THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-702

STEVEN ZANNINI and PAMELA ZANNINI

Appellants,

v.

PHENIX MUTUAL FIRE INSURANCE COMPANY

Appellee

Appeal from Trial Court Decision on the Merits

Merrimack County Superior Court Case No. 217-2018-CV-00122

BRIEF OF APPELLEE

PHENIX MUTUAL INSURANCE COMPANY

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May 15, 2019

Gary M. Burt will present oral argument on behalf of Phenix Mutual Insurance Company

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QUESTIONS PRESENTED

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II. Whether the trial court correctly concluded that it could not negate the one-year filing requirement based on the Zanninis' claim that enforcement was unreasonable where the provision was approved by the General Court as part of the New Hampshire Standard Fire Policy.

III. Whether the trial court correctly concluded that the deadline for filing suit was not tolled where there was no evidence that Phenix Mutual fraudulently concealed any facts, nor evidence that Phenix Mutual made an unqualified statement admitting liability and a willingness to pay the unpaid debt.

IV. Whether the trial court correctly concluded that Phenix Mutual was not estopped to enforce the one-year requirement where there was no evidence presented that statements were made that the Zanninis relied upon to their detriment.

V. Whether the trial court correctly concluded that Phenix Mutual did not waive enforcement of the one-year filing requirement where the undisputed material facts established its communication with the Zanninis did not express any intent to forgo the requirement.

TEXT OF RELEVANT AUTHORITIES

TITLE XXXVII
INSURANCE
CHAPTER 407
THE FIRE INSURANCE CONTRACT AND SUITS THEREON
Section 407:22

407:22 New Form Adopted. – The Standard Fire Policy (with permission to substitute for the word, company, a more accurate descriptive term for the type of insurer) shall be in the following form:

Standard Fire Insurance Policy for New Hampshire

No. Type of Company
Renewal of Number

Space for Company Name, Insignia and Location

Insured's Name and Mailing Address

Space for Producer's Name and Mailing Address

.....
Inception (Mo. Day Yr.) Expiration (Mo. Day Yr.) Years

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

Insurance is provided against only those perils and for only those coverages indicated below by a premium charge and against other perils and for other coverages only when endorsed hereon or added hereto.

Space for policy amounts, rates, premium, description and location of property covered.

Subject to Form No(s). attached hereto.

Insert form number(s) and edition date(s)
Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:
Insert name(s) of mortgagee(s) and mailing address(es)

Agency at
Countersignature Date. .....Agent

If any conditions of this form are construed to be more liberal than any other policy conditions relating to the perils of fire, lightning or removal, the conditions of this form shall apply.

In consideration of the provisions and stipulations herein or added hereto and of the premium above specified, this Company, for the term of years specified above from inception date shown above at 12:01 AM (Midnight, Standard Time) to expiration date shown above at 12:01 AM (Midnight, Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure the insured named above and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all direct loss by fire, lightning and by removal from premises endangered by the perils insured against in this policy, except as hereinafter provided, to the property described herein while located or contained as described in this policy, or pro rata for 5 days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere. Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

Concealment, fraud.

Coverage under this policy shall be void for the insured who, whether before or after a loss, has intentionally concealed or misrepresented any material fact or circumstance; engaged in fraudulent conduct; or made false statements relating to this insurance.

Notice requirements.

In the event that a company or filing or rating organization eliminates or reduces coverages, conditions or definitions in its policies issued under this section other than at the request of a policyholder, the company must attach to the policy a printed notice in each such policy explaining clearly what coverages, conditions or definitions have been eliminated or reduced. If explanations of such reduced or eliminated coverages are not contained in the printed notice attached to its policies, then such coverages, conditions or definitions shall remain in full force and effect without such reductions or eliminations. The requirements of this section shall apply only to such policies renewed or endorsed with the same company.

Uninsurable and excepted property.

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included.

This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) terrorism; (i) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (j) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (k) nor shall this Company be liable for loss by theft.

Other insurance.

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance.

Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 consecutive days; or (c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only.

Other perils or subjects.

Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions.
The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions.

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy.

This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a 5 days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations.

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a 10 days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability.

This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs.

The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and

schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.

In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any 2 when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.

It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required.

Abandonment.

There can be no abandonment to this Company of any property.

When loss payable.

The amount of loss for which this Company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit.

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Subrogation.

This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

Insert signatures and titles of proper officers.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the trial court's determination that a provision requiring suit be brought within one year from the date of loss contained in Phenix Mutual Insurance Company's ("Phenix Mutual") policy was not in violation of New Hampshire public policy and not an unreasonable provision. In that same order the trial court concluded that an inquiry from Phenix Mutual's counsel to the Zanninis' counsel regarding settlement possibilities did not estop Phenix Mutual from asserting the one-year filing agreement nor constitute a waiver of the requirement.

On March 4, 2016, Steven and Pamela Zannini's home suffered damage due to flooding the result of a burst pipe. Complaint ¶ 13. The Zanninis had purchased a Homeowner Insurance Policy, Policy No. HOM1123110 (the "Policy"), from Phenix Mutual for the property. Complaint ¶ 6-7; Aff. of S. Zannini (App. 55); Policy (App. 59-95).[1]

Following an investigation and partial payment of the claim, Phenix Mutual denied coverage to the Zanninis on May 3, 2016 for additional claimed damage. The denial was based upon the Zanninis failing to afford Phenix Mutual the opportunity to inspect the additional claimed damages prior to the Zanninis' teardown of the residence. Id. at ¶ 23.

The Policy required the Zanninis to bring any lawsuit against Phenix Mutual within one year of a date of loss:

> *Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.*

Policy 9 (App. 69).

The Zanninis filed suit almost two years after the date of the loss on February 23, 2018. Complaint ¶ 6. Phenix Mutual moved for summary judgment maintaining that the suit was barred by the contractual limitation period. The Zanninis objected, making claims that public policy precluded enforcement of a one-year contractual limitation period, the contractual limitations period was tolled, estoppel precludes enforcement of the contractual limitations period, and Phenix Mutual waived the contractual limitations period.

Following a September 10, 2018, hearing, the Merrimack Superior Court (Kissinger, J.) granted Phenix Mutual's motion for summary judgment. T (App. 128-144); Order (App. 145-155).

[1] App. refers to the Zanninis' appendix.

The Zanninis' filed a motion for reconsideration on October 29, 2018. The motion was denied on November 26, 2018. Mot. to Reconsider (App. 156); Obj. to Mot. to Reconsider (App. 164); Order on Mot. to Reconsider (App. 173). This appeal followed.

SUMMARY OF ARGUMENT

The trial court correctly concluded that Phenix Mutual was entitled to summary judgment where the Zanninis failed to bring suit before the contractual limitations period ended. The Zanninis make multiple arguments for reversal, but the principal claims are that the provision violates an affirmative New Hampshire public policy, and that trial court erred in not finding that the provision was "unreasonable" thus requiring the court to negate the provision.

Appellants' claim that the contractual requirement violates public policy is unpersuasive as the legislature, the governmental body responsible declaring public policy, has expressly approved the use of contractual limitations provisions in the New Hampshire Standard Fire Policy. Further, the General Court has charged the New Hampshire Insurance Commissioner with the duty to disapprove any policy language that is contrary to public policy. Finally, this Court has affirmed enforceability of contractual limitations agreements.

Appellants' claim that the limitations provision should not be enforced for being "unreasonable" disregards case law that has consistently declared courts should enforce contracts as agreed to by parties. Appellants also do not contend the limitations provision, *as applied to them*, was unreasonable. Instead, they posit several hypothetical ways in which the Policy language *might* result in an unreasonable or impossible situation. The trial court correctly disregarded those arguments as the Zanninis had a reasonable amount of time after denial of their claim to file suit—305 days.

The trial court also properly disregarded the Zanninis' arguments that the limitations period was tolled or that Phenix Mutual waived or should be estopped from enforcing the limitations agreement. The undisputed facts failed to satisfy the necessary elements of those doctrines.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE PHENIX MUTUAL POLICY PROVISION REQUIRING SUIT BE BROUGHT WITHIN ONE YEAR FROM THE DATE OF LOSS DID NOT VIOLATE NEW HAMPSHIRE PUBLIC POLICY WHERE THE GENERAL COURT HAS MANDATED AN IDENTICAL POLICY PROVISION BE INCLUDED IN THE NEW HAMPSHIRE STANDARD FIRE POLICY, AND THIS COURT HAS PREVIOUSLY ENFORCED THE SAME POLICY REQUIREMENT.

The trial court correctly concluded that public policy does not preclude contracting parties from agreeing to reduce a limitations period that would otherwise apply to a dispute. In New Hampshire "[m]atters of public policy are reserved for the legislature . . ." In re Kilton, 156 N.H. 632, 645 (2007). "[T]he declaration of public policy with reference to a given subject is regarded as a matter primarily for legislative action." Welch v. The Frisbee Memorial Hosp., 90 N.H. 337, ¶ 23 (1939). The question of "what is the public policy of a state, and what is contrary to it . . . will be found to be one of great vagueness and uncertainty" and one that falls outside the range of a court's traditional "duties and functions." Glover v. Baker, 76 N.H. 393, ¶ 48 (1912) (noting that since "men may and will complexionally differ" on questions of public policy, such questions "scarcely come within the range of judicial duty and functions."); see also Tamello v. New Hampshire Jockey Club, Inc., 102 N.H. 547, 549 (1960) (holding that making changes to public policy "is not a proper function of this court"). Though judicial authority "undoubtedly exists to declare public policy unsupported by legislative announcement," such a judicially-declared policy "must be based on a thoroughly developed, definite, persistent and united state of the public mind. There must be no substantial doubt about it." Welch, 90 N.H. 337 at ¶ 23; Welzenbach v. Powers, 139 N.H. 668, 690 (1995).

Not only does the contractual limitation time limit not violate public policy because it allows less time than the statutory limitations period, it has been mandated for use in the New Hampshire Standard Fire Policy. The New Hampshire legislature has expressly *required* their use in the Standard Fire Insurance Policy. RSA 507:1 et seq. (setting forth requirements to which all homeowners fire insurance policies written in New Hampshire must adhere). The legislature adopted a standard form for all fire insurance policies, and no deviations from the form are allowed. RSA 407:22. Id. Among the required provisions in the form is a limitation agreement:

Suit.

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

RSA 407:22. As the General Court, the body charged with setting public policy, has unqualifiedly mandated the use of a contractual time limitation in New Hampshire Standard Fire Policy, the trial court was clearly correct in concluding the limitations agreement at issue did not violate public policy. Petition of Kilton, 156 N.H. 632.

The legislature has also tasked the New Hampshire Insurance Commissioner to review and approve insurance policy forms, endorsements, and contract provisions prior to their commercial use. RSA 412:5. The Commissioner must "disapprove [any policy language] that does not comply with the requirements of law, *is not in the public interest, is contrary to public policy*, is inequitable, misleading, deceptive, or encourages misrepresentation of such policy." Id. (emphasis added). Appellants offered no evidence that the Commissioner had disapproved the subject Policy with its contractual limitations provision.

This Court has expressly held that contractual limitations periods are enforceable. Forbes Farm Partnership, 146 N.H. 200 (2001) (affirming summary judgment for insurer on grounds that insured failed to sue within one year contractual limitations period). Appellants suggest the holding of Forbes Farm Partnership is narrower, claiming that ". . . the Court's analysis was limited to the issue of whether the Policy required the insurer to give notice of the contractual limitation period to the insured," and that the Court "did not hold, one way or another, that the contractual limitation period" was enforceable. The Court did hold that an insurer did not have to give additional notice of the contractual limitation period to the insured, but the case contained additional holdings including the decision to leave unaffected the insurer's denial of a claim based on a contractual limitations period.

This Court recently declared that insurance provisions will not be invalidated on public policy grounds absent a clear legislative directive. Rizzo v. Allstate Insurance Company, 170 N.H. 708, 714 (2018). Rizzo involved a so-called *de novo* provision allowing either the insurer or insured in an uninsured motorist claim to set aside an arbitration award and elect trial. The Court declined to adopt the approach taken by the majority of jurisdictions to not enforce such provisions absent a legislative decision on whether they are permitted. Instead, the Court held that

enforceability of contracts freely entered should prevail absent a clear legislative signal on whether a particular provision is contrary to public policy. Id. at 714

Appellant contend that contractual limitations periods violate public policy, relying upon City of Rochester v. Marcel A. Payeur, Inc., 169 N.H. 502 (2016) and West Gate Village Ass'n. v. Dubois, 145, N.H. 293 (2000). App. Brief 12. As the trial court recognized, City of Rochester involved only the question of whether the doctrine of *nullum tempus occurrit regi*—"time does not run against the king," *exempting* certain government entities from limitation periods entirely—may be used by a municipality to avoid the application of the statute of limitations to the city's claims against a contractor. This Court held that a municipality could not use the doctrine, noting that application of the doctrine would defeat the legislative declared public policy of terminating claims if not pursued within three years. 169 N.H. at 508. The Court noted that the legislative public policy prohibits contracting parties from "agree[ing] by contract made in advance of the accrual of a cause of action for breach to *extend* or *avoid* application of the limitations period." City of Rochester, 169 N.H. at 508 (emphasis added). An agreement to shorten the application of limitations period, however, does not violate the maximum amount of time in which suit must be brought, and actually advances the legislative desire to avoid stale claims.

West Gate Village Ass'n *supra* is similarly inapplicable to the current matter. There, this Court declared that an agreement to "*extend[]* the three-year statute of limitations before any cause of action exists" is contrary to public policy and thus is "inoperative." 145 N.H. at 299 (quotation omitted) (emphasis added). This Court noted that the agreement "[was] unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative." Id. quoting John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 550 (1979). Appellants claim that an agreement to reduce the otherwise-applicable limitations period should similarly be inoperative, citing *John J. Kassner & Co.* The reliance on the New York case, however, ignores that the New York Court declared expressly the opposite:

> *The parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. Such an agreement does not conflict with public policy but, in fact, more effectively secures the end sought to be attained by the statute of limitations. . . But the power of the parties to make enforceable agreements which would extend the Statute of Limitations is, of course, more restricted.*

John J. Kassner & Co. Inc., 46 N.Y.2d at 551-52 (quotations omitted).

Appellants' reliance upon Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 14 (1988) regarding the intersection of public policy and statutes of limitation, is similarly misplaced. Appellants note that: "[Statutes of limitation] thus represent the legislature's attempt to achieve a balance among State interests in protecting both forum courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action." Brief 12. Keeton, however, does not limit enforceability of contractual limitations provisions. The plaintiff in Keeton sued Hustler Magazine for libel in New Hampshire because the statute of limitations in every other jurisdiction had expired. Keeton, 131 N.H. at 8. The issue was a choice of law determination of which state's statute of limitation should apply. Neither party in Keeton had agreed to extend or reduce the limitations period. Although the Court did comment on the public policy of the legislature affording parties sufficient time to sue, the Court did not declare that public policy precludes parties from voluntarily reducing the limitations period that would otherwise apply to their transaction.

Appellants finally suggest that parties may not "reduce a limitations period by agreement . . . prior to the accrual of a cause of action," but that assertion ignores that any performance-related contractual dispute necessarily arises *after* the parties have agreed to a contract's terms. The suggestion that parties cannot agree to terms ahead of a dispute ignores the very purpose of a contract, i.e., to establish with certainty the parties' rights and obligations before carrying out a transaction.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT IT COULD NOT NEGATE THE ONE-YEAR FILING REQUIREMENT BASED ON APPELLANTS' CLAIM THAT ENFORCEMENT WAS UNREASONABLE, AS THE PROVISION WAS APPROVED BY THE GENERAL COURT AND NOT AN UNREASONABLE PROVISION AS APPLIED TO APPELLANTS.

A. Reasonableness would not have been an appropriate inquiry for the trial court as New Hampshire law is clear that parties are bound by their agreements.

In New Hampshire, "[p]arties generally are bound by the terms of an agreement freely and openly entered into, and courts cannot make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably." Rizzo, 170 N.H. at 718 (2018) (quoting Mills v. Nashua Fed. Sav's and Loan Assoc., 121, N.H. 722, 726 (1981)). The Zanninis freely entered into the insurance contract with Phenix Mutual, complete with its requirement that any suit against the carrier must be brought within one year of a date of loss. Though Appellants may find enforcement of the provision to "operate harshly or inequitably,"

it was nevertheless proper for the trial court to enforce the policy. Id. Just as the Court rejected similar reasonableness arguments in Rizzo regarding *de novo* provisions, it too should reject Appellants' argument that a limitations agreement should not be enforced for being unreasonable.

B. Contractual limitations periods that accrue from a date of loss are reasonable and enforceable.

Although it would have been improper for the court to make inquiry into the reasonableness of the Policy, the limitations provision is actually quite reasonable. Appellants argue that a "one year limitation period that accrues from the date of loss is not reasonable, since it leaves claimants with an insufficient amount of time to file suit." App. Brief 16. Appellants describe a hypothetical situation where a claimant, due to an insurer's "delays" in determining coverage, might be left with "less than a full year to file suit," and that the claimant "deserves" more time to determine whether to sue its insurer. Id. at 17. Appellants' hypotheticals, however, are immaterial, because the Policy, as applied to the Zanninis, operated reasonably. Phenix Mutual denied coverage to the Zanninis 305 days before the contractual limitations period barred this suit. The Zanninis had over ten months to organize their affairs and file suit, and thus cannot claim the Policy as applied to them was unreasonable.

The legislature also has expressly approved contractual limitations periods running from a date of loss by requiring such a provision in the Standard Fire Insurance Policy for New Hampshire:

> *Suit.*
>
> *No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.*

RSA 407:22. See Petition of Kilton, 156 N.H. at 645 (stating matters of public policy are reserved for the legislature). If the legislature has deemed it reasonable to commence the running of the contractual limitation period from the date of loss in the Standard Fire Policy legislatively, there is no reason to hold that an identical policy provision contained within a multi-risk policy is unreasonable.

This Court has also held enforceable limitations agreements that run from a date of loss. Forbes Farm Partnership, 146 N.H. at 201 (affirming summary judgment following an insured's failure to comply with a contractual limitations period that ran from the date of loss). Integral to

the result in Forbes Farm Partnership is a holding that limitations agreements may run from a date of loss.

Appellants cite Clark v. Truck Ins. Exchange, 95 Nev. 544 (1979) for the proposition that a limitations period may not run from a date of a loss. App. Brief 16. Clark involved an ambiguous policy provision requiring suit against the insurer to be brought within 12 months after the "inception of the loss." Clark, 95 Nev. at 545. The carrier argued that inception was the date of the loss, while the insured contended that it was the date of the carrier's denial of the claim. Id. Ambiguity, and not public policy, guided the court to its interpretation of the policy against the drafter that the period ran from the date of the carrier's denial. Id. at 546. In the subject Policy, however, the time when the time beings to run is stated clearly and unequivocally:

> *Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.*

Policy 9 (App. 69).

C. A one-year contractual limitation agreement that includes a requirement that the insured comply with the policy is reasonable and enforceable.

Appellants argue that the contractual limitation period is "not reasonable," and thus unenforceable, "because it requires an insured to complete a condition precedent . . . prior to filing suit." App. Brief 18. That "condition precedent," however, is merely the requirement that the Zanninis comply with all provisions in the Policy:

> *Suit Against Us. No action can be brought* ***unless the policy provisions have been complied with*** *and the action is started within one year after the date of loss.*

Policy 9 (App. 69) (emphasis added).

Appellants cite Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511 (2014), for the proposition that a contractual limitations period requiring pre-suit satisfaction of *any* condition precedent is unenforceable. The case, however, does not support that proposition. Executive Plaza, LLC involved an insurance policy "allowing reimbursement of replacement costs," in addition to actual cash value of property, "only after the property was replaced and . . . a provision requiring an insured to bring suit [against the carrier] within two years after the loss," but it was impossible for the insured to reasonably replace the property within two years. Id. at 517-8. The sole question before the court was whether a limitations period is enforceable that is coupled with an *impossible*

condition precedent. Id. at 314. Appellants have not asserted it was impossible to comply with any condition precedent before filing suit.

Appellants also cite Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355 (1977) for the proposition that "a limitation period [that has] the possibility to expire before a plaintiff is eligible to file suit" is unenforceable. App. Brief 20. The case does not, in fact, contain that holding. Occidental Life Ins. Co. of California addresses whether Equal Employment Opportunity Commission enforcement actions are subject to states' statutes of limitation if the state limitation period would not comport with the federal statute's underlying policies. Id. at 367 ("State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute."). Occidental Life Ins. Co. of California is thus of no relevance. Further, as the suit must be brought within one year of the date of loss, it is impossible to imagine a situation where the limitation period would expire before a plaintiff was eligible to bring suit. Appellants' reliance on the parade of potential horrible events to invalidate the contractual provision is simply misplaced.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE DEADLINE FOR FILING SUIT WAS NOT TOLLED AS APPELLANTS FAILED TO PRESENT EVIDENCE THAT PHENIX MUTUAL FRAUDULENTLY CONCEALED ANY FACTS, OR THAT PHENIX MUTUAL MADE AN UNQUALIFIED ADMISSION OF LIABILITY AND A WILLINGNESS TO PAY AN UNPAID DEBT BASED.

Appellants argue that a dispute of material fact existed as to the applicability of tolling. This Court reviews the trial court's fact-sensitive determinations of the applicability of tolling doctrines for an unsustainable exercise of discretion. Travelers Indemnity Company v. Construction Services of New Hampshire, LLC, No. 2016-0649 (N.H. Sup. Ct.) (holding review of equitable doctrines such as tolling is conducted under unsustainable exercise of discretion standard). For the reasons that follow, the trial court did not unsustainably exercise its discretion in finding no genuine issue of material fact warranted denial of summary judgment on the doctrines of tolling.

The trial court correctly rejected the Zanninis' argument that the limitations period was tolled by two emails sent by Phenix Mutual's counsel to the Zanninis' counsel. The first email was sent February 9, 2017:

> *Roy,*
>
> *I have spoken with the adjustor. We don't necessarily agree that the [public adjuster] is disinterested, or that he does not have to be.*

However, we would like to see what evidence you have that there was a collapse, as this is the first time we have heard that.

Can you provide all documentation regarding the collapse, including photos, letters, inspections etc.

[Gary]

App. 103-4. The second email was sent March 19, 2017:

Roy,

File came up on diary. I don't see where you responded to my email below. The carrier would like to resolve the claim if possible.

Gary

App. 103.

New Hampshire's statutes of limitation are subject to three tolling doctrines, i.e., the discovery rule, the fraudulent concealment rule, debt acceptance doctrine—none of which apply to the contractual limitation agreement at issue. A personal cause of action accrues at the time damage occurs. Roberts v. Richard & Sons, Inc., 113 N.H. 154, 155 (1973). The discovery rule, however, provides that a cause of action does not accrue until a plaintiff discovers, or in the exercise of reasonable diligence should discover, that he was injured as a result of a defendant's conduct. Brown v. Mary Hitchcock Memorial Hospital, 117 N.H. 739, 743 (1977). Additionally, when facts essential to a cause of action are fraudulently concealed from a plaintiff by a defendant, a statute of limitations is tolled until the plaintiff discovers or reasonably should discover those facts. Shillady v. Elliot Community Hospital, 114 N.H. 321, 320 (1974).

There was no evidence from which the trial judge could have found applicable either the discovery rule or the fraudulent concealment rule. The Zanninis did not allege late discovery of the alleged breach—the insurance denial occurred 305 days before the expiration of the limitations period. There also was no evidence that Phenix Mutual fraudulently concealed any element essential to the cause of action. Thus, neither the discovery nor fraudulent concealment rules apply.

Appellants cite A & B Lumber Co., LLC v. Vrusho, 151 N.H. 754 (2005) for the proposition that a "limitations period may be tolled . . . by a party's acknowledgement of a subsisting debt with an admission that the party is liable and willing to pay." App. Brief 21. A & B Lumber, however, is inapplicable because it concerns only a *statute* of limitations, not a *contractual* limitations periods. A & B Lumber is also inapplicable because it concerns a breach of contract action for the collection of a sum certain debt—a specific amount of money owed under

a contract. The tolling rule under A & B Lumber is inapplicable as the present case does not involve collection of a debt, nor a sum certain owed by Phenix Mutual to the Zanninis.

A & B Lumber also requires satisfaction of a stringent test to toll a statute of limitations: "To toll the [statutory] limitations period, an acknowledgement of debt must be more than a recognition of debt; it must be an admission of liability for an unpaid debt that the party is willing to pay." A & B Lumber, 151 N.H. at 756 quoting Premier Capital v. Gallagher, 144 N.H. 284, 287 (1999). The admission must be direct and unqualified. A & B Lumber, 151 N.H. at 756 quoting Soper v. Purdy, 144 N.H 268, 270 (1999). "[A]wareness [of a debt] does not constitute an acknowledgement of an existing debt and a willingness to pay." A & B Lumber, 151 N.H. at 756 quoting Premier Capital, 144 N.H. at 287.

The February 9, 2017, and March 19, 2017, emails did not toll the limitations period or revive the Zanninis' claim because they did not contain a "direct and unqualified" "admission of liability for an unpaid debt" and there was no expression of any "willingness to pay." Premier Capital, 144 N.H. at 287; Soper, 144 N.H at 270. The emails were simply a general statement that Phenix Mutual would like to resolve the claim "if possible," and merely expressed an interest in gathering information upon which the carrier could later make a decision on the claim. Phenix Mutual did not acknowledge any liability or debt owed or state an unequivocal willingness to pay. Id.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT PHENIX MUTUAL WAS NOT ESTOPPED TO ENFORCE THE ONE-YEAR REQUIREMENT TO BRING SUIT, AS NO EVIDENCE WAS PRESENTED THAT STATEMENTS WERE MADE TO APPELLANTS THAT THEY RELIED UPON TO THEIR DETRIMENT.

The trial court properly found Phenix Mutual was not estopped from asserting the contractual limitations defense. An insurer's request for information does not estop it from enforcing a contractual limitations period and the record contains no evidence that Phenix Mutual represented or concealed any material fact.

The essential elements of estoppel are:

> *(1) a representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it to his prejudice.*

Town of Nottingham v. Lee Homes, Inc., 118 N.H. 438, 442 (1978). The party asserting estoppel bears the burden of proving it. Bigwood v. Merrimack Village Dist., 108 N.H. 83, 87 (1967). A party asserting estoppel must allege specific facts in support of each element. Cahoon v. IDM Software, Inc., 153 N.H. 1, 9 (2005) See also N.E. Tel. & Tel. Co. v. City of Franklin, 141 N.H. 449, 454 (1996) (holding conclusory assertions do not satisfy nonmovant's burden in opposing summary judgment). The applicable standard of review is for an unsustainable exercise of discretion. Vention Medical Advanced Components, Inc. v. Pappas, 171 N.H. 13, 25 (2018) (holding each element of estoppel requires a factual determination); Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 66-7 (2012) (holding applicability of estoppel is reviewed under the unsustainable exercise of discretion standard).

This Court has held that an insurer is not estopped from enforcing a contractual limitations period by its request for more information regarding an insured's insurance claim. Forbes Farm Partnership, 146 N.H. at 203-4. In Forbes Farm Partnership, the carrier, via letter, requested additional information regarding their insured's claim. Id. at 200. The insured subsequently brought suit after the contractual limitations period expired, and the insured argued that the carrier's request for information estopped the carrier from enforcing the limitations period. Id. at 200-2. The Court held that a carrier's request for information does not estop it from enforcing a limitations agreement because a request for information is not misleading. Id. at 203-4.

The relevant facts before the trial court that the Zanninis claimed triggered estoppel were the above February 9, 2017, and March 19, 2017, emails, and an affidavit of Steven Zanninis that states in relevant part:

> *On May 3, 2016, Phenix Mutual sent a letter, in which it declined to provide coverage for additional damage to the property caused by the collapse. However, Phenix Mutual subsequently attempted to negotiate resolution of the claim, which led me to believe that the claim could be resolved without filing a lawsuit.*

App. 55-56.

The trial court properly found the affidavit of Mr. Zannini was legally insufficient to satisfy the elements of estoppel. Mr. Zannini did not allege in his affidavit that Phenix Mutual represented it would not enforce the limitations provision. Mr. Zannini also did not include in his affidavit any specific information regarding the substance of the alleged negotiations with Phenix Mutual. He merely asserted that there were negotiations, yet did note state how, based on the negotiations, he was led to believe that Phenix Mutual would not enforce the contractual limitations period. He

provided no negotiation dates, and he did not identify any individuals with whom he spoke. The affidavit is simply insufficient to establish that Phenix Mutual made any representation to the Zanninis. The trial court was left to speculate regarding the necessary details and "guess at . . . the specific facts required for estoppel . . ." Cohoon, 153 N.H. at 9. This, it is not allowed to do. Id.

In Forbes Farm Partnership this Court held, based on materially similar facts, that a carrier's request for information does not estop a carrier from enforcing a contractual limitations period. Phenix Mutual's attorney's February 9, 2017, email was a general request for information. For that reason, estoppel does not apply. Forbes Farm Partnership, 146 N.H. at 204.

In addition to the shortcomings with Mr. Zannini's affidavit, the emails fail to satisfy the elements of estoppel. Town of Nottingham, 118 N.H. at 442. They did not suggest that Phenix Mutual intended to accept liability for the claim. Nor did they reasonably suggest that Phenix Mutual intended to forego enforcing the limitations provision. There also was no evidence before the trial court that the Zanninis relied on the emails to their detriment. The March 19, 2017, email also could not have caused the Zanninis to fail to timely file suit as it was sent fifteen days after the limitations period ended. Forbes Farm Partnership, 146 N.H. at 204 (holding request for additional information could not possibly have induced the plaintiff not to file a timely action because it was made after the one-year period had elapsed). The trial court thus properly exercised its discretion in finding the foregoing facts did not trigger estoppel.

V. THE TRIAL COURT CORRECTLY CONCLUDED THAT PHENIX MUTUAL DID NOT WAIVE ENFORCEMENT OF THE ONE-YEAR FILING REQUIREMENT AS THE UNDISPUTED MATERIAL FACTS ESTABLISHED ITS COMMUNICATIONS WITH APPELLANTS DID NOT EXPRESS ANY INTENT TO FORGO THE CONTRACTUAL REQUIREMENT.

The trial court properly found that Phenix Mutual did not waive enforcement of the limitations agreement. To establish waiver, a plaintiff must show explicit language indicating a defendant's intent to forego a known right, or conduct from which it may be inferred that the defendant abandoned a right. Forbes Farm Partnership, 146 N.H. at 204. An insurer's request for information regarding a claim, however, does not constitute waiver of a policy's limitations provision. Id. The Court should review applicability of waiver under the unsustainable exercise of discretion standard. Vention Medical Advanced Components, Inc., 171 N.H. at 25 (2018) (holding each element of waiver requires a factual determination); Town of Atkinson, 164 N.H. at 66-7 (2012) (holding applicability of waiver is reviewed under the unsustainable exercise of discretion standard).

The communications that Appellants argue triggered waiver of the limitations agreement are again the February 29, 2017, and March 19, 2017, emails:

> *Roy,*
>
> *I have spoken with the adjustor. We don't necessarily agree that the [public adjuster] is disinterested, or that he does not have to be. However, we would like to see what evidence you have that there was a collapse, as this is the first time we have heard that.*
>
> *Can you provide all documentation regarding the collapse, including photos, letters, inspections etc.*
>
> *[Gary]*

App. 103-4.

> *Roy,*
>
> *File came up on diary. I don't see where you responded to my email below. The carrier would like to resolve the claim if possible.*
>
> *Gary*

App. 103.

Phenix Mutual did not communicate to the Zanninis through explicit language that it was intentionally waiving the contractual limitations provision. Forbes Farm Partnership, 146 N.H. at 204. In fact, the limitations provision is not mentioned in the emails. An insurer's request for information additionally cannot constitute waiver of a limitations agreement. Id. (citing Therrian v. Maryland Cas. Co., 97 N.H. 180, 183 (1951). The trial court thus properly exercised its discretion in finding no dispute of material fact as to the applicability of waiver.

CONCLUSION

For the foregoing reasons, Phenix Mutual respectfully requests that this Court affirm the trial court's grant of summary judgment.

REQUEST FOR ORAL ARGUMENT

Phenix Mutual respectfully requests fifteen minutes to present oral argument. Gary M. Burt will represent Phenix Mutual at oral argument.

CERTIFICATION REGARDING THE DECISION BEING APPEALED

A true copy of the trial court's order being appealed is appended to Appellants' brief.

/s/ Gary M. Burt
Gary M. Burt, #5510

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this brief do not exceed the maximum of 9,500 words.

/s/ Gary M. Burt
Gary M. Burt, #5510

RULE 16(10) CERTIFICATION

It is hereby certified that two copies of the foregoing brief was sent by first-class mail to opposing counsel.

/s/ Gary M. Burt
Gary M. Burt, #5510

Respectfully submitted,

PHENIX MUTUAL FIRE INSURANCE COMPANY

By Its Attorneys:

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Dated: May 15, 2019

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