaintiff could not recover the traditional measure of damages in a breach of contract lawsuit—the expectation measure—where Plaintiff alleged that Defendants breached "covenant[s] not to sue" and "agree[ments] not to enforce any claim" or "cause of action" connected to the subject matter of a lawsuit Defendants filed in federal court? Preserved at App. 262.

2) Did the trial court violate the traditional rule that clauses in a contract must be construed so as not to render any clause superfluous or a nullity, by concluding, in error, that "covenant[s] not to sue" and "agree[ments] not to enforce any claim" or "cause of action" have no meaning separate and apart from separate contract language promising "release[s]"? Preserved at App. 589.

3) Did the trial court err in dismissing Plaintiff's complaint on the ground that the underlying cause of action did not permit the recovery of damages, where Plaintiff also sought equitable relief in the form of an injunction, a form of relief the trial court failed to adjudicate? Preserved at App. 592.

4) Did the trial court err in granting a motion to dismiss Plaintiff's breach of contract claim by invoking the so-called "American Rule" where Plaintiff alleged that Defendants breached the relevant contract provisions in bad faith and where their breaches were obvious? Preserved at App. 262-264.

5) Did the trial court err in failing to adhere to the standard of review governing motions to dismiss in granting Defendants' motion to dismiss? Preserved at App. 591-92.

6) Did the trial court violate the Plaintiff's state and federal constitutional rights to a jury in a civil trial under Part 1, Article 20 of the New Hampshire Constitution and the Seventh Amendment to the United States Constitution by finding facts and drawing credibility determinations when granting Defendants' motion to dismiss? Preserved at App. 590.

CONSTITUTIONAL PROVISIONS

1) N.H. Const., Part 1, Art. 14:

> Legal Remedies to be Free, Complete, and Prompt. Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

2) N.H. Const., Part 1, Art. 20:

> Jury Trial in Civil Causes. 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 hereafter to alter it.

3) U.S. Const. Amend. VII

> Trial by Jury in Civil Cases. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF CASE AND FACTS

Plaintiff is a New Hampshire company that is the successor in interest to Pro Cut Licensing Company, LLC, Pro Cut International Limited, LLC, and Brake Solutions, Inc. (collectively, "Pro Cut" or the "Company"). App. 1, 7-8.[1]

Defendants are Teresa Basham, Timothy Hooper, and Terrence Hooper (collectively, the "the Sibling Defendants"), who were each non-independent trustees and beneficiaries of the Paul R. Hooper 1997 Trust dated August 8, 1997 (the "1997 Hooper Trust") and the Paul R. Hooper 1998 GST Exempt Trust dated April 29, 1998 (the "1998 Hooper Trust" and, together with the 1997 Hooper Trust, collectively, the "Hooper Trusts"). App. 1-2.

Defendants also include the independent trustees of those trusts: John C. Ransmeier ("Ransmeier") and Douglas Basham, who is the successor to Bank of America N.A. as independent trustee of the 1998 Hooper Trust f/b/o Teresa Basham. App. 1-2.

Prior to November 27, 2013, the Hooper Trusts held ownership interests in Pro Cut. App. 4-5. On November 27, 2013, the trustees and beneficiaries of the trusts entered into agreements in which they obtained $2.25 million collectively from Pro Cut in exchange for their equity interests in Pro Cut. App. 7.

Ransmeier, as trustee of the Hooper Trusts, signed these agreements, each of which was titled Securities Redemption Agreement (collectively, "Contracts"). App. 5-6. The Contracts incorporated documents titled "Releases." App. 6.

Each of the "Releases" included the following promises:

> 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 . . . against, [Pro Cut], its respective officers, directors, managers, members, employees,

[1] Citations to the record are as follows: "App." indicates a citation to the Appendix filed together with this brief. "Order" indicates the trial court's order of December 20, 2017 which is appended hereto.

> agents, and representatives, as well as their successors and assigns . . . from . . . any and all claims . . . of any kind . . . in connection with any prior ownership interest in [Pro Cut] by the Seller, including but not limited to any claim based on any future transaction that [Pro Cut] or any unit holder may enter into in relation to the equity of [Pro Cut].

App. 6.

The "Releases" therefore included at least three separate promises binding Defendants in regard to future litigation. *Id.* First, they contained releases. *Id.* Second, they contained covenants not to sue. *Id.* Third, they contained additional promises "otherwise agree[ing] not to enforce any claim, [or] cause of action." *Id.*

The same contract language then specifies that all of these promises relate to any claim of any kind connected to "any future transaction" regarding the equity of Pro Cut. *Id.* The terms bound the parties and "the heirs, personal representatives, successors and assigns of the parties." App. 6.

Subsequent to the execution of the Contracts, Ransmeier, as trustee to the Hooper Trusts, assigned his rights and obligations under the Contracts to the Siblings Defendants for the purpose of permitting them to initiate a lawsuit against the officers, directors, managers, members, representatives, successors and assigns of Pro Cut. App. 13-14.

The Sibling Defendants, in conjunction with Ransmeier, then initiated a lawsuit in the United States District Court for the District of New Hampshire against officers, directors, managers, members, and representatives of Pro Cut, namely, Joseph Willey, the former manager of Pro Cut, and Janet Willey and Curtis Nuckolls, who, in their capacity as trustees, were members of Pro Cut. App. 15.

Following the filing of Sibling Defendants' federal lawsuit against the manager and members of Pro Cut, Plaintiff, as a successor company to Pro Cut, initiated this lawsuit in the

Superior Court of Merrimack County, bringing, *inter alia*, a claim for breach of contract against Defendants for breaching their promises not to sue. App. 2.

Plaintiff's complaint included allegations of the existence of a valid, binding contract between Defendants and Pro Cut, the terms of which were made binding on the Sibling Defendants, as assignees of rights from Ransmeier, allowing them to sue with respect to those agreements. App. 24-27. Plaintiff's complaint included allegations that "Plaintiff has sustained and will continue to sustain damages as a result of the breaches of contract." App. 28. Plaintiff further alleged the breach constituted bad faith. App. 29.

Defendants subsequently moved to dismiss Plaintiff's complaint, arguing, *inter alia*, that the breach of contract claim should be dismissed on the theory that a release and a covenant not to sue constituted affirmative defenses and do not give rise to an independent cause of action for breach of contract. App. 42, 243-247; App. 292, 296-297.

At oral argument, Ransmeier and the Sibling Defendants did not contest that the releases and the covenants and agreements not to sue or take action all were contracts. Instead, the Defendants devoted their time to addressing Plaintiff's tort claims. App. 355-369. At that hearing, Plaintiff informed the trial court of its intent to move to amend its complaint to clarify issues with its tort claims. App. 361. Plaintiff subsequently filed its motion to amend. App. 371

The trial court granted Plaintiff's motion to amend and invited the parties to supplement their pleadings. App. 429. While Ransmeier supplemented his pleadings and moved to dismiss the First Amended Complaint, the Sibling Defendants did not. App. 455. Nevertheless, on December 20, 2017, the trial court issued an order dismissing Plaintiff's lawsuit in its entirety. Order at 9.

The trial court did not conduct an evidentiary hearing prior to issuing its decision. Order at 1-9. Instead, based solely on the pleadings, the trial court dismissed the case, including Plaintiff's two tort claims and its request for injunctive relief. *Id.* at 9.

The trial court's order dismissing this action relied upon the decision of a Maryland state appellate court, *Kaye v. Wilson-Gaskins*, 135 A.3d 892, 904 (Md. App. 2016). Reviewing this authority, the trial court found that "[t]o the extent the agreements constitute 'releases' in the ordinary sense, they cannot give rise to a breach of contract action" because "a release is generally deemed to take effect immediately, thereby instantaneously discharging any obligation created by the release in the party relinquishing a claim." Order at 6.

The trial court further found that, to the extent the agreements "are better categorized as 'covenants not to sue,' they fare no better . . . ." *Id.* at 7. The trial court explained that, "some courts will allow a covenant not to sue to form the basis of a breach of contract action if '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.'" *Id.* at 8 (quoting *Kaye*, 135 A.3d at 906-907; and citing *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 814, 1008 (S.D.N.Y. 1964).

Applying this understanding of law to the facts, the trial court found:

> no clear indication in the Releases that the parties contemplate consequential damages to be award (sic) as a result of their breach. Thus, even 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 name suggests—operated as releases and their performance was effectively completed upon consummation of the agreements.

Order at 9. The trial court's conclusion in this regard is conclusory, failing to describe in any fashion why and how it determined that the contracts at issue failed to convey a clear indication

regarding what the parties bargained for in the course of negotiating the Contracts and what they "contemplated."

Plaintiff moved for reconsideration. App. 584. Plaintiff argued that *Kaye v. Wilson* was distinguished by a subsequent Maryland federal court on the ground that the decision violated the rule against rendering contract provisions superfluous or a nullity. App. 588-89. Plaintiff also argued that the Court's decision denied relief even though Plaintiff claimed the breach was undertaken in bad faith and even though Plaintiff sought an injunction, claims for relief that the Court's dismissal would not and could not cover. App. 590-93. The Court denied Plaintiff's motion for reconsideration without a hearing in a *pro forma* order. App. 624. This appeal followed. App. 625.

SUMMARY OF ARGUMENT

The trial court's dismissal of Plaintiff's complaint elevates the so-called "American rule" to a status previously unrecognized under New Hampshire law. Under the trial court's ruling, the "American rule" casts a policy shadow over the law of our state that is so powerful it lays waste to traditional contract law and standard rules of civil procedure.

According to the trial court's ruling, the American rule may now render contract provisions superfluous and a nullity. The American rule may now also prevent Plaintiff from recovering damages as the preferred measure of relief where Defendants violated their promises not to sue in exchange for substantial consideration.

Indeed, by virtue of the trial court's decision, the American rule now eliminates Plaintiff's ability to obtain equitable relief where adequate remedies at law are not available.

Having cut off all forms of relief, the policies of the American rule thus would supplant the policies underlying Part I, Article 14 of the New Hampshire Constitution, which confer upon citizens the right to complete relief by virtue of its plain text.

As a matter of substantive contract law, the trial court's decision to grant Defendants' motion to dismiss rendered promises contained in binding contracts, the covenants not to sue and the agreements not to bring any claim or cause of action, superfluous and a nullity.

The trial court found that all of the separate terms contained in the contract prohibiting Defendants' federal action meant the same thing, a decision that is not supported by any case law. This ruling violated the principle that contracts will not be interpreted to render their terms a nullity or superfluous.

The trial court then found that the Plaintiff, who had alleged breach of contract, could not obtain the traditional form of relief to which a Plaintiff is entitled in a breach of contract action—expectation damages.

This ruling conflicts with what this Court has found to be the traditional measure of damages for a breach of contract action: the right to one's expectation damages. The trial court's decision thus deprived the Plaintiff of the means to be made whole after suffering injury caused by Defendants' breaches.

Indeed, the trial court's decision departs from the most restrictive case law from other jurisdictions in the area by preventing Plaintiff from presenting evidence that the Defendants' breaches were in bad faith and obvious.

The trial court's ultimate decision, to cut off all forms of relief by dismissing the action though Plaintiff also sought injunctive relief, is not supported by any authority and, indeed, defies standard authority regarding equitable relief.

The trial court's decision fails even to abide by the internal logic of the trial court's own decision. The trial court's decision ruled that Plaintiff's action should be dismissed because the contracts at issue do not contemplate an award of damages. That decision did not address Plaintiff's right to seek an injunction.

Taken together, the trial court's decision cuts off all avenues to a remedy in this matter, whether as a matter of law or equity, compounding its error in this case and depriving Plaintiff of any relief, to say nothing of the complete relief to which the Plaintiff is entitled under the state constitution.

It does so through the broadest application of the American rule—an application whose breadth this Court, upon review of the trial court's decision, must weigh against all of the other policies, including those emanating from the state constitutional right to a remedy.

Finally, the trial court's decision is flawed as a matter of basic civil procedure. In dismissing this case, the trial court engaged in fact-finding and credibility determinations in furtherance of its decision on Defendants' motion to dismiss. It did so in regard to the parties' conflicting claims about the intent and motives of the parties in regard to the scope of the contracts at issue and the Defendants' alleged breaches.

The law of this state requires that the trial court assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff when determining whether the plaintiff has plead allegations that are reasonably susceptible of a construction that would permit recovery. That standard was not followed in this case, when the trial court dismissed the case. Instead, the trial court's determination drew inferences regarding the underlying intent and meaning of the contract terms without the benefit of any testimony from any party or any discovery on the subject.

This failure to comply with the standard of review imposed by this Court is also in violation of state and federal constitutional rights to a jury in a civil trial under Part 1, Article 20 of the New Hampshire Constitution and the Seventh Amendment to the United States Constitution.

For all of these reasons, the trial court's decision of December 20, 2017 regarding Defendants' motion to dismiss and its subsequent decision as to Plaintiff's motion for reconsideration should be reversed and the matter should be remanded.

STANDARD OF REVIEW

In an appeal from a trial court order granting a motion to dismiss, this Court's standard of review is "whether the allegations in the petitioner's pleadings are reasonably susceptible of a construction that would permit recovery." *General Insulation Co. v. Eckman Const.*, 159 N.H. 601, 611 (2010) (citation omitted). This Court will "assume the petitioner's pleadings to be true and construe all reasonable inferences in the light most favorable to it," though the Court "need not assume the truth of statements in the petitioner's pleadings that are merely conclusions of law." *Id.* The Court will then engage in a threshold inquiry that tests the facts in the petition against the applicable law. *Id.* If the allegations constitute a basis for legal relief, this Court must deny a motion to dismiss. *Id.*

ARGUMENT

I. THE TRIAL COURT'S DECISION IMPROPERLY ELEVATES THE AMERICAN RULE ABOVE OTHER CONTRACT DOCTRINES WITHOUT A BASIS IN LAW OR FACT.

A. The Trial Court's Dismissal Renders Contract Terms A Nullity in Violation of this Court's Long-held, Strongly Stated Policy Against Such Practice.

Fundamental to the trial court's dismissal of Plaintiff's complaint was its decision to prioritize the so-called "American rule" over other contract doctrines of greater historical standing within the law. In effect, the trial court's decision rendered provisions of the Contracts superfluous even as the Contracts enriched the Defendants.

The trial court's decision to give no more force and effect to the Contracts' terms "covenant[ing]" not to sue and "agree[ing] not to enforce any claim, or cause of action," beyond the separate Contract terms "release[ing]" Plaintiff, renders those contract terms a nullity. Indeed, the trial court writes out of the contract "covenants" and "agreements" that are separately stated within the contract before permitting discovery and hearing evidence about the intent or purpose of the terms.

Cook v. SCI Md. Funeral Servs., Civil Case No. 14-3770-GLR, 2016 U.S. Dist. LEXIS 117887, *5 (D. Md. Aug. 31, 2016), rejected this type of construction. The United States District Court for the District of Maryland refused to extend the "American rule" to a contract that contained "covenant not to sue" language alongside "release" language. *Id.* at *10.

The Federal District Court of Maryland noted that, where parties "bargained for both a release and a covenant not to sue, or both," the party alleging breach is entitled to the benefits of this bargain. *Id.* at *10 (quoting *Kaye,* 135 A.2d at 906-07). It held:

> Were the language of this clause construed as nothing more than a release, that construction would not only be contrary to the plain meaning of the promise not to sue, but it would also give no effect

> to the fact that the parties chose to include both an express ongoing promise not to litigate and a release of claims.

Cook, 2016 U.S. Dist. LEXIS, 117887, at *10 (emphasis added).

This first doctrine the *Cook* court deployed is an age-old doctrine familiar to this and other courts throughout the country. It is that clauses in a contract will not be interpreted to render their terms superfluous or a nullity. This principle is widely accepted as a matter of contract law. *See Restatement (Second) Contracts* § 203 cmt. b. (1981) ("Since an agreement is interpreted as a whole, it is assumed that no part of it is superfluous.").

The New Hampshire Supreme Court has embraced this doctrine for almost 150 years. It has ruled that "all parts of an agreement are to be given a meaning whenever reasonably possible." *See Robbins v. Salem Radiology*, 145 N.H. 415, 419 (2000) (quoting *Rivier College v. St. Paul Fire Ins. Co.*, 104 N.H. 398, 402 (1963)); *see also Restatement (Second) Contracts* § 203 (1981) ("an interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part, unreasonably, unlawful or of no effect"); *and Baldwin v. Hartford Ins. Co.*, 60 N.H. 422, 425 (1880) ("the terms of a contract are to be understood so as to have an actual and legal operation, and the construction is to be such that the whole instrument or contract and every part of it may take effect, if possible consistently with the rules of law and the intentions of the parties").

The second doctrine deployed in *Cook* is the doctrine that a party alleging a breach of contract may pursue its "expectation interest" which is defined as its "interest in having the benefit of [its] bargain by being put in as good a position as he would have been in had the contract been performed." *Restatement (Second) Contracts* § 344(a). "Contract damages are ordinarily based on the injured party's expectation interest and intended to give [it] the benefit of

its bargain by awarding [it] a sum of money that will, to the extent possible, put [it] in as good a position as [it] would have been in had the contract been performed. *Id.* at § 347 cmt. a.

The New Hampshire Supreme Court stands shoulder-to-shoulder with *Cook,* expressing in the strongest terms its preference for the expectation remedy. *See Jackson v. Morse*, 152 N.H. 48, 52-53 (2005) (vacating damages award with instructions to the "trial court that the presumptive measure of damages in this case is expectation damages"); *Concord Hosp. v. New Medical Malpractice Joint Underwriting Ass'n*, 142 N.H. 59, 61 (1997) ("The purpose of awarding compensatory damages in breach of contract actions . . . is to place the plaintiff in the position the plaintiff would have occupied absent a breach.") (citation omitted). The historical and public policy justifications for adopting this measure of damages are deep and substantial. *See* W. David Slawson, *Why Expectation Damages for Breach of Contract Must be the Norm: A Refutation of the Fuller and Perdue "Three Interests" Thesis*, 81 Neb. L. Rev. 839, 846 (2003) ("the expectation measure . . . provides a remedy for every breach. . . compensates the injured party for what he has lost . . . and . . . provides the right incentives for decisions whether to breach.").

The trial court's decision that the Contracts did not clearly indicate, by their terms, Plaintiff's right to consequential damages, which are part of the expectation damages calculation, conflicts with these decisions, is unsupported and constitutes reversible error. *See* Daniel J. Pope, *N.H. Civil Jury Instructions* at s. 32.43 (2018) (permitting consequential damages for breaches of contract) (collecting cases).

B. The Trial Court's Decision Rests on an Inaccurate Assessment of the Respective Policies at Issue, Elevating the American Rule Beyond Its Historical Station.

Because the roots of the so-called American rule, by contrast, are not so deep, the *Cook* court refused to elevate it over these other doctrines. As one commentator has stated, "In a sense, the American rule has no history." John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law and Contemporary Problems 9 (1984). Indeed, over the course of its existence, the judiciary's "[w]illingness to apply the American rule was not matched by a willingness to justify it." *Id.* at 23.

Notably, New England courts have taken a particularly jaundiced view of the rule. At an early stage of its history, neighboring courts even established a practice of "impl[ying] fee clauses in contracts obviously intended to shield the parties from the costs of litigation." *Id.* at 24 (citing *Ryerson v. Chapman,* 66 Me. 557 (1877) and *Pond v. Harris*, 113 Mass. 114 (1873); *see also Dionne v. LeClerc*, 896 A.2d 923, 930-31 (Me. 2006) (affirming *Ryerson, supra*).

In New Hampshire, the earliest mention by this Court of the "American rule" as an "American rule" was in the 1981 case of *Silva v. Botsch*, 121 N.H. 1042, 1043 (1981) (finding an exception to the rule).

Even upon its first mention, however, this Court acknowledged exceptions to the rule, including where parties enter agreements in conflict with the American rule. *Pugliese v. Northwood Planning Bd.*, 119 N.H. 743 (1979) (citing *Harkeem v. Adams*, 117 N.H. 687, 690 (1977)).

Perhaps in recognition of the dubious historical roots and policy justifications of the American rule, this Court therefore has been non-exhaustive in describing exceptions to the rule,

stating that the "exceptions are flexible, not absolute, and have been extended on occasion." *See id.*

Other courts have gone further. They have set the American rule to the side where expectation principles would be violated as between sophisticated parties with bargaining power. *See Microsoft Corp. v. Motorola, Inc.*, 963 F. Supp. 2d 1176, 1193) (2013) ("[W]hen one party agrees not to sue the other but then does anyway . . . . the primary form of damages flowing from the breach will likely be attorney's fees, and it would be inequitable to deprive the aggrieved party of those damages."); *Anchor Motor Freight, Inc. v. Int't Broth. Of Teamsters, Local Union No. 377*, 700 F.2d 1067, 1072 (6th Cir. 1983) (reversing and remanding to award attorney fees "used as a measure of the actual damages . . . incurred in defending against the lawsuit . . . instituted purportedly in violation of a covenant not to sue"); *Prospect Energy Corp. v. Dallas Gas Partners, LP*, 761 F. Supp. 2d 579, 595-96 (S.D. Tex. 2011) (attorneys' fees as damages resulting from the breach of a covenant not to sue not subject to American rule and "are the incidental costs of litigation."); *Divine Tower Int'l Corp. v. Kegler, Brown, Hill & Ritter Co., L.P.A.*, 2008 U.S. Dist. LEXIS 85246 *10 (S.D. Ohio Sept. 24, 2008) (denying motion to dismiss since "where there is a breach of a covenant not to sue, an available remedy is actual damages, which are measured by the attorney fees and costs incurred in defending the lawsuit.") (citations omitted); *Gregoire v. Lucent*, 2005 U.S. Dist. LEXIS 39988, **45-46 (M.D. Fla. Aug. 5, 2005) (denial of summary judgment seeking dismissal of claim for attorneys' fees for breach of covenant not to sue); *Kelleigh v. Algonquin Gas Transmission Co.*, 1996 Mass. Super. LEXIS 29, *19 (Mass. Super. Nov. 6, 1996) (allowing claim "for actual damages (legal fees and costs associated with defending [the] lawsuit)" caused by "breach of the covenants not to sue"); *Riveredge Assocs. v. Metro. Life Ins. Co.*, 774 F. Supp. 897, 901 (D.N.J. 1991) (rejecting

plaintiffs' invocation of the American rule and finding attorney fees are "a proper element of damages when the right violated is the right to be free from suit."); *Cefali v. Buffalo Brass Co.*, 748 F. Supp. 1011, 1026 (W.D.N.Y. 1990) (rejecting invocation of the "American rule" because "[i]n this case, the fees can be seen as a direct measure of damages for the alleged breach of contract"); *Verhagen v. Platt*, 61 A.2d 892, 895 (N.J. 1948) ("If a breach of contract is the cause of litigation between the plaintiff and third parties that the defendant had reason to foresee when the contract was made, the plaintiff's reasonable expenditures in such litigation are included in estimating his damages.").

In this respect, those jurisdictions follow the New Hampshire Supreme Court's practice of enforcing contracts and their terms, particularly where sophisticated parties bargained for and received substantial consideration as a result. *See, e.g., ACAS Acquisition (Precitech) Inc. v. Hobert*, 155 N.H. 381, 394 (2007) (enforcing covenant not to compete where "defendant negotiated a substantial severance package in exchange for decreasing the sting of the restrictive covenant" and with other consequences in mind).

The trial court's decision failed to account for this jurisprudence, which would give due weight to the fact that Defendants bargained for a deal that enriched them in exchange for multiple promises not to sue. Instead, the trial court's decision would permanently block Plaintiff from presenting such evidence in support of its complaint in this matter.

C. The Trial Court's Decision Deprives Plaintiff of the Opportunity to Seek Equitable Relief Where It Has Foreclosed Other Adequate Remedies At Law.

In the process of violating traditional common law rules regarding the interpretation and enforcement of contracts, the trial court thus left Plaintiff with no remedy at law. *Cf.* N.H. Const. Pt. 1, Art. 14 ("Every subject of the state is entitled to a certain remedy, by having

recourse to the laws, for all injuries he may receive in his person, property or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."); *see also Trovato v. Deveau*, 143 N.H. 523, 525 (1999) (Part I, Article 14's grant "is necessarily relative, only requiring a remedy that conforms to the statutory and common law rights applicable at the time of the injury.") (citations omitted). Because the trial court ignored the fact that Plaintiff sought relief at equity, as well, the trial court has actually deprived Plaintiff of any and all relief arising from Defendants' breaches.

The distinction between law and equity in this country's jurisprudence is not yet dead. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (distinguishing equitable and legal relief in copyright law); *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (distinguishing equitable and legal relief in patent law); *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 312 (1999) (distinguishing equitable and legal relief in contract law). Perhaps the most durable of the equitable remedies is the injunction, relief that is available even before a decision on legal remedies has been made. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

A trial court's decision to grant or dismiss a request for injunctive relief "necessarily depends upon the factual circumstances in each case." *Exeter Realty Co. v. Buck*, 104 N.H. 199, 200 (1962). A court thus errs when dismissing a request for equitable relief without a separate consideration of the factual circumstances and basis for the request for injunctive relief. *City of Keene v. Cleaveland*, 167 N.H. 731, 743 (2015) (finding "the trial court erred when, solely because it had dismissed the underlying tortious interference claim, it denied injunctive relief without considering all the factual circumstances of the case.").

The trial court gave no consideration to Plaintiff's request for equitable relief. Instead, the trial court relied upon authorities from other jurisdictions that did not pertain to contracts of the sort at issue in this case. The trial court's decision therefore had no basis in law, fact, or reasoning and should be reversed on that ground.

II. THE TRIAL COURT'S DECISION VIOLATED MOTION TO DISMISS PLEADING STANDARDS BY MAKING FACT FINDINGS AND CREDIBILITY DETERMINATIONS.

Even more extraordinary, the trial court's decision cut off relief to Plaintiff at the motion to dismiss phase of litigation while citing the authority of jurisdictions that would permit discovery on the matter. It did so without the support of any precedent. In jurisdictions where courts are more restrictive in granting a party attorney's fees as damages, those jurisdictions still permit recovery where there is an "obvious" breach or a breach in "bad faith." *See Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1007-08 (2d Cir. 1966).

Here, the trial court failed to acknowledge that obvious breaches and those generated through bad faith had been pled and could be the basis for relief, even under the most expansive reading of the American Rule. The trial court therefore deprived Plaintiff of its right to develop the record on that issue or on the question of whether the Defendants engaged in obvious breaches of contract.

On this record, the trial court either made an error of law or misapplied the motion to dismiss standard by finding facts or drawing inferences, including about Defendants' bad faith, that it could not have found and should not have found at a motion to dismiss stage of civil litigation. *See Bohan v. Ritzo*, 141 N.H. 210, 212 (1996) (citation omitted); *Tessier v. Rockefeller*, 162 N.H. 324, 330 (2011).

These determinations as to the credibility of Plaintiff's allegations, as opposed to the plausibility of Plaintiff's allegations, violate the motion to dismiss standard trial court's must apply under this Court's law. *See, e.g. Bohan v. Ritzo*, 141 N.H. at 212; *see also* Gordon J. MacDonald, *Wiebusch on New Hampshire Practice Civil Practice and Procedure* § 16.18 (4th Ed. Matthew Bender & Co.).

Further, the trial court's decision that found there was no "clear indication" that the parties "contemplated" consequential damages as relief is not accompanied by any explanation or citation to authority. The trial court did not, because it could not, at a motion to dismiss phase, reference discovery from the parties regarding their intent.

The trial court's decision in regard to the scope of the contractual provisions at issue and the trial court's unexpected rejection of Plaintiff's allegation that Defendants breached those provisions in bad faith and that breach was obvious, thus come out of thin air.

Issues regarding the intent and motives of parties in a breach of contract suit, including issues regarding a party's bad faith, are among the most widely recognized of the factual determinations entrusted to juries under our laws. *See* Daniel J. Pope, *New Hampshire Civil Jury Instructions* § 32.37 (2018) ("In determining the intent of the parties, you may consider the plain and ordinary meaning of the words used, the subject matter of the contract, the situation of the parties, the purpose of the contract, and other surrounding circumstances."); *see also id.* § 2.2 (the role of the jury).

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, the trial court must assume that all of the plaintiff's well-pleaded allegations of fact and the reasonable inferences to be drawn therefrom are true and must construe those allegations and inferences in the manner most favorable to the plaintiff. *Bohan*, 141 N.H. at 212; *see also*

LaBonte v. Nat'l Gypsum Co., 110 N.H. 314, 316 (1970). The motion must be denied when those "facts and inferences so viewed would constitute a basis for legal relief." *Flags I, Inc. v. Kennedy*, 131 N.H. 412, 414 (1989) (quotation omitted).

The trial court's decision did not abide by this standard. Instead, under a reading that most favors the trial court's decision, the trial court must have engaged in factual determinations and inference drawing. The trial court's analysis regarding what the contract indicated or did not indicate and how the trial court drew that determination is otherwise entirely unexplained and could not be sustained.

Restrictions on a trial court's ability to dismiss a matter at a motion to dismiss phase is a product of constitutional mandate. Part I, article 20 of the New Hampshire Constitution provides:

> In all controversies concerning property, and in all suits between 2 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.

N.H. CONST. pt. I, art. 20. *See, e.g, Opinion of Justices*, 138 N.H. 445, 450-51 (motion to dismiss standard does not deprive party of constitutional jury trial rights, including under Part I, Article 20 of the New Hampshire Constitution, because it "does not resolve the merits of a disputed factual claim" where a plaintiff who is "otherwise entitled to a jury trial has a right to have all factual issues resolved by a jury.") (citing *State v. Jones*, 125 N.H. 490, 494 (1984) and *Opinion of the Justices*, 113 N.H. 205, 214 (1973); *see also* U.S. Const. amend. 7. The trial court's decision violated that mandate.

The trial court violated the rights afforded the Plaintiff by the Seventh Amendment of the Constitution of the United States in the same way. *See, e.g., Hi-Tech Pharms., Inc. v. Cohen*, 208 F. Supp. 3d 350, 355 (D. Mass. 2016) (invalidating anti-SLAPP suit procedure on Seventh Amendment grounds "in as much as it would require this Court to make factual findings and credibility determinations that the Constitution reserves to a properly constituted jury of the people."); *Davis v. Cox*, 183 Wash. 2d 269, 294 (2015) (holding "a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial" is a violation of the Washington Constitution).

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that this honorable Court reverse the decision of the trial court granting Defendants' motion to dismiss and the decision denying Plaintiff's motion to dismiss.

REQUEST FOR ORAL ARGUMENT

Appellant requests fifteen minutes for oral argument before the full Court. Oral argument shall be presented by Michael S. Lewis.

CERTIFICATION OF SERVICE

I, Michael S. Lewis, hereby certify that I caused the foregoing brief and accompanying appendix to be delivered by hand on this 18th day of May 2018 to the following counsel of record.

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CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)

I, Michael S. Lewis, hereby certify that the appealed decision is in writing and is appended to the Appellant's Opening Brief.

Respectfully submitted,

Pro Done, Inc.

By its Attorneys,

RATH, YOUNG AND PIGNATELLI, P.C.

Dated: May 18, 2018

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