THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0702

STEVEN ZANNINI & a.
Plaintiffs—Appellants

v.

PHENIX MUTUAL FIRE INSURANCE COMPANY
Defendant—Appellee

Rule 7 Mandatory Appeal from the
New Hampshire Superior Court, Merrimack County
Case No. 217-2018-CV-00122

BRIEF FOR PLAINTIFFS—APPELLANTS

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QUESTIONS PRESENTED

1. Did the trial court err when it decided that the one year limitations period in the "Suits Against Us" provision is enforceable?

Plaintiff's Objection to Defendant's Motion for Summary Judgment (July 2, 2018), Appendix (hereinafter referred to as "App.") at 41 – 48; Transcript of Hearing on Motion for Summary Judgment (September 10, 2018), App. at 135 – 139; Plaintiff's Motion for Reconsideration (October 29, 2018), App. at 157 – 162.

2. Did the trial court err when it decided that contracting to reduce the limitations period prior to the accrual of a cause of action does not violate public policy?

Plaintiff's Objection to Defendant's Motion for Summary Judgment (July 2, 2018), App. at 41 – 46; Transcript of Hearing on Motion for Summary Judgment (September 10, 2018), App. at 135 – 137; Plaintiff's Motion for Reconsideration (October 29, 2018), App. at 157 – 162;

3. Did the trial court err when it concluded that the one year limitation period, as set forth in the applicable policy, was reasonable?

Plaintiff's Objection to Defendant's Motion for Summary Judgment (July 2, 2018), App. at 45 – 48; Transcript of Hearing on Motion for Summary Judgment (September 10, 2018), App. at 138 – 139; Plaintiff's Motion for Reconsideration (October 29, 2018), App. at 157 – 162.

4. Did the trial court err when it decided that there was no genuine dispute of material fact concerning whether the limitations period was tolled, the applicability of the estoppel doctrine, or the applicability of the waiver doctrine?

Plaintiff's Objection to Defendant's Motion for Summary Judgment (July 2, 2018), App. at 48 – 52.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

Steven and Pamela Zannini (the "Zanninis" or "Appellants") filed suit against Phenix Mutual Fire Insurance Company ("Phenix Mutual" or "Appellee") to recover damages for breach of contract (Count I) and to seek a declaratory judgment (Count II) as to coverage under the applicable insurance policy (the "Policy"). (App. at 40.) Phenix Mutual subsequently filed a Motion for Summary Judgment on the basis that the litigation was barred by a one year limitation period set forth in the Policy. (Id. at 2 – 6.)

The Zanninis filed an Objection to Phenix Mutual's Motion for Summary Judgment, in which they argued that (1) the one year limitation period was not enforceable because it violates public policy; (2) a genuine dispute of material fact exists as to whether the one year limitation period was tolled when Phenix Mutual acknowledged responsibility, and asserted a willingness to pay, for coverage under the Policy; (3) a genuine dispute of material fact exists as to whether Phenix Mutual should be estopped from relying on the one year limitation period; and (4) a genuine dispute of material fact exists as to whether Phenix Mutual's conduct and written statements waived the one year limitation period. (Id. at 34 – 53.)

The Merrimack Superior Court (Kissinger, J.) (the "Trial Court") held a hearing on the Motion for Summary Judgment. (Id. at 128 – 144.) The Trial Court subsequently granted Phenix Mutual's Motion for Summary Judgment on the basis that (1) the one year limitation period did not violate public policy, so it was enforceable; (2) Phenix Mutual's conduct did not toll the limitation period; (3) Phenix Mutual was not estopped from relying on the limitation period; and (4) Phenix Mutual did not waive the one year limitation period. (Id. at 145 – 155.)

The Zanninis filed a Motion to Reconsider on the basis that the one year limitation period was not enforceable because it violated public policy, since (1) parties cannot contract to reduce a limitation period in advance of the accrual of a cause of action; and (2) a one year limitation period that accrued from the date of loss and included a condition precedent was not reasonable. (Id. at 156 – 163.) Phenix Mutual filed an Objection to the Motion for Reconsideration, and the Trial Court denied the Appellants' Motion for Reconsideration. (Id. at 164 – 173.)

B. Statement of the Facts

In October 2011, the Zanninis purchased the land and residence located at 30 Squam Shore Drive in Ashland, New Hampshire (the "Property"). (Aff. of S. Zannini, dated July 22, 2018, App. at 55 ¶ 1.) The Zanninis purchased a Homeowner's Insurance Policy for the Property from Phenix Mutual, which was in effect from October 7, 2015 to October 7, 2016 (the "Policy"). (Id. at ¶ 2; Order on Motion for Summary Judgment, dated Oct. 17, 2018, Id. at 146; Policy, Id. at 59 – 95.) The Policy, in relevant part, includes a "Suits Against Us" provision under "Section I," which includes coverage for the dwelling, other structures, personal property, and loss of use. (Id. at 69.) Under Section I, the Suits Against Us provision states:

> 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.

(Id.)

On March 4, 2016, a pipe burst within the Zanninis' home, which caused significant damage. (Id. at 146.) The Zanninis filed a timely insurance claim under the insured peril provision of the Policy, which provided coverage for accidental discharge or overflow of water from within the plumbing system. (Id. at 55 ¶ 4.) Phenix Mutual acknowledged the Zanninis' insurance claim. (Id.) Phenix Mutual sent an adjuster to investigate the damage. (Id. at ¶ 5.)

In March 2016, the adjuster visited the Property to investigate the water damage. (Id. at 55 – 56 ¶¶ 5 – 6.) During that visit, the Zanninis provided the adjuster with an opportunity to investigate the area beneath the floor in a crawl space. (Id. at ¶ 6.) However, the adjuster refused to do so, and instructed the Zanninis to remove the floor, at which time he would return to investigate the area. (Id.)

Upon removing the floor, the Zanninis discovered that the structure of the Property was severely compromised. (Id. at ¶ 8.) Shortly thereafter, the floor collapsed. (Id.) The Zanninis notified the adjuster of the collapse, and he visited the Property to further investigate the damage. (Id. at ¶ 9.) As a result of the adjuster's instruction to remove the floor, the Zanninis suffered a complete loss to the Property. (Id. at ¶ 10.) Additionally, the Zanninis incurred damages associated with loss of use of the Property and direct physical loss to personal property. (Id.)

On May 3, 2016, Phenix Mutual sent a letter to the Zanninis, in which Phenix Mutual declined to provide coverage for the additional damage to the Property caused by the collapse. (Id. at ¶ 11; Letter from Phenix Mutual to Zanninis, App. at 100.) However, Phenix Mutual continued to investigate and negotiate the Zanninis' insurance claim related to such damage. For example, almost nine (9) months later, on February 9, 2017, Phenix Mutual's counsel contacted Zanninis' counsel with a request for more information concerning the collapse. (Email from Phenix Mutual's counsel, App. at 103.) Shortly thereafter, Phenix Mutual's counsel represented that Phenix Mutual would like to "resolve the claim if possible." (Id.) In response, the Zanninis' counsel provided more information about the collapse, in an effort to resolve the claim. (Letter, App. at 106 – 107.) Phenix Mutual subsequently responded by stating that its position "remains unchanged." (Email, App. at 111.) The Zanninis filed a breach of contract (Count I) and declaratory judgment (Count II) action against Phenix Mutual on February 23, 2018.

STANDARD OF REVIEW

In reviewing the Trial Court's grant of summary judgment, this Court will "consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Sintros v. Hamon, 148 N.H. 478, 480 (2002). The Court will only affirm the Trial Court's grant of summary judgment when a review of that evidence "discloses no genuine issue of material fact, and [ ] the moving party is entitled to judgment as a matter of law." Id. This Court reviews the Trial Court's "application of the law to the facts *de novo*." Id.

SUMMARY OF THE ARGUMENT

The Trial Court erred when it granted Phenix Mutual's Motion for Summary Judgment because the Suits Against Us provision is not enforceable. Under New Hampshire law, the Trial Court cannot enforce a contract or contract term that violates public policy. The Suits Against Us provision violates public policy for two reasons. First, New Hampshire prohibits parties from contracting to reduce the applicable statute of limitations before a cause of action accrues. Here, Phenix Mutual attempted to reduce the applicable statute of limitations before a cause of action accrued via the Suits Against Us provision of the Policy. Accordingly, the Suits Against Us provision violates public policy, so it is not enforceable. Second, the Suits Against Us provision cannot be enforced, since the one year contractual limitation period fails to provide a plaintiff with a sufficient amount of time to file suit. As a result, the Suits Against Us provision is not reasonable, so it cannot be enforced. Therefore, the Trial Court erred when it enforced the Suits Against Us provision.

Additionally, the Trial Court erred when it granted Phenix Mutual's Motion for Summary Judgment because genuine disputes of material fact exist concerning whether (1) the limitation

period was tolled; (2) the doctrine of estoppel applies; and (3) the waiver doctrine applies. As set forth below, Phenix Mutual communicated with the Zanninis in a manner that, at a minimum, supports a finding that a genuine dispute of material fact exists concerning whether the limitations period was tolled and whether the estoppel and waiver doctrines apply. Consequently, the Trial Court erred when it granted summary judgment in favor of Phenix Mutual. Therefore, this Court should reverse the Trial Court's Order granting Phenix Mutual's Motion for Summary Judgment.

ARGUMENT

I. THE SUITS AGAINST US PROVISION IS NOT ENFORCEABLE BECAUSE IT VIOLATES PUBLIC POLICY. THE SUITS AGAINST US PROVISION VIOLATES PUBLIC POLICY BECAUSE (1) PARTIES CANNOT CONTRACT, IN ADVANCE OF THE ACCRUAL OF A CAUSE OF ACTION, TO REDUCE THE LIMITATIONS PERIOD; AND (2) A ONE YEAR LIMITATION PERIOD THAT ACCRUES FROM THE DATE OF LOSS AND INCLUDES A CONDITION PRECEDENT IS UNREASONABLE.

The Suits Against Us provision is not enforceable, since it violates public policy. Specifically, public policy does not allow parties to reduce a limitations period by agreement, prior to the accrual of a cause of action. Further, a one year limitation period that accrues from the date of loss and includes a condition precedent is not reasonable. As a result, the Suits Against Us provision violates public policy, so it cannot be enforced. Therefore, the Trial Court erred when it held that the Suits Against Us provision barred the Zanninis claims against Phenix Mutual.

A. The Suits Against Us Provision Violates Public Policy Because Parties Cannot Contract to Reduce the Limitations Period Before a Cause of Action Accrues.

In contrast to the Trial Court's conclusion, New Hampshire law does not allow parties to shorten the statute of limitations by agreement, since doing so would circumvent a statute

grounded in public policy. (See Order, App. at 150 (concluding that "parties in New Hampshire are normally free to shorten the statutes of limitations by agreement.")) Statutes of limitations are grounded in public policy. The public policy behind the statutes of limitations is to "achieve a balance among State interests in protecting both forum courts and defendants generally against stale claims and insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action." City of Rochester v. Marcel A. Payeur, Inc., 169 N.H. 502, 508 (2016) (citing Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 14 (1988) (emphasis added)).

Under New Hampshire law, parties cannot enter into a contract to circumvent the public policy behind a statute of limitation. In West Gate Village Ass'n, the plaintiff attempted to assert six (6) year old claims against the defendant. West Gate Village Ass'n v. Dubois, 145 N.H. 293, 297 – 98 (2000). To overcome the general statute of limitations of three (3) years, the plaintiff argued that the parties contractually agreed, before the cause of action accrued, to extend the statute of limitations period to six (6) years. Id. at 298. The Court held that the parties could not extend the statute of limitations period by contractual agreement, since such an agreement would "circumvent the legislature's declaration of public policy" for the statute of limitations. Id. at 298 – 99. In its reasoning, the Court explained that a contractual agreement to circumvent the statute of limitations "is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative." Id. at 299.

Although the facts in West Gate Village Ass'n involved a contractual agreement to extend the limitation period, the holding in West Gate Village Ass'n should apply with the same force and effect to contractual agreements to reduce the limitation period. As a threshold matter, the Court in West Gate Village Ass'n did not limit its holding to cases where parties attempted to extend the limitation period. Id. Rather, the Court held that the agreement was invalid because it

attempted to circumvent a statute that is founded in public policy. Id. Accordingly, the Court's holding should apply with equal force to any agreement that attempts to circumvent the statute of limitations by either extending or reducing a limitation period, since such a statute is grounded in public policy.

In its Order, the Trial Court explained that parties cannot contract to extend a statute of limitation period, since doing so would allow stale claims in violation of public policy. However, the Trial Court failed to address how a contract to reduce a statute of limitation period is not also an attempt to circumvent a statute grounded in public policy. As a result, the Trial Court overlooked the breadth of the law that applies to contracts that attempt to circumvent the statute of limitations.

Here, the Suits Against Us provision is an attempt to circumvent a statute grounded in public policy, so it is not enforceable. As set forth above, the statute of limitations is a statute grounded in public policy. See City of Rochester, 169 N.H. at 508 (explaining that the public policy underpinnings of the statute of limitations are two-fold: (1) to protect against stale claims, and (2) to provide plaintiffs with a reasonable amount of time seek recovery). Accordingly, parties cannot attempt to circumvent the statute of limitations by contract. West Gate Village Ass'n, 145 N.H. at 297 – 98 (explaining that parties "cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative"). The Suits Against Us provision is an attempt to circumvent the public policy considerations behind the statute of limitations. Id. As a result, the Suits Against Us provision is not enforceable. Id. (holding that a contractual agreement to circumvent a statute grounded in public policy is not enforceable).

Further, the Trial Court misapprehended the law when it concluded that "parties in New Hampshire are normally free to shorten the statutes of limitation by agreement." (App. at 150.)

To reach this conclusion, the Trial Court relied on Forbes Farm Partnership v. Farm Family Mut. Ins. Co., 146 N.H. 200 (2001). However, Forbes Farm Partnership does not stand for this legal proposition. In Forbes Farm Partnership, the plaintiff brought a declaratory judgment action against its property insurer for a determination of coverage. 146 N.H. at 200. The insurer attempted to dismiss the plaintiff's claims on the basis that the policy required all claims to be filed within one year of loss. Id. at 201. To overcome this argument, the plaintiff argued that the policy required the insurer to provide notice of the one year provision, and the insurer failed to do so. Id. Notably, the plaintiff did not argue that the one year provision violated public policy. The Court held that the insurer's failure to give notice did not negate the one year provision, since "[n]othing in the policy ... requires the defendant to give notice of the one year provision." Id. at 203.

In contrast to the Trial Court's analysis, Forbes Farm Partnership does not stand for the legal proposition that parties are free to shorten the statutes of limitation by agreement. (App. at 150.) The Court in Forbes Farm Partnership did not address whether parties are free to shorten the statutes of limitation by agreement, nor did the Court issue any finding as to whether the one year contractual limitation period was valid. In fact, the issue of whether the one year limitation period was reasonable was not before the Court, since the plaintiff did not raise the issue, nor did the Court address the issue *sua sponte*. Rather, 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. Forbes Farm Partnership, 146 N.H. at 201. Accordingly, the Court did not hold, one way or another, that the contractual limitation period should or should not be enforced based on public policy considerations. Therefore, the Trial Court erroneously relied on Forbes Farm Partnership for the conclusion that "the Court finds Forbes Farm nonetheless confirms that

parties in New Hampshire are normally free to shorten the statutes of limitation by agreement." (App. at 150.) As a result, the Trial Court's Order granting Phenix Mutual's Motion for Summary Judgment should be reversed.

B. **The Suits Against Us Provision Violates Public Policy Because a One Year Limitation Period that Accrues From the Date of Loss and Includes a Condition Precedent is Not Reasonable.**

Assuming *arguendo* this Court decides that parties may contract to reduce the limitation period before a cause of action accrues, the Suits Against Us provision is still not enforceable because it contravenes the public policy behind the statute of limitations. See Rizzo v. Allstate Ins. Co., 170 N.H. 708, 713 (2018) (explaining that the Court will not enforce a "contract or contract term that contravenes public policy"). As set forth above, the public policy underpinnings of the statute of limitations are two-fold: (1) to protect against stale claims, and (2) to provide plaintiffs with a reasonable amount of time to seek recovery. See City of Rochester, 169 N.H. at 508. Accordingly, a contract term that either fails to protect against stale claims or fails to provide a plaintiff with a reasonable amount of time to seek recovery contravene public policy, and, thus, will not be enforceable. See Rizzo, 170 N.H. at 713. As set forth below, the Suits Against Us provision fails to provide a plaintiff with a reasonable amount of time to file suit because the one year limitation period accrues from the date of loss and includes a condition precedent. As a result, the Suits Against Us provision contravenes the public policy behind the statute of limitations, so it cannot be enforced. See id.

i. A One Year Limitation Period that Accrues from the Date of Loss is Not Reasonable.

The Trial Court misapprehended New Hampshire law when it concluded that a one year limitation period that accrues from the date of loss was reasonable. (Order, App. at 148 – 150.)

As set forth in its Order, the Trial Court reasoned that "the outcome in Forbes Farm [is] dispositive on this question, given that a one-year limitations provision – calculated from the date of loss – was likewise at issue in that case and the New Hampshire Supreme Court nevertheless affirmed summary judgment for the defendant on the grounds that the plaintiff's failure to comply with the provision precluded litigation." (Id. at 151 – 53.) In contrast to the Trial Court's conclusion, the Court in Forbes Farm Partnership did not address whether a one year contractual limitations period was reasonable. As discussed above, the issue before the Court in Forbes Farm Partnership was whether the insurer was required to provide notice of the one year limitation period. The issue of whether the one year limitation period was reasonable was not before the Court, since the plaintiff did not raise the issue, nor did the Court address the issue *sua sponte*. Put simply, Forbes Farm Partnership does not address whether a one year limitation period is reasonable. Therefore, the Trial Court erroneously relied on Forbes Farm Partnership to determine whether a one year limitation period that accrues from the date of loss was reasonable.

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. In Clark, an insurance company filed a motion for summary judgment on the basis that the suit was barred by a one year contractual limitation period. Clark v. Truck Ins. Exchange, 95 Nev. 544, 545 (1979). The plaintiff objected on the basis that the one year limitation period was unreasonable, since it accrued from the date of loss. Id. To determine whether the limitation period was reasonable, the Court considered the public policy behind limitation periods. Id. Upon doing so, the Court explained that

> while the twelve-month limitation period may represent a reasonable balance between the insurer's interest in prompt commencement of action and the

> insured's need for adequate time to bring suit, the insured in reality does not have the full twelve months in which to commence the action because of substantial delays built into the insurance policy. Here the insured must first give written notice of the loss to the insurer. The insured then has 90 days to file a proof of loss claim; however, the insurer may grant extensions of time beyond the ninety days...

Id. (emphasis added). The Court held that the one year limitation period was not reasonable because

> [i]f the limitation period is construed to commence to run from the date of the fire, then the entire period could, as here, be consumed by the built-in delays of the policy and by the time in which the parties attempt to negotiate the claim. It would not be reasonable for the insured to anticipate such construction.

Id. In other words, a one year limitation period that accrues from the date of loss leaves a plaintiff with an insufficient amount of time to bring suit, so the one year limitation period is not reasonable.

As applied here, the Suits Against Us provision is not reasonable because it provides for a one year limitation period that accrues from the date of loss. Although the one year limitation period may appear to provide an insured with a full twelve months to file suit, the reality is that an insured may encounter a number of delays associated with the insurance policy, such as a coverage investigation, which shortens the limitations period even further, and leaves the insured with less than a full year to file suit. A plaintiff deserves more than a few months to decide whether s/he should file suit, speak with an attorney, consider his/her legal advice, and then instruct the attorney to move forward with filing suit. In other words, the one year contractual limitations period set forth in Suits Against Us provision is not reasonable because it fails, in reality, to provide a plaintiff with a sufficient amount of time to file suit. As a result, the Suits Against Us provision violates public policy, so it cannot be enforced.

ii. A One Year Limitation Period that Includes a Condition Precedent is Not Reasonable.

The one year limitation period is not reasonable because it requires an insured to complete a condition precedent within a narrow time frame prior to filing suit. In Executive Plaza, LLC, the Second Circuit certified a question to the New York Court of Appeals concerning whether a shortened contractual limitations period, which accrued from the date of loss and included a condition precedent, was reasonable. Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y. 3d 511 (2014). The Court held that the limitation period was not reasonable because

> [t]he problem with the limitations period in this case is not its duration, but its accrual date. It is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit...that cannot be met within that two-year period. A 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim.

Id. In other words, a shortened contractual limitation period that accrues from the date of loss is not reasonable when it includes a condition precedent that may not be met within the limitation period.

Here, the one year limitations period is not reasonable because it might expire before the imposed condition precedent is satisfied. To illustrate, the Suits Against Us provision states that

> [n]o 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.

(App. at 69.) Based on the foregoing, the Zanninis were required to file suit within one year from the date of loss, but they could only file suit if all of the policy provisions had been complied with at that point in time. For example, the Policy sets forth the Zanninis' duties after loss, including, but not limited to:

(e) Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;

(f) As often as we reasonably require:

(1) Show the damaged property;
(2) Provide us with records and documents we request and permit us to make copies; and
(3) Submit to examination under oath, while not in the presence of any other 'insured' and sign the same;

(g) Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
....
(5) Specifications of damaged buildings and detailed repair estimates;
(6) The inventory of damaged personal property described in 2.e. above;
(7) Receipts for additional living expenses incurred and records that support the fair rental value loss; ...

(App. at 68.) It is not improbable that an insured may not be able to complete all of the foregoing activities until near the end of, or even after, the one year contractual limitations period expires. As a result, the insured's window of opportunity to file suit within one year becomes unreasonably narrow with each day that passes after the date of loss, since s/he must satisfy certain conditions set forth in the Policy prior to filing suit.

Further, the condition precedent that an insured must comply with all terms of the Policy before s/he can file suit can operate to eliminate an insured's ability to sue the insurance company. For example, an insured incurs a loss on January 1, 2018. The insured cannot immediately bring suit on January 2, 2018, as the insured has not yet met the compliance condition precedent. If for some reason the insured, despite his/her best efforts, is in the process of complying with outstanding requests of the insurance company when the one year period

expires, the insured loses the right to bring suit against the insurance company at the end of the one year period. At a minimum, the two conditions precedent limit the insured's ability to bring suit against the insurance company to a few months—not a full year. As Phenix Mutual's counsel explained at the hearing on the Motion for Summary Judgment, "[e]ssentially, if they don't comply [with the Policy], then they can't bring suit, of if they don't bring suit within one year, then they're barred under the contractual provision." (App. at 130:16-19.) Consequently, the one year limitation period is "not really a limitation at all, but simply a nullification of the claim." See Executive Plaza, LLC, 22 N.Y. at 518.

At the hearing on the Motion for Summary Judgment, Phenix Mutual argued that the Trial Court should not consider whether the above-described condition precedent, in conjunction with the one year limitation period that accrues from the date of loss, violates public policy, since the Zanninis satisfied the conditions precedent prior to filing suit. (App. at 131:19-25; 132:1-16.) However, Phenix Mutual's argument lacks merit. In Occidental Life Ins. Co. of Cal., the United States Supreme Court declined to enforce a one year limitations period that accrued from the date of a violation under Title VII of the Civil Rights Act of 1964, since such a limitation period had the possibility to expire before a plaintiff is eligible to file suit. Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355, 370 – 372 (1977). Here, the Suits Against Us provision, which combines a condition precedent with a one year limitation period that runs from the date of loss, should not be enforced, since the limitation period could expire before the insured is eligible to file suit. See id. As a result, this Court should decline to enforce the Suits Against Us provision.

Further, this Court should decline to enforce the Suits Against Us provision, since it provides for a limitation period of less than one year. Assuming *arguendo* this Court concludes

that a one year limitation period is reasonable, a one year limitation period that accrues from the date of loss, combined with the condition precedent, equates to a limitation period of less than one year. In fact, such a combination, at most, provides an insured with a few months to file suit against the insurance company. A limitation period of a few months is not a reasonable amount of time for a plaintiff to file suit. As a result, the Suits Against Us provision circumvents the public policy behind the statute of limitations, so it cannot be enforced. See West Gate Village Ass'n, 145 N.H. at 297 – 98 (holding that parties cannot "circumvent the legislature's declaration of public policy" by contract); Rizzo, 170 N.H. at 713 (explaining that the Court will not enforce a "contract or contract term that contravenes public policy"). Therefore, the Trial Court erred when it held that the Suits Against Us provision was enforceable, so the Trial Court's Order granting Phenix Mutual's Motion for Summary Judgment should be reversed.

II. THE TRIAL COURT ERRED IN FINDING THAT NO GENUINE DISPUTE OF MATERIAL FACT EXISTED AS TO THE TOLLING OF THE LIMITATION PERIOD, THE APPLICABILITY OF THE DOCTRINE OF ESTOPPEL, AND APPLICABILITY OF THE WAIVER DOCTRINE.

A. A Genuine Dispute of Material Fact Exists Concerning the Tolling of the Limitation Period.

The Trial Court erred when it held that there was no genuine dispute of material fact as to whether the Zanninis "issued an actionable 'new promise' sufficient to toll the one year limitation period." (Order, App. at 153.) Although a breach of contract action must be filed within the applicable limitations period, a "limitations period may be tolled, however, by a party's acknowledgement of a subsisting debt with an admission that the party is liable and willing to pay." A & B Lumber Co., LLC v. Vrusho, 151 N.H. 754, 756 (2005) (citing Exeter Bank v. Sullivan, 6 N.H. 124, 134 (1833)). The limitations period will be tolled when a defendant provides a direct and unqualified admission that it is liable for, and willing to pay, an

amount to the plaintiff after the limitations period expires. A & B Lumber Co., LLC, 151 N.H. at 756.

In the event this Court applies the one year limitations period, a genuine dispute of material fact exists concerning whether the limitations period was tolled from the date Phenix Mutual acknowledged its liability and willingness to pay coverage under the Policy. To illustrate, Phenix Mutual requested more information about the collapse on February 9, 2017. (App. at 103.) On March 19, 2017, Phenix Mutual stated that it would like to resolve the Zanninis' claim, i.e. the Zanninis' claim against Phenix Mutual for inadequate coverage, if possible. (Id.) As a result, Phenix Mutual revived the Zanninis' claim for inadequate coverage via email, despite the fact that the one year limitations period had purportedly expired. Phenix Mutual's statement in the March 19, 2017 email qualifies as a direct and unqualified offer to pay an amount to resolve the Zanninis' claim against Phenix Mutual, which tolled any arguable limitations period as of that date. See A&B Lumber Co., LLC, 151 N.H. at 756 (explaining that a waiver of the limitation period occurs when the defendant makes a direct and unqualified admission that the party is liable for, and willing to pay, an amount to the plaintiff after the limitation period expired). At a minimum, Phenix Mutual's communications demonstrate that a genuine dispute of material fact exists as to whether Phenix Mutual waived the limitation defense. Therefore, the Trial Court's Order should be reversed.

B. A Genuine Dispute of Material Fact Exists Concerning the Applicability of the Doctrine of Estoppel.

The Trial Court erred when it held that there was no genuine dispute of material fact as to whether Phenix Mutual should be estopped from relying on the limitation defense. The doctrine of estoppel is used to "prevent[ ] one party from asserting a position contrary to one previously taken when it would be unfair to allow him to do so." Appeal of Cloutier Lumber Co., 121 N.H.

420, 422 (1981); see also Lakeman v. La France, 102 N.H. 300, 304 (1959). The decision to invoke the doctrine of estoppel is a question of fact that "rests largely on the facts and circumstances of the particular case." Olszak v. Peerless Ins. Co., 119 N.H. 686, 690 (1979).

The doctrine of estoppel has five elements, including:

> (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.

Hodge v. Allstate Ins. Co., 130 N.H. 743, 746 (1988). Estoppel can arise from silence or inaction when the silent party has knowledge and a duty to disclose. Guri v. Guri, 122 N.H. 552, 555 (1982). Further, an express promise to waive the statute of limitations is not necessary to estop a party from pleading the statute as a defense. Bergeron v. Mansour, 152 F.2d 27, 30 (1st Cir. 1945). The conduct of an insurer's agent can be imputed to the insurer when all of the elements of estoppel are present. Hodge, 130 N.H. at 746 (citing Johnson v. Phenix Mut. Fire Ins. Co., 122 N.H. 389, 393 (1982)).

Phenix Mutual should be estopped from asserting a limitations defense because the Zanninis relied on Phenix Mutual's representation that it intended to resolve the dispute through negotiations. For example, immediately prior to expiration of the purported limitations period, Phenix Mutual requested more information from the Zanninis about the collapse. (App. at 103.) Following this, Phenix Mutual represented to the Zanninis that it intended to "resolve the claim if possible." (Id.) Mr. Zannini explained in his Affidavit, which was submitted with the Zanninis' Objection to Phenix Mutual's Motion for Summary Judgment, that he relied on Phenix Mutual's representations that it intended to resolve the claim through negotiations. (App. at 56 ¶ 11.) Consequently, the Zanninis continued to negotiate with Phenix Mutual in an effort to resolve the

claim. (Id.) Unbeknownst to the Zanninis, Phenix Mutual's assurance that it was willing to resolve the dispute through negotiations was inaccurate. In other words, Phenix Mutual lulled the Zanninis into a false sense of security that it would work with them to resolve the claims without a lawsuit. See McWaters & Bartlett v. United States, 272 F.2d 291, 296 (10th Cir. 1959) ("Estoppel arises where one, by his conduct, lulls another into a false security, and into a position he would not take only because of such conduct."). Unfortunately, the Zannnis relied on Phenix Mutual's representations to their detriment. Bergeron, 152 F.2d at 30 ("A person is estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith or such that a reasonable man would rely upon the representations made."). Based on the foregoing, it would be unjust to allow Phenix Mutual to assert a limitations defense when it continued to negotiate with the Zanninis after the alleged limitations period expired, and the Zanninis relied on Phenix Mutual's representation to their detriment.

Moreover, a genuine dispute of material fact exists as to whether the Zanninis relied on Phenix Mutual's representations about its willingness to settle the dispute. The evidence demonstrates that the Zanninis relied on Phenix Mutual's representation that it would like to resolve the claim. (App. at 56 ¶ 11.) For example, Mr. Zannini stated in his Affidavit that he relied on Phenix Mutual's representation that it intended to resolve the claim through negotiations. (Id.) The Trial Court erred when it did not take Mr. Zannini's representation of reliance in the light most favorable to the non-moving party, i.e. the Zanninis. See Jeffery v. City of Nashua, 163 N.H. 683, 686 (2012) (explaining that when considering a motion for summary judgment, the Court examines the evidence submitted, and all inferences properly drawn from it, in the light most favorable to the non-moving party.) Further, the Zanninis'

reliance on such a representation is a triable issue that cannot be decided as a matter of law. See Bergeron, 152 F.2d at 30. Therefore, the Trial Court erred when it held that the doctrine of estoppel did not apply, so the Trial Court's Order granting Phenix Mutual's Motion for Summary Judgment should be reversed.

C. A Genuine Dispute of Material Fact Exists Concerning the Applicability of the Waiver Doctrine.

The Trial Court erred when it held that no genuine dispute of material fact existed as to whether Phenix Mutual waived its ability to assert the limitations defense. Waiver is a question of fact. Groleau v. Am. Exp. Fin. Advisors, Inc., No. 10-CV-190-JL, 2011 WL 4801361, at *4 (D.N.H. 2011) (quoting Logic Assocs., Inc. v. Time Share Corp., 124 N.H. 565, 571 (1984)). To determine whether the waiver doctrine applies, the Court will review whether (1) a party expressed in explicit language an intention to forego a right, or (2) engaged in conduct that, under the circumstances, justifies an inference of a relinquishment of a right. Therrien v. Maryland Cas. Co., 97 N.H. 180, 182 (1951); see also Groleau, 2011 WL 4801361, at *4 (explaining that the Court will review "the entirety of a party's behavior vis- à-vis the other party and the court" and "inaction as well as action" to determine whether the doctrine of waiver applies).

A genuine dispute of material fact exists as to whether Phenix Mutual's statements and conduct justify an inference that Phenix Mutual intended to relinquish its right to assert a statute of limitations defense. In fact, Phenix Mutual's conduct demonstrates an intent to abandon its right to assert the contractual limitations period. See Forbes Farm Partnership, 146 N.H. at 204. Not only did Phenix Mutual request more information about the collapse immediately before the purported limitations period expired, but also Phenix Mutual continued to negotiate the claim after the limitations period allegedly expired. (See App. at 103) Phenix Mutual's conduct and

communications caused the Zanninis to conclude that Phenix Mutual waived its right to assert the limitations period, and a reasonable juror could reach the same conclusion based on the evidence. Therefore, the Court erred when it held that the waiver doctrine did not apply.

CONCLUSION

For the foregoing reasons, the Zanninis respectfully request that this Honorable Court reverse the Trial Court's Order granting Phenix Mutual's Motion for Summary Judgment.

ORAL ARGUMENT

The Zanninis request fifteen (15) minutes for oral argument. Roy W. Tilsley, Jr., Esq. will argue on the Zanninis' behalf.

CERTIFICATION

I, Roy W. Tilsley, Jr., Esq., hereby certify that the appealed decisions are in writing and appended to the brief.

Respectfully submitted,
Steven and Pamela Zannini

By their attorneys,
Bernstein, Shur, Sawyer & Nelson, P.A.

Dated: April 15, 2019

*<u>/s/ Roy W. Tilsley, Jr., Esq.</u>*________________

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CERTIFICATE OF SERVICE

I hereby certify that I provided a true and exact copy of the foregoing to Gary M. Burt, Esq., counsel for Phenix Mutual via the New Hampshire Supreme Court's electronic filing system on April 15, 2019.

*/s/ Roy W. Tilsley, Jr., Esq.*________________
Roy W. Tilsley, Jr., Esq.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Steven Zannini and Pamela Zannini v Phenix Mutual Fire Insurance Company**
Case Number: **217-2018-CV-00122**

Enclosed please find a copy of the court's order of October 17, 2018 relative to:

ORDER

October 19, 2018

Catherine J. Ruffle
Clerk of Court

(485)

C: Roy W. Tilsley, ESQ; Hilary Anne Holmes Rheaume, ESQ; Gary Michael Burt, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS. No. 217-2018-CV-00122

Steven Zannini and Pamela Zannini

v.

Phenix Mutual Fire Insurance Company

ORDER

The Plaintiffs, Pamela and Steven Zannini (collectively the "Zanninis"), bring two counts — breach of contract and declaratory judgment — against the Defendant, Phenix Mutual Fire Insurance Company ("Phenix"). Phenix moves for summary judgment, arguing that the Zanninis' suit is contractually barred. The Zanninis object. The Court held a hearing on this matter on September 10, 2018. For the following reasons, Phenix's motion for summary judgment is GRANTED.

I. Background

The Zanninis purchased a homeowner's insurance policy (the "Policy") from Phenix that was in effect between October 7, 2015, and October 7, 2016, and that covered various calamities that might befall their Ashland residence. On March 4, 2016, a pipe purportedly burst inside the Zanninis' home, causing significant damage. The Zanninis' promptly informed Phenix, which soon sent an adjuster to investigate. The Zanninis allege the adjuster recommended they undertake certain actions that reportedly caused their house to collapse sometime soon after March 28, 2016. The

adjuster preformed a second investigation and subsequently advised the Zanninis in a May 3, 2016, letter that Phenix would not cover all losses they claimed under the Policy. The Zanninis initiated this suit on February 26, 2018.

The Policy, however, stipulates: "**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." (Mem. of Law in Supp. of Def.'s Mot. for Summ. J., Ex. A [hereinafter "Policy"] at 9.) Phenix argues it is entitled to judgment as a matter of law because there is no genuine dispute that the Zanninis failed to adhere to the one-year deadline of the Policy's litigation provision.

II. Legal Standard

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, sufficient to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial." Phillips v. Verax Corp., 138 N.H. 240, 243 (1994) (quotation and ellipsis omitted). A fact is material if it affects the outcome of the case under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In scrutinizing a party's motion for summary judgment, the Court considers the evidence, and all inferences properly drawn from it, in the light most favorable to the non-moving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002).

III. Analysis

The Zanninis concede that they did not fully comply with the Policy's litigation provision. Nevertheless, they contend Phenix is not entitled to summary judgment for two general reasons: (1) that the provision is unenforceable "because it violates New Hampshire law and undermines the public policy underpinnings of the statute of limitations," (Pls.' Mem. of Law in Supp. of Their Obj. to Def.'s Mot. for Summ. J. [hereinafter "Obj."] at 1); and (2) that Phenix's purported actions and representations either "tolled the statute of limitations," constituted a "waive[r] [of] its right to assert the limitations defense," and/or justify "estopp[ing] [Phenix] from relying on the limitations defense," (Obj. at 2).

Regarding their former rationale, the Zanninis primarily argue that "parties cannot contract, in advance of the accrual of a cause of action, to reduce the statutory limitations period" and, alternatively, they argue that the Policy's litigation provision "provides for an unreasonable statute of limitations period." (Id. at 6.) Both arguments are unavailing.

The Zanninis cite City of Rochester v. Marcel A. Payeur, Inc., 169 N.H. 502 (2016) and West Gate Village Association v. Dubois, 145 N.H. 293 (2000) for the proposition that public policy considerations preclude parties from agreeing to reduce the general statutory limitations period in circumstances implicated here. Although City of Rochester indeed states that, "[b]ecause statutes of limitations are grounded in public policy, parties cannot agree by contract made in advance of the accrual of a cause of action for breach to extend or avoid application of the limitations period," 169 N.H. at

508, it does not expressly provide that parties may not contract to *reduce* the limitations period ordinarily governing their transaction.

Notably, the question before the City of Rochester court was whether public policy favored *excepting* municipalities from limitation periods entirely. Given that statutes of limitation "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," the New Hampshire Supreme Court concluded that "[a]llowing a municipality to bring contract claims notwithstanding [the relevant statute of limitations] would undermine [this] public policy." Id. (quotation omitted). Likewise, West Gate Village merely held that contractual efforts to "*extend*[] the three-year statute of limitations before any cause of action exists" is contrary to public policy and is, thus, "inoperative." 145 N.H. at 299 (quotation omitted) (emphasis added). This context demonstrates that the City of Rochester language the Zanninis' cite is almost certainly dicta and that neither case offers much support for the Zanninis' position.

Moreover, the public policy considerations principally explored in both City of Rochester and West Gate Village — *i.e.* the justifications for forestalling stale actions — are not implicated here, where the issue is not whether to allow a potentially outdated claim to proceed but rather whether public policy precludes parties from freely agreeing to shorten the statutory window within which to bring suit against each other. The Zanninis cite no case tangentially, never-mind squarely, addressing such an issue and in fact their pleadings ignore Forbes Farm Partnership v. Farm Family Mutual Insurance Company, 146 N.H. 200 (2001), in which the New Hampshire Supreme Court affirmed

summary judgment for an insurer involving a suit springing from an insurance policy on the grounds that the insured failed to assert its rights within the one year provided for doing so by the parties' compact. Although the plaintiff in that case did not challenge its contract on the same public policy grounds as the Zanninis do now, the Court finds Forbes Farm nonetheless confirms that parties in New Hampshire are normally free to shorten the statutes of limitation by agreement. See John J. Kassner & Co. v. City of New York, 389 N.E.2d 99, 103 (N.Y. 1979) (cited in West Gate Village, 145 N.H. at 999 and stating that "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 . . . parties to make enforceable agreements which would extend the Statute of Limitations is, of course, more restricted" (quotation omitted)).

The Zanninis' next argue that the Policy's limitation provision is unenforceable because: (1) the Policy is confusing; (2) it is conceivable that the limitation provision could foreclose litigation before a cause of action even accrues; and (3) a one year limitations period is inherently unreasonable. (See Obj. at 10–13.)

To this first point, the Policy in fact contains two provisions relating to bringing suit against Phenix: the provision outlined above and a later provision that likewise stipulates "[n]o action can be brought against us unless there has been compliance with the policy provisions" (Policy at 15) but which does not include the additional requirement that "the action [be] started within one year after the date of loss," (id. at 9). The Zanninis contend these dueling provisions render the limitations period

unenforceable because, "upon reading the Policy, a layperson of average intelligence would be required to not only determine whether the Suits Against Us provision supersedes the state statutory limitations period, but also which Suits Against Us provision applies." (Obj. at 11.) Fair enough. Regardless, a person of average intelligence would not unreasonably struggle with such tasks and could comprehend that the litigation provision requiring suit be brought within one year of a loss relates to Section I of the Policy, which primarily governs "loss to the property," (Policy at 6), and that the litigation provision lacking a one-year limitation relates to Section II of the Policy, which governs "Liability Coverages," (Policy at 10). Seeing as loss to the Zanninis' property is at issue here, it is not unreasonable to presume they were more capable of ascertaining which litigation provision controlled.

Requiring little consideration is the Zanninis' next argument, which is that the Policy is unenforceable because it might be impossible — through no fault of the insured — to comply with all the Policy's provisions within a year of a loss. Although it is indeed conceivable that such scenarios could occur, the Zanninis notably do not argue that *this* case is among them and cite no law for the dubious proposition that a contractual provision is unenforceable merely because its operation could be unreasonable in hypothetical circumstances not presented.

Lastly, the Zanninis' contend that a one-year limitations provision is inherently unreasonable. The Court finds the outcome in Forbes Farm dispositive on this question, given that a one-year limitations provision — calculated from the date of loss — was likewise at issue in that case and the New Hampshire Supreme Court

nevertheless affirmed summary judgment for the defendant on the grounds that the plaintiff's failure to comply with the provision precluded litigation.

Along with arguing that the Policy's limitation provision is unenforceable for the various reasons outlined above, the Zanninis also maintain that Phenix's actions prior to litigation prohibit it from relying on the limitation provision at this time. To that end, the Zanninis first argue that email communications between their counsel and that of Phenix's on February 9. 2017, and March 19, 2017, (see Obj. Ex. 5), present a genuine issue as to whether Phenix acknowledged its liability and willingness to pay coverage under the Policy, thereby "tolling any arguable limitations period." (Obj. at 14.)

In New Hampshire,

> the statute of limitations will not act to bar an action on a debt where there is a direct and unqualified admission by a debtor within the statutory period prior to the commencement of the action, of a subsisting debt which he is liable and willing to pay, and that this promise is sufficient evidence of a new promise which will prevent the statute from operating as a bar to recovery of the debt.

Soper v. Purdy, 144 N.H. 268, 270 (1999) (quotation and brackets omitted). Although such a new promise "need not be express," the "conduct of the debtor must be such as to *justify* an inference that a new promise was made." Id. (quotations omitted) (emphasis added). Indeed,

> if there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not go to a jury as evidence of a new promise to revive the cause of action.

Id. at 270–71 (quotation and brackets omitted).

Assuming *arguendo* that this rule applies equally to contractual limitation periods as it does to statutory ones, the email communications the Zanninis cite do not present a genuine issue of whether Phenix issued an actionable "new promise" sufficient to toll the Policy's one-year limitation provision. The first email communication simply asks that the Zanninis' counsel forward whatever "documentation" he has pertaining to the collapse of the Zanninis' home. The second email, sent more than a month later, suggests Phenix's counsel had not yet received a response from the Zanninis' counsel and concludes by stating that "[t]he carrier would like to resolve the claim if possible." The Zanninis' argument emphasizes the "would like to resolve the claim" portion of the second email, but ignores that Phenix's counsel explicitly qualified that his client's wish to resolve the parties' dispute only "if possible." Considering this equivocation and the fact that the emails' context strongly indicates that Phenix's counsel was merely interested at the time with gathering evidence to inform a *later* decision regarding the Zanninis' claim, the emails are insufficient to justify sending the issue to the ultimate fact-finder to determine if they constitute a direct and unqualified admission of Phenix's liability and willingness to pay the Zanninis' claim.

Next, the Zanninis contend that the email communications — which Mr. Zannini attests "led [him] to believe that the claim could be resolved without filing a lawsuit" (Obj. Ex A ¶ 11) — present a genuine issue of whether Phenix should be estopped from asserting a limitations defense. A party asserting estoppel in this context must prove:

> first, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have intentionally, or through culpable negligence, induced the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Forbes Farm, 146 N.H. at 204 (quotation omitted).

The Zanninis' argument fails because, in order for estoppel to apply in this case, Phenix must have at least implicitly represented not just its general willingness to negotiate but specifically its willingness to do so notwithstanding the Policy's limitation provision. Although the email communications certainly show Phenix was open to considering the Zanninis' claim, they are devoid of any reference to the limitation provision nor are their expressions of a willingness to negotiate so absolute and conciliatory that a reasonable fact-finder could conclude they were intended to mislead or induce the Zanninis to assume that Phenix would forego asserting the Policy's limitation provision. Moreover, as the Zanninis' concede (see Obj. at 17), the second email was sent *after* the one-year deadline had expired, which further undermines the notion that the email was intended to induce the Zanninis not to bring suit. See Forbes Farm, 146 N.H. at 204 (concluding that an insurer's request for more information in response to an insured's reassertion of its claim after the parties' contractual litigation limitation period had run was insufficient to establish estoppel, in part, because the insured had "not shown that the request for additional information was misleading" and "the request for additional information could not possibly have induced the plaintiff not to file a timely action [as] it was made after the one-year period had elapsed").

Finally, the Zanninis maintain that the email communications reveal a genuine issue of whether Phenix waived its right to raise the limitations period. "To establish waiver, the plaintiff must show explicit language indicating the defendant's intent to forego a known right, or conduct from which it may be inferred that the defendant abandoned this right." Forbes Farm, 146 N.H. at 204. As discussed above in regards

to the Zanninis' tolling and estoppel arguments, the emails do not even reasonably imply Phenix intended to forego its right to assert the limitations provision, let alone do they constitute evidence of an "explicit" waiver. Additionally, in accordance with Forbes Farm's holding, a mere request for information and an expression of a willingness to negotiate after a contractual limitation period has expired is alone insufficient to suggest the party has abandoned its rights under the contract.

Conclusion

Considering there is no genuine dispute that the Zanninis failed to adhere to the Policy's one-year litigation provision and — for the foregoing reasons — that the provision is enforceable, Phenix is entitled to judgment as a matter of law and its motion for summary judgment is, therefore, GRANTED.

SO ORDERED.

10/17/18
Date

John C. Kissinger, Jr.
Presiding Justice